SUPREME COURT OF QUEENSLAND

CITATION:	*Chandra v Queensland Building and Construction Commission* [2017] QCA 4
PARTIES:	**SURESH CHANDRA** (applicant) **v** **QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION** (respondent)
FILE NO:	Appeal No 2885 of 2016 QCATA No 58 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Queensland Civil and Administrative Tribunal Act*
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal at Brisbane – Unreported, 22 February 2016
DELIVERED ON:	3 February 2017
DELIVERED AT:	Brisbane
HEARING DATE:	26 August 2016
JUDGES:	Margaret McMurdo P and Fraser JA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. In relation to the application for leave to appeal by Suresh Chandra:** **a. Grant leave to appeal.** **b. Allow the appeal.** **c. Set aside so much of Order No 1 made on 22 February 2016 by the Appeal Tribunal of the Queensland Civil and Administrative Tribunal as confirmed Order No 1 made on 22 November 2013 by the Queensland Civil and Administrative Tribunal.** **d. Order No 1 made on 22 November 2013 by the Queensland Civil and Administrative Tribunal is set aside and it is ordered instead that Suresh Chandra is not permitted to apply to be licensed or re-licensed by Queensland Building and Construction Commission before 21 November 2018.** **e. Order that the Queensland Building and Construction Commission pay the applicant's costs of the application for leave to appeal and the appeal.** **2. In relation to the application for leave to appeal by the Queensland Building and Construction Commission:**

a. Grant leave to appeal.
b. Allow the appeal.
c. Set aside Order No 2 made on 22 February 2016 in the Queensland Civil and Administrative Tribunal Appeal Tribunal.
d. Order Suresh Chandra pay the costs of the application for leave to appeal and the cross-appeal by the Queensland Building and Construction Commission.
e. Refuse the application by the Queensland Building and Construction Commission to adduce evidence in its application.

CATCHWORDS: ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – where the respondent had previously made findings of unsatisfactory conduct against the applicant – where the respondent determined that the applicant had also engaged in professional misconduct because of his repeated unsatisfactory conduct – where the Queensland Civil and Administrative Tribunal ordered that the applicant's licence as a building certifier under the *Building Act* 1975 (Qld) be cancelled – where the Tribunal ordered that the applicant never be re-licensed and imposed a pecuniary penalty – where the applicant appealed against the decision that he never be re-licensed and challenged the pecuniary penalty – where the Appeal Tribunal affirmed the decision but vacated the pecuniary penalty order – where the applicant applied to the Court of Appeal challenging the decision to affirm the licensing prohibition – where the respondent applied for leave to cross-appeal against the Appeal Tribunal's decision to vacate the pecuniary penalty order – whether a prohibition on re-licensing for a specified period of time sufficiently and appropriately protect the public against the risk of further misconduct by the applicant – whether it was open to the Appeal Tribunal to set aside the Tribunal decision imposing the pecuniary penalty – whether the appeal should be allowed

Building Act 1975 (Qld), s 45, s 157, s 186, s 187, s 204, s 208, s 212
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 150, s 153

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 AC 223; [1947] EWCA Civ 1, cited
Chandra v QBSA [2008] CCT CR004-08, related
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Minister for Immigration and Citizenship v Li (2013) 249 CLR 332; [2013] HCA 18, cited
Nursing and Midwifery Board of Australia v Buckby [2015] WASAT 19, distinguished
Paridis v Settlement Agents Supervisory Board (2007) 33 WAR 361; [2007] WASCA 97, cited

Prothonotary of the Supreme Court of New South Wales v P [2003] NSWCA 320, distinguished
QBSA v Chandra [2009] CCT QD035-05, related
Queensland Building Services Authority v Chandra & Anor [2013] QCAT 628, overturned
Quinn v Law Institute of Victoria Ltd (2007) 27 VAR 1; [2007] VSCA 122, considered
Re Hope [1996] 2 Qd R 25; [1995] QCA 471, cited
Watts v Legal Services Commissioner [2016] QCA 224, cited

COUNSEL:	B T Wright for the applicant S P Formby for the respondent
SOLICITORS:	Gregg Lawyers for the applicant Queensland Building and Construction Commission for the respondent

[1] **MARGARET McMURDO P:** I agree with Fraser JA's reasons and proposed orders.

[2] **FRASER JA:** The applicant was a licensed building certifier under the *Building Act* 1975 (Qld). The owner of a residential house engaged the applicant in 2005 to retrospectively certify renovations to the house done in 2004. That work included the conversion of a garage area under the house into two bedrooms. The applicant approved the building works on 31 May 2006 and, after undertaking a final inspection on 23 June 2006, issued a Final Inspection Certificate.

[3] The house was later sold. The new owners purchased in reliance upon the approved plans for the building work and the applicant's certification. In November 2008, after extensive rainfall, water penetrated through the walls and the slab in the area of the certified building works. After the new owners had carried out extensive rectification work water again penetrated through the certified building works in October 2010. The cost of repairing the damage and rectifying the cause of the water penetration was a little less than $45,000. The owners lodged a complaint with the respondent about the applicant's conduct of approving and certifying the relevant part of the building works. On 4 April 2011 the respondent determined pursuant to s 204 of the *Building Act* that the applicant had engaged in professional misconduct, including by "acting in a way that was grossly negligent and grossly incompetent by approving the conversion of a garage area into habitable bedrooms when that part of the building was not confirmed as having been lawfully constructed for habitable purposes, protected against moisture and surface water to habitable rooms and damaged by subterranean termites".[1] The respondent also considered that the applicant's conduct "showed incompetence and lack of adequate judgment, integrity, diligence and care in performing building certifying functions".[2] The respondent had previously made findings of unsatisfactory conduct against the applicant after investigation of three separate complaints in different matters. In the present matter the respondent determined that the applicant had also engaged in professional misconduct because of his engagement in repeated unsatisfactory conduct.

[4] The applicant's response to the complaints against him was that in 2006 he believed that his obligations as a certifier were limited, he understood that his role was not as

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1 *Queensland Building Services Authority v Chandra & Anor* [2013] QCAT 628 at [25](f)(iii).
2 *Queensland Building Services Authority v Chandra & Anor* [2013] QCAT 628 at [26].

clearly defined in 2006 as it later became, and he believed that he had discretionary powers in respect of work that he certified.[3]

Proceedings at first instance in the Queensland Civil and Administrative Tribunal

[5] The respondent commenced disciplinary proceedings against the applicant in 2012. The applicant did not acknowledge any impropriety in his conduct in certifying the building works in 2006. On 23 November 2013 the Queensland Civil and Administrative Tribunal ("the Tribunal"): rejected the applicant's contentions that his obligations as a certifier were limited in the way he argued and that the duties of a certifier were not as thoroughly understood in 2006 as they later became; found that the applicant was on notice when he gave his certificate in 2006 that the renovations were probably not compliant; referred to a condition of an approval signed by the applicant in 2006 requiring an inspection and certificate about specified works which in fact were not indicated on the plan and did not exist; referred to superfluous and irrelevant requirements by the applicant to inspect numerous certificates, which were mostly irrelevant to the work to be certified, in respect of which there was no evidence that they were in fact provided to or seen by the applicant; and found that the applicant did not properly consider the requirements of the particular development and that his conduct in performing his certifying functions involved a "lack of integrity, diligence and care".[4]

[6] The Tribunal found that the applicant was guilty of professional misconduct. The Tribunal decided that the applicant must never be re-licensed as a building certifier by the respondent, imposed a penalty of $10,000, and ordered the applicant to pay compensation and interest to the home owners.

Proceedings in the Appeal Tribunal of the Queensland Civil and Administrative Tribunal

[7] The applicant did not challenge the Tribunal's decision that he was guilty of professional misconduct. He appealed against the decision that he must never be re-licensed as a building certifier. During the hearing of the appeal the applicant was permitted to enlarge the appeal to challenge the penalty of $10,000.[5] The appeal was brought only upon a question of law.[6]

[8] On 22 February 2016 the Queensland Civil and Administrative Tribunal Appeal Tribunal ("the Appeal Tribunal") confirmed the Tribunal's decision that the applicant must never be re-licensed as a builder certifier with the respondent but vacated the Tribunal's order imposing a penalty of $10,000.

The applications in this Court

[9] The applicant has applied for leave to appeal against the Appeal Tribunal's decision confirming the 2013 decision that the applicant must never be re-licensed as a building certifier by the respondent. The respondent has applied for leave to cross-appeal against the Appeal Tribunal's decision to vacate the Tribunal's order imposing a penalty of $10,000. The notice of cross-appeal includes within it an application for

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3 *Queensland Building Services Authority v Chandra & Anor* [2013] QCAT 628 at [35].
4 *Queensland Building Services Authority v Chandra & Anor* [2013] QCAT 628 at [44]-[51].
5 RB 90-94.
6 RB 95.

leave to appeal. The respondent instead should have filed and served an application for leave to appeal but the applicant did not take any point about that. It is appropriate to treat the purported cross-appeal as an application for leave to appeal.

[10] Such appeals may be made only on a question of law and only by the leave of this Court.[7] In accordance with the Court's usual practice in matters of this kind the Court heard argument upon the merits of the proposed appeals together with the applications for leave to appeal, with a view to deciding the appeals if leave were granted. For the following reasons I would hold that leave to appeal should be granted in each case, the appeal and the cross-appeal should be allowed, and consequential orders should be made to give effect to those conclusions.

Some relevant provisions of the *Building Act*

[11] Section 208 of the *Building Act* provides that, on application (including an application by the respondent), the Tribunal may conduct a disciplinary proceeding to decide whether proper grounds for taking disciplinary action against a building certifier are established, and that proper grounds exist if the building certifier has behaved in a way that constitutes professional misconduct. If the Tribunal decides that proper grounds exist for taking disciplinary action against a former building certifier, the Tribunal may make one or more of the orders set out in ss 212(3) to (8). Section 212(3) authorises orders concerning either having another appropriately licensed person take all necessary steps to ensure the obtaining of a complying certification of building work or the payment of an amount to the complainant or another person which is sufficient to complete the certification work. Section 212(4) authorises orders for the rectification or completion, at the building certifier's cost, of building work that is defective or incomplete as a result of the former building certifier's professional misconduct, or an order that the former building certifier pay an amount which is sufficient to rectify or complete the work. Section 212(5) authorises orders imposing a penalty on the former building certifier. Section 212(6) concerns orders against a corporation or local government who employed the former building certifier and did not take all reasonable steps to ensure that the former building certifier did not engage in professional misconduct. Section 212(7) authorises the Tribunal to:

> "make an order that the former building certifier must –
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> (a) not be licensed or relicensed by QBCC for the period stated in the order; or
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> (b) never be licensed or re-licensed by QBCC."

Section 212(8) empowers the Tribunal to "make any other order it considers appropriate".

Summary of relevant aspects of the Tribunal's reasons

[12] The effect of the findings made by the Tribunal about the applicant's conduct was summarised by the Tribunal in the following passage:

> "[52] I have little difficulty in finding that Mr Chandra was guilty of professional misconduct. He appears to have taken a rather cavalier attitude in applying himself to his role of registered certifier. There was strong evidence to suspect that the earlier work had not been lawfully approved, yet, Mr Chandra,

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7 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 150.

although initially appearing to show some concern, quickly forgot about it. On the other hand he made demands for inspection certificates and reports but again failed to follow up. One gains the strong impression that it was all for show and that there was little substance to his investigations. In my opinion Mr Chandra's conduct was incompetent and lacking in integrity. As a consequence, his conduct compromised the amenity of Mr Niessl's property for some considerable time and put Mr Niessl and his family to considerable inconvenience and expense. I have no hesitation finding that there are proper grounds for taking disciplinary action against Mr Chandra."[8]

[13] The Tribunal went on to refer to the applicant's history of misconduct as follows:

"[55] Proven complaints in respect Mr Suresh Chandra, Licence No A81718, at the time of the hearing of the 2010 matter were:

1. Case ID 81718_19: Engaged in Unsatisfactory Conduct. Reprimand was given. (Finalised 04 June 2004)

2. Case ID 81818_21: Engaged in Unsatisfactory Conduct. Reprimand was given. (Finalised 21 June 2005)

3. Case ID: 81718_37: Engaged in Unsatisfactory Conduct. Direction was given resulting in an Enforcement Action. (Finalised 12 April 2006)

4. Case ID: 81718_41: Engaged in Professional Misconduct as well as Unsatisfactory Misconduct. Reprimand was given. (Finalised 15 January 2008)

5. Case ID: 81718_22: Engaged in Professional Misconduct and underwent an Educational Course, Report on Practise, Suspension of License, an Order pursuant to s 45(4) of the Building Act 1975 that the Respondent at his own cost, have the work found to be defective rectified by a person appropriately licensed. In addition, a Monetary Penalty was ordered to be paid in the sum of $7,500.00. (Finalised 11 September 2009)

6. Case ID: 81718_45: Engaged in Unsatisfactory Conduct. Reprimand was given. (Finalised 28 April 2010)

7. Case ID: 81718_44 Engaged in Unsatisfactory Conduct. Reprimand was given. (Finalised: 30 July 2010)

[56] In *Chandra v QBSA* [2008] CCT CR004-08, Mr Chandra sought a review of a decision by the QBSA that found him guilty of professional misconduct. Member Lorisch confirmed the Authority's decision on review. Dr Cullen, in the 2010 proceedings, imposed the following penalty in respect of that decision:

i) Mr Chandra's Licence No A81718 be cancelled;

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8 [2013] QCAT 628.

ii) Mr Chandra be disqualified from obtaining a licence in the Class of Assistant Building Surveyor and/or Building Surveying Technician for a period of not less than 2 years and 3 months (2 ¼ years);

iii) Mr Chandra pay a penalty to the QBSA in the amount of $12,000 within 60 days of the order.

[57] I understand that there is a further instance where Mr Chandra was disciplined, being on 17 May 2010 in respect of case ID Number 81718/50 in which he was found guilty of unsatisfactory conduct relevant to the approval of assessable building work. It is not apparent what penalty was imposed on that occasion.

[58] I am not aware whether the offences complained of in those matters occurred before or after the events for which he is now being disciplined. In *QBSA v Chandra* [2009] CCT QD035-05, Mr Chandra was disciplined on 10 September 2009 for events that took place before 14 October 2005 (when the Authority commenced proceedings). On that occasion, the following orders were made:

1. Subject to order 3, the respondent's licence in the class of building surveyor be suspended for a period of 8 months.

2. Pursuant to section 45(4) of the Building Act 1975, the respondent at his own cost, will have the work, found in these proceedings to be defective, rectified at the following addresses by a person appropriately licenced:

   (1) 20 Federation Street, Wynnum West

   (2) 8 Coolibah Place, Narangba

   (3) 6 Coolibah Place, Narangba

3. During the 8 month suspension period the respondent is to –

   (a) undertake educational instruction/programs of 20 hours at least, approved, and monitored and certified in writing by the Authority, to include fire protection matters and, if possible, other certification issues which have arisen during the course of these proceedings.

   (b) have the rectification work referred to order 2 completed to the written satisfaction of the Authority.

4. In the event the respondent fails to comply with order 3 within the time allowed, the period of suspension of 8 months is hereby extended until there has been compliance.

5. For the period of 12 months following the period of suspension, the respondent is directed to report on his practice as a building certifier to the Authority on a monthly basis for a 12 month period of matters where he has issued approvals for certificates with respect to fire separation.

> 6. The respondent is to pay to the applicant by way of penalty the sum of $7,500.00 within 28 days of the date of this decision."[9]

[14] After referring to authorities concerning the purpose of disciplinary proceedings against a member of the profession being "the protection of the public and the maintenance of proper professional standards" rather than punishment[10] and finding that the applicant's incompetence had put the home owners to great expense and inconvenience and caused much unhappiness in their household, the Tribunal explained why it was thought appropriate to order that the applicant must never be re-licensed as a building certifier by the respondent:

> "[64] In view of the extensive history of professional misconduct and unsatisfactory conduct, it is my view, that a monetary penalty is merely punishing Mr Chandra without achieving the objects of the legislation. The history of his conduct is well documented and fines, although a deterrent to others in the industry, in this instance, have had little effect on Mr Chandra. The best protection for the public in this case is that Mr Chandra never be allowed to hold a license again."[11]

The Appeal Tribunal's reasons

[15] The principal reasons in the Appeal Tribunal were given by a judicial member. The other (legally qualified) member of the Appeal Tribunal agreed with those reasons and added a few comments.

[16] The judicial member referred to the applicant's history of disciplinary findings of unsatisfactory professional conduct before and after 2006; between 2004 and 2010 the applicant was disciplined in every year other than 2007; he had seven licence violations by August 2010; he was reprimanded once in each of 2004, 2005 and 2008 and he was reprimanded twice in 2010; and he had been subject to adverse findings of unsatisfactory professional conduct in relation to services he provided between 1999 and 2002. In an earlier proceeding, in which the tribunal ordered the cancellation of the applicant's licence, disqualified him from reapplying for 28 months, and imposed a penalty of $12,000, the tribunal had stated that the applicant, "has not accepted full responsibility for the conduct that led to the findings of unsatisfactory conduct and professional misconduct, in that he continues to suggest reasons that others are partly to blame, at a stage when the only matters in issue are penalty and costs" and "he has not accepted that he bears personal responsibility for the factors that lead to these misconduct proceedings".[12]

[17] The judicial member observed that because the applicant had not engaged in building certification since 28 April 2009 he had not had an opportunity to demonstrate what, if any, lessons he had learned since then, or how he had benefited from the 20 hours of retraining ordered in 2009. The judicial member noted that the tribunal doubted the extent to which the applicant was retrained as a result of that order because the

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9 [2013] QCAT 628.

10 *Paridis v Settlement Agents Supervisory Board* (2007) 33 WAR 361 at 375 (Buss JA). The Tribunal member referred also to *Smith v New South Wales Bar Association* (1992) 176 CLR 256 at 270 and *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239 at 251.

11 [2013] QCAT 628 at [64].

12 *Queensland Building Services Authority v Chandra* [2010] QCAT 451 at [25], [32].

retraining was involuntary and, although he asserted that he had higher competency levels, that assertion had not been confirmed independently.[13] The judicial member rejected the applicant's ground of appeal that the tribunal missed the point that the post-2009 disciplinary proceedings could not be shown to have had any practical effect upon the applicant's behaviour because he had not worked as a certifier after his licence was suspended in 2009. The judicial member observed that, "[t]he problem with his argument is that in choosing not to reapply for a certifier licence after the ten month suspension in 2009, and for a further two and a half years in 2010 for 2008 transgressions, he deprived himself of the chance of demonstrating to the Tribunal in 2013 any improved capacity and competence due to the 2009 retraining or otherwise."[14]

[18] The crux of the judicial member's reasons for upholding the permanent ban is contained in three paragraphs:

> "[40] On balance, it was open to the Tribunal to find, in my opinion, that the appellant's serial offending over such a long period of time over-shadowed what little there was (or could be) said by way of mitigation. Even assuming that in 2006 "new regulations had been in place for *only* (emphasis added) two and a half years" and that he was not as competent or knowledgeable as he should have been or is now, it was reasonable for the Tribunal to treat such submissions with circumspection. The tribunal had limited capacity to assess the appellant's extent of post retraining competence because he elected not [to] return to practice in 2009, and was suspended again in 2010 for conduct in 2008. The Tribunal was not required to give him the benefit of the doubt, for he was required to demonstrate that he had learned lessons from the past, and no longer posed any risk to consumers of building services. However, instead of such positive action, he minimised his liability and tried to mitigate his responsibility on the basis of a mistaken belief that was itself unreasonable and, in any event, had been rejected by the Tribunal.
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> [41] Overall, although arguably harsh, the absolute suspension from practice was not disproportionate to the gravity of the breach of duty in the circumstances, especially having regard to the appellant's past disciplinary history and limited future capacity for rehabilitation. The persistence of the appellant's past misconduct is as good a prediction of likely future behaviour as any. A less severe penalty might have provided inadequate public protection. It was within the available range open to the Tribunal on the facts, and within the bounds of discretion. Without some evidence of positive and lasting change or sign of reasonable prospects of, or even a genuine willingness to accept and reduce the risks posed by, his professional shortcomings, the Tribunal was entitled to take a "better safe than sorry" approach.
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> [42] The appellant's own failure to propose an equally effective but less onerous available option is telling. The probable explanation is

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13 *Chandra v Queensland Building Services Authority* [2016] QCATA 53 (APL 058-14) (Appeal Tribunal Reasons) at [14].

14 Appeal Tribunal Reasons at [22].

> that there realistically isn't one. It is also indicative of an inability to come to grips with the magnitude of the risk he poses now and in the foreseeable future."

Consideration

[19] One ground of the applicant's appeal to the Appeal Tribunal was "the making of the decision was an improper exercise of power conferred by the enactment in pursuance of which it was purported to be made…"[15]. A particular of that ground was that the Tribunal's decision was one that no reasonable Tribunal could have reached ("*Wednesbury* unreasonableness"[16]). As the judicial member observed, the question raised by that ground of appeal was whether the decision lacked "an evident and intelligible justification".[17] The respondent submitted in the Appeal Tribunal that this ground is appropriate for administrative review but that in appeals from Tribunal decisions the Appeal Tribunal has instead applied the principles in *House v The King*[18] (that appellate correction against an exercise of discretion is permissible only if the decision-maker acted upon a wrong principle, allowed extraneous or irrelevant matters to guide or affect the decision, mistook the facts, did not take into account a material consideration or, if the result is unreasonable or plainly unjust upon the facts). There is in any case a close analogue between the *Wednesbury* unreasonableness ground and the principles in *House v The King*: see *Minister for Immigration and Citizenship v Li*.[19]

[20] Other, overlapping, grounds of the appeal to the Appeal Tribunal included contentions that "the decision involved an error of law" in that, amongst other matters, "the Member misapprehended the operation of the relevant legislation", and that "protection of the public could have been assured with a less onerous and less prohibitive order (such as onerous conditions)."[20]

[21] These grounds were inelegantly expressed but they comprehended a contention that the Tribunal erred in law by imposing a permanent ban when a less severe order would have been sufficient and appropriate to meet the legislative purposes. Upon that topic the applicant argued in the Appeal Tribunal that:

(a) The judicial member's analysis was misconceived; the applicant had no reasonable opportunity to demonstrate any change in his work practices because, from September 2009, he was either suspended or disqualified (save for a period from November 2012) until the hearing of the discipline proceedings in April 2013; the circumstance that the applicant's retraining was done pursuant to an order of the tribunal rather than voluntarily was immaterial; and the circumstance that the applicant had never applied to be re-licensed was not evidence that, following retraining, the applicant could never meet the standards required of a certifier.

(b) "the better, correct and preferable order, … would be for him to be suspended for a period…that period is not defined indefinitely, meaning

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15 RB 133.

16 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 AC 223.

17 *Flegg v Crime and Corruption Commission* [2014] QCA 42 at [3], [16].

18 (1936) 55 CLR 499 at 504-505 (Dixon, Evatt and McTiernan JJ); see *Watson-Paul v Acting Assistant Commissioner Kerry Dunn* [2013] QCATA 245 at [33]-[34], *Crime and Misconduct Commission v Warren Flegg* [2013] QCATA 28 at [12]-[13]; the respondent cited those and other Appeal Tribunal decisions in its written submissions in the Appeal Tribunal, paragraphs 13-15, 64: RB142, 156.

19 (2013) 249 CLR 332 at [68]-[76] (Hayne, Kiefel and Bell JJ), [110]-[111] (Gageler J).

20 RB 134.

that he can make application again, but he could be suspended for a period of not less than a certain period … within three months he should be able to reapply and to have his affairs in order to such an extent that his education, his references and anything else … if he's able to do it … then in not less than three months he should be able to reapply".[21] Upon application by the applicant for a licence, the respondent would be "in a position to assess competency and ability to practice, and if they don't like it then they won't allow Mr Chandra to be registered";[22] "[h]e could make an application … in not less than three months, … but it might be of the view that six months is the shortest period possible … but, again, the QBCC make the decision, and it would be for Mr Chandra to prove that he has, for example… paid the fines, paid the compensation, expressed that he wished it will never happen again, and he's learnt his lesson, and how he does that will be a matter for him".[23] The purpose of the ban applying for a set period was to allow the applicant "to become compliant and to prove that he was able to be registered".[24] A permanent ban was "a disproportionate penalty to what was done", and "the public can be protected by a period of suspension of not less than an a matter (sic) that the tribunal finds, but I suggested three months".[25] "… It is of no risk to the public to put Mr Chandra in a position where he has to make application to the Commission who are the ultimate gatekeepers" and that the Commission "would … not be in a position to grant his application for some time and that is a far more fair and not manifestly excessive penalty than just saying, "We formed the view he has got no insight"… ."[26]

(c) In relation to the arguments in (b), the applicant adopted the judicial member's summary of the applicant's submission in this respect as being that "you would be adequately covering the risk if you extended the existing ban for another period of time because there's another hurdle he has to get over…that's the Commission, that's the very regulatory body responsible for ensuring that the certifiers are competent and professional, that is, suitable to practice as certifiers. If he can't [get] through that gate, … so the best safety mechanism in this case is not a lifetime ban, but an order that gives him an opportunity to show that he's a safe pair of hands or learn to be a safe pair of hands and then be assessed by the assessor of safer hands in the business."

[22] As to the argument in (a) whether or not the applicant was prevented by disciplinary orders from demonstrating the effect of the retraining he undertook pursuant to the orders made on 10 September 2009, the Appeal Tribunal was correct in finding and taking into account that the applicant had not demonstrated an improvement resulting from the retraining. In relation to the appropriateness of the permanent ban though, it is important to bear in mind that the Tribunal did not find that the applicant's disciplinary history demonstrated that he had **not** benefitted from the 2009 retraining. The absence of such a finding may be related to the Tribunal's finding that it was "not aware whether the offences complained of in those matters [the decision of member

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21 RB 98.
22 RB 99.
23 RB 99-100.
24 RB 103.
25 RB 106.
26 RB 126.

Lorisch in the 2008 proceeding, and the further instance where the applicant was disciplined on 17 May 2010] occurred before or after the events for which he is now being disciplined".[27] Although the Tribunal referred to the orders made on 10 September 2009, it did not express any conclusion about the effect, if any, of the ordered retraining upon the applicant's ability properly to carry out the duties required by the appropriate licence. It is also relevant to mention that, although the Tribunal referred to a submission by the respondent that it was relevant to take into account that, before an interlocutory decision of the Appeal Tribunal on 15 May 2013, the applicant incorrectly continued to assert that his liability as a certifier did not extend to carrying out inspections of the earlier work or questioning its effectiveness,[28] the Tribunal did not express acceptance of that submission. In any case the hearing in the Tribunal occurred about six months after the interlocutory decision. In the appeal upon the question of law to the Appeal Tribunal it was therefore not open to assume that the applicant's attitude of innocence and lack of insight persisted after the interlocutory decision rejecting his defence. The judicial member's view that the applicant's past conduct was a good predictor of likely future behaviour overlooked the potential effect of the retraining and of these disciplinary proceedings themselves.

[23] The judicial member observed that the Tribunal's justification for the decision at paragraph 64 of the Tribunal's reasons had not been impeached. I respectfully disagree. The Tribunal did not find that a less severe, available order would not provide sufficient and appropriate protection for the public. The Tribunal's concluding statement in paragraph 64 was instead that "the best protection for the public in this case is that Mr Chandra never be allowed to hold a licence again". The Tribunal did not apply the correct test. In every case of professional misconduct it might be said that a permanent ban supplies the best protection for the public, but that is not a justification for a permanent ban where a less severe order is appropriate to meet the legislative purposes. In *Watts v Legal Services Commissioner*[29] Gotterson JA cited and followed the decision in *Prothonotary of the Supreme Court of New South Wales v P*[30] that an order striking a legal practitioner off the roll should only be made when the probability is that the practitioner is permanently unfit to practice. The analogy with orders concerning a building certifier's licence under the *Building Act* is of course incomplete, but those authorities nevertheless suggest that a permanent ban should not have been imposed in this case unless the Tribunal was satisfied that the licensee was probably permanently unfit to hold the licence. The Tribunal made no such finding.

[24] The Tribunal did not cite any authority for applying as the test what was the "best protection for the public". It seems likely that the Tribunal derived that test from the respondent's citation of *Nursing and Midwifery Board of Australia v Buckby*[31] as authority for the proposition that, "where there is a choice of sanctions, the Tribunal will choose that sanction which maximises the protection of the public".[32] I do not accept that the State Administrative Tribunal of Western Australia intended to convey that it was appropriate to choose a sanction which maximises the protection of the

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27 Appeal Tribunal Reasons at [58].

28 [2013] QCAT 628 at [62].

29 [2016] QCA 224 at [33] and [45]-[52].

30 [2003] NSWCA 320 at [17] per Young CJ in Eq (Meagher and Tobias JJA agreeing), citing *Prothonotary v Richard* NSWCA 31 July 1987 per McHugh JA and *NSW Bar Association v Maddocks* NSWCA 23 August 1988), followed in *Legal Profession Complaints Committee v Love* [2014] WASC 389 at [16] **(**Beech, Kenneth, Martin and Edelman JJ).

31 [2015] WASAT 19 at [107].

32 RB 154.

public in a case in which a less severe sanction would appropriately protect the public. So much is suggested by the subsequent statement in the reasons of the Western Australian Tribunal that "[a] practitioner is not a fit and proper person to be a registered practitioner and should be removed from the register where the unprofessional conduct is so serious that the practitioner is permanently or indefinitely unfit to practise".[33] The Western Australian Tribunal found that the practitioner was "permanently or indefinitely unfit to practise" and that suspension was not an appropriate penalty.[34] The Tribunal made no similar findings in the present case.

[25] The Western Australian Tribunal derived the relevant proposition from a statement in those terms by Maxwell P in *Quinn v Law Institute of Victoria Ltd.*[35] Understood in the context of the unusual facts of that case, it also did not authorise a more severe sanction than was considered to be necessary to meet the protection of the public upon the facts of any particular case. The Victorian Legal Profession Tribunal ordered that a solicitor's practising certificate be suspended for 12 months for misconduct, including overcharging. One ground of appeal was that the Victorian Tribunal had failed to address an undertaking proffered by the solicitor in relation to the future billing of client matters. Maxwell P pointed out that the undertaking did not include any time limit and seemed likely to provide greater protection for the public than the suspension ordered in the Victorian Tribunal, which was not accompanied by any requirement of training or further education and would be followed by a resumption of unsupervised practice.[36] Maxwell P concluded that the Tribunal's exercise of discretion miscarried because the Tribunal gave no explanation for rejecting the alternative remedy of accepting the solicitor's undertaking and because the solicitor's conduct was not so grave that suspension was the only course open.[37] His Honour's reasons should not be regarded as authority for a proposition that, in a case such as this where the protective function is paramount, it is permissible to impose the most severe sanction provided for in the relevant legislation even though a less severe sanction would meet the legislative purposes and otherwise would be appropriate upon the facts of the case.

[26] Chernov JA decided the case on the narrow ground that the Victorian Tribunal's reasons were inadequate because of its omission to explain the relevance of the mitigating factor of the solicitor's proposed undertaking.[38] Nettle JA dealt with the point in terms which I respectfully consider are applicable here by analogy:

> "In this case, the Tribunal stated in its reasons that it regarded the appellant's misconduct as so grave that the only course was to suspend him. In a sense that was an explanation of why suspension was chosen. But it is an inadequate explanation because it does not reveal the path of reasoning which led to that conclusion. It does not disclose whether the Tribunal considered that nothing short of suspension would provide the level of general deterrence that was needed, or whether the Tribunal considered that nothing short of suspension would provide the sort of specific deterrence that was needed, or whether it was a combination of both factors and maybe something else."[39]

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33 [2015] WASAT 19 at [112].
34 [2015] WASAT 19 at [134].
35 (2007) 27 VAR 1 at [34].
36 (2007) 27 VAR 1 at [32].
37 (2007) 27 VAR 1 at [34].
38 (2007) 27 VAR 1 at [41]-[42].
39 (2007) 27 VAR 1 at [46].

[27] A less severe order of the kind proposed by the applicant – an order that precluded the applicant from applying to be re-licensed for a specified period of time determined by the Tribunal, thereafter leaving it to the respondent to decide if the applicant then satisfied the statutory criteria for holding a licence[40] – would appear to sufficiently and appropriately protect the public against the risk of further misconduct by the applicant. The judicial member concluded instead that the applicant's "own failure to propose an equally effective but less onerous available option" indicated that "there realistically isn't one" and that his failure was "also indicative of an inability to come to grips with the magnitude of the risk he poses now and in the foreseeable future".[41] Those conclusions did not explain why an order along the lines proposed in the applicant's extensive submissions set out in [21] of these reasons was not appropriate and sufficient to protect the public.

[28] The respondent argued that statements in the reasons of the Tribunal and of the judicial member demonstrated that the Appeal Tribunal did not err in concluding that the Tribunal's discretion had not miscarried. The respondent referred to the statement by the Tribunal that a monetary penalty was "merely punishing Mr Chandra without achieving the objects of the legislation," and that fines "had little effect on Mr Chandra". Those and other statements by the Tribunal justify a conclusion that an order precluding the applicant from holding a licence for a lengthy period, after which the respondent could require the applicant to demonstrate his suitability to hold a licence, was an appropriate sanction, but they do not explain why a permanent ban was appropriate or required for the protection of the public.

[29] The respondent relied upon the judicial member's statement that although the absolute suspension from practice was "arguably harsh", it "was not disproportionate to the gravity of the breach of duty in the circumstances, especially having regard to the appellant's past disciplinary history and limited future capacity for rehabilitation." Certainly the applicant had a bad disciplinary record and until a late stage in the proceedings he appeared to lack insight into his misconduct, but the Tribunal did not find that by the time of its decision in late 2013 the applicant still lacked insight, that it was unlikely that he could ever rehabilitate himself, or that some other appropriate consideration required a permanent ban. The respondent also relied upon the judicial member's statements that whilst "a less severe penalty might have provided inadequate public protection" a permanent ban "was within the available range open to the Tribunal on the facts, and within the bounds of discretion."[42] A bare possibility that inadequate public protection would be secured by any one of the many kinds of less severe penalties could not justify imposing the most severe penalty available. This part of the judicial member's reasons also does not explain how a permanent ban could be justified upon the Tribunal's findings of fact.

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40 Upon the basis of the present legislation the respondent may decide to licence the applicant only "if it is satisfied the applicant is a suitable person to hold a licence": *Building Act* 1975, s 157. In deciding whether the applicant is a "suitable person" the respondent must consider specified criteria including: whether the applicant has previously been refused a licence; had their licence suspended or cancelled; been disqualified from holding a licence under another relevant Act; dealings the applicant has been involved in and the standard of honesty and integrity demonstrated in the dealings; any failure by the applicant to carry out statutory obligations relating to building or private certifying functions and the reasons for failure; whether the applicant holds a current accreditation issued by an accreditation standards body; and, all other relevant circumstances: *Building Act* 1975, s 186(2). The respondent may, by notice to the applicant, require the applicant to provide documents or information the respondent considers is needed to establish that the applicant is a "suitable person": *Building Act* 1975, s 187.

41 Appeal Tribunal Reasons at [42].

42 Appeal Tribunal Reasons at [41].

[30] The judicial member also observed that, in the absence of "some evidence of positive and lasting change or sign of reasonable prospects of, or even a genuine willingness to accept and reduce the risks proposed by, his professional shortcomings, the Tribunal was entitled to take a "better safe than sorry" approach".[43] That observation affirmed the Tribunal's erroneous approach of adopting the most severe penalty without explaining why a less severe penalty would not provide the required protection of the public. The respondent also relied upon the statement by the Appeal Tribunal member that, "[w]hile it will only be in a rare case (one would hope) that a life-time ban is within the range of penalties that a reasonable Tribunal would impose, there comes a time, in the work of a certifier, when enough is enough and his pattern of behaviour is such that it is open to the Tribunal to impose such a ban."[44] There is no error in that proposition, but the question is whether a permanent ban was an appropriate penalty upon the facts of this case as found by the Tribunal. Neither the Appeal Tribunal's reasons nor the Tribunal's reasons explain why a less severe order would not provide the necessary protection for the public.

[31] The applicant engaged in the subject conduct in May and June 2006. Whilst the litany of his unprofessional conduct and professional misconduct recited in paragraphs 55 – 58 of the Tribunal's reasons was certainly relevant to the choice of sanction, it would have had much more significance if the applicant had been sanctioned for those infringements before he engaged in the subject conduct. It appears from the dates mentioned in those paragraphs, however, that the respondent proved only that before the applicant engaged in the subject conduct he had been found guilty of unsatisfactory conduct (Tribunal's reasons paragraph 55, items 1-3), rather than professional misconduct. For two of the three instances of that unprofessional conduct the only sanction was a reprimand (June 2004 and June 2005), only one instance having been found to merit enforcement action (April 2006). It should also be noted that the case identified in item 5 of paragraph 55 appears to be the same case described in paragraph 58, the sanction (including the required re-training) described in each case apparently being identical. Furthermore, the disciplinary proceeding in the Tribunal for the subject conduct was not completed until some seven years after the applicant engaged in that conduct, long after the applicant had been required to undergo re-training and ceased to hold the relevant licence. Whilst the Tribunal characterised the applicant's conduct as not only incompetent but also lacking integrity, and whilst that conduct was serious, the Tribunal did not make a finding that the applicant had acted dishonestly; rather, the Tribunal's reference to the applicant's lack of integrity was related to findings that the applicant had adopted a cavalier attitude to his role as a certifier, he quickly forgot about concerns he had shown, he failed to follow up upon earlier demands for some certificates and reports, he engaged in some conduct only for show, and there was little substance in his investigation: paragraph 52 of the Tribunal's reasons.

[32] Those findings engender a reasonable concern about the applicant's suitability to hold the licence but they do not establish that he was unlikely ever to rehabilitate himself. In these circumstances, whilst the seriousness and repetition of the applicant's conduct merited a severe sanction, including deprivation of the licence for a substantial period, to further the dominant legislative purpose of protecting the public, it was not open to impose a permanent ban for the subject conduct. Absent a finding that it was likely that the applicant would remain unfit to be licensed for the rest of his working life,

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43 Appeal Tribunal Reasons at [41].

44 Appeal Tribunal Reasons at [53].

the protection of the public could be secured by a severe sanction, falling short of a permanent ban, that precluded the applicant from applying to be re-licensed for a substantial period, when he would be required to satisfy the respondent that he was then a suitable person to be licensed: see [27] of these reasons and the associated footnote.

Disposition and proposed orders in the applicant's application

[33] It is appropriate to grant leave to appeal in light of the significant consequences of the error for the applicant and in other cases.

[34] Section 153 of the *Queensland Civil and Administrative Tribunal Act* provides that, in relation to an appeal before the Court of Appeal against a decision of the tribunal on a question of law only, the Court of Appeal may, in deciding the appeal, amongst other things, "set aside the decision and substitute its own decision" or "set aside the decision and return the matter to the tribunal for reconsideration…".

[35] Upon the facts found by the Tribunal, the dominant legislative purpose of protecting the public would be met by an order precluding the applicant from applying to be re-licensed for five years from the date of the Tribunal's decision. A ban on applying for such a lengthy period is required by the seriousness and repetition of the applicant's conduct and, in the interests of the protection of the public, to deter others from engaging in similar conduct. If the applicant thereafter applies for a licence the respondent would no doubt take into account both the applicant's bad disciplinary history and any evidence he might provide about his rehabilitation in deciding whether the applicant then meets the legislative criteria for the grant of the relevant licence.

[36] Putting aside the legal error I have identified, the reasons of the Tribunal and the Appeal Tribunal demonstrate that such an order is appropriate. In these circumstances, and having regard to the remarkably lengthy period of time that has elapsed since the applicant engaged in the conduct found against him, it is appropriate for the Court to make that order rather than remitting the matter to the Tribunal.

Respondent's application

[37] The judicial member gave the following reasons for setting aside the penalty of $10,000:

> "[44] The fines imposed in *Chandra* [2009] and *Chandra* [2010] were at, or close to, the maximum. The $10,000 pecuniary penalty on this occasion is not quite half the maximum of $17,600 now available [sic]. This may indicate that the Tribunal moderated the financial penalty in light of the severity of the lifetime ban, and his reduced capacity to pay a $10,000 fine as a result of having to pay fines of nearly twice that amount in the previous two years when not working as a certifier.
>
> [45] Nonetheless, the Tribunal's conclusion at [64] that 'a monetary penalty is merely punishing (the appellant) without achieving the objects of the legislation … fines, although a deterrent to others in the industry, in this instance, have had little effect on (the appellant)' was clearly correct, and should have been given full, not partial, practical expression.
>
> [46] Disciplinary proceedings are not punitive but protective and corrective. There was no need in light of the incapacitation order for specific deterrence. The only relevant policy objective,

> therefore, was general deterrence, but the lifetime ban itself more than adequately met that purpose in this case. In any case, it intuitively seems unjust that the appellant should, as well losing his livelihood at an age when his employability in another field must be problematic, incur further pecuniary liability for the sole benefit of other potential transgressors.
>
> [47] Accordingly, although I cannot identify any specific error, I have reached the conclusion that, to the extent of the inclusion of the fine, the overall penalty is disproportionate and unjust."[45]

[38] Those reasons depend in part upon the effect of the permanent ban which I would overturn. For that and the following reasons I would grant leave to appeal and allow the appeal against the Appeal Tribunal's decision to set aside the penalty.

[39] The respondent argued that: the judicial member made an implied finding of fact that the cancellation of the applicant's QBCC certifier licence deprived the applicant of the ability to make a livelihood and for that reason it would be unjust to also impose a fine; the evidence available to the Appeal Tribunal was insufficient to justify a positive finding about the nature of the applicant's ability to pay a fine; and the evidence that was available tended to show that the applicant's livelihood was **not** adversely affected by the cancellation of his licence.

[40] The applicant argued that the proposed cross-appeal was incompetent because it amounted to an appeal on the basis of mixed error of fact and law, rather than being an appeal only on a question of law, as required by s 150(3)(e) of the *Queensland Civil and Administrative Tribunal Act*. The applicant argued that the Appeal Tribunal member was correct in his reasons for agreeing with the judicial member "that, in the circumstances, a monetary penalty was not justified in addition to the ban, particularly given the Tribunal's conclusion at [64]."[46] The applicant argued that the respondent was incorrect in its contention that the judicial member made an implied finding of fact that cancellation of the licence deprived the applicant of the ability to make a livelihood and it would therefore be unjust to impose a fine. In the applicant's submission there was no demonstrable error in relation to a consideration of the financial circumstances of the applicant.

[41] The judicial member clearly found that as a result of the order that the applicant must never be re-licensed by the respondent, the applicant had lost his livelihood, and that this occurred at a time "when his employability in another field must be problematic". There was no finding to that effect made by the Tribunal. There was no evidence that the applicant had lost his livelihood or that his employability in another field was problematic. The parties' submissions in the Appeal Tribunal were to the contrary effect. As the respondent argued, it was submitted for the applicant at the hearing in the Appeal Tribunal that the applicant had continued to work in the building industry as an engineer, he had a company that was involved in building, he had been involved in the industry for the whole period since April 2009,[47] and he had "continued to work in the industry".[48] Similarly, the respondent submitted to the Appeal Tribunal that the applicant was "still practising as an engineer", his profession had not gone, and he was "not without livelihood".[49]

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45 Appeal Tribunal Reasons at [44]-[47].
46 Appeal Tribunal Reasons at [55].
47 RB 98.
48 RB 99.
49 RB 82.

[42] The grounds of the notice of cross-appeal include a ground that the Appeal Tribunal's decision to set aside the penalty of $10,000 amounted to an error in law. That ground should be upheld. The basis upon which the judicial member found the penalty of $10,000 to be unjust was inconsistent with the submissions of both parties and was unsupported by any evidence. There were no facts found by the Tribunal or agreed between the parties that could justify the inference drawn by the judicial member. It follows that the finding involved an error of law.[50]

[43] The applicant did not submit that there was any other ground upon which it was open to the Appeal Tribunal to set aside the Tribunal decision imposing the penalty. There was some discussion in argument before the Appeal Tribunal about the effect of the conclusion by the Tribunal that "a monetary penalty is merely punishing Mr Chandra without achieving the objects of the legislation". That conclusion was plainly not intended to convey that the penalty was not one of the appropriate responses in the circumstances of the case; indeed, the reference in the next sentence to the fine having a deterrent effect on others in the industry itself supplied support for the imposition of the fine, notwithstanding the finding by the Tribunal member that fines have had little effect on the applicant.

[44] Leave to appeal should be given because the Appeal Tribunal's order vacating the penalty involved an error of law and the public interest is served by the restoration of the order imposing the penalty.

[45] The respondent applied for leave to adduce additional evidence in its application to prove that, contrary to the Appeal Tribunal's findings, the applicant's livelihood was not put at risk by the imposition of the penalty and he had continued to work in the building industry as an engineer. The applicant opposed the application. In view of my conclusion that the Appeal Tribunal's decision to vacate the penalty must be set aside in any event, the application for leave to adduce additional evidence should be refused on the ground that it is unnecessary to consider it. In circumstances in which it was not submitted that there was any other basis for the Appeal Tribunal to vacate the order for the penalty, the appropriate order in the cross-appeal is that the Appeal Tribunal's order vacating the order for the imposition of the penalty should be set aside.

Proposed orders

[46] The costs of the appeal and cross-appeal should follow the event in each case. On 20 April 2016, the Appeal Tribunal ordered Suresh Chandra to pay 80 per cent of the Commission's costs of the appeal to the Appeal Tribunal, to be assessed on the standard basis at the District Court scale. Neither party has sought to appeal against that order or advanced argument about the costs in the Tribunal or in the Appeal Tribunal. It is therefore not appropriate to make any order about those costs.

[47] I would make the following orders:

1. In relation to the application for leave to appeal by Suresh Chandra:
   (a) Grant leave to appeal.
   (b) Allow the appeal.
   (c) Set aside so much of Order No 1 made on 22 February 2016 by the Appeal Tribunal of the Queensland Civil and Administrative Tribunal as

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50 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355-356 (Mason CJ).

confirmed Order No 1 made on 22 November 2013 by the Queensland Civil and Administrative Tribunal.

(d) Order No 1 made on 22 November 2013 by the Queensland Civil and Administrative Tribunal is set aside and it is ordered instead that Suresh Chandra is not permitted to apply to be licensed or re-licensed by Queensland Building and Construction Commission before 21 November 2018.

(e) Order that the Queensland Building and Construction Commission pay the applicant's costs of the application for leave to appeal and the appeal.

2. In relation to the application for leave to appeal by the Queensland Building and Construction Commission:

(a) Grant leave to appeal.

(b) Allow the appeal.

(c) Set aside Order No 2 made on 22 February 2016 in the Queensland Civil and Administrative Tribunal Appeal Tribunal.

(d) Order Suresh Chandra pay the costs of the application for leave to appeal and the cross-appeal by the Queensland Building and Construction Commission.

(e) Refuse the application by the Queensland Building and Construction Commission to adduce evidence in its application.

[48] **DAUBNEY J:** I agree with Fraser JA.