

SUPREME COURT OF QUEENSLAND

CITATION: *Ericson v Queensland Building Services Authority* [2013] QCA 391

PARTIES: **IAN JAMES ERICSON**
(applicant)
v
QUEENSLAND BUILDING SERVICES AUTHORITY
(respondent)

FILE NO/S: Appeal No 6138 of 2013
QCAT 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

DELIVERED ON: 20 December 2013

DELIVERED AT: Brisbane

HEARING DATE: 13 November 2013

JUDGES: Holmes and Fraser JJA and Applegarth J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. The application for leave to appeal is granted.**
2. The appeal is allowed and the matter is remitted to the appeal tribunal of the Queensland Civil and Administrative Tribunal for reconsideration in accordance with these reasons.
3. The respondent pay the applicant's filing fees on this application.

CATCHWORDS: PROCEDURE – INFERIOR COURTS – QUEENSLAND – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – where the respondent suspended and then cancelled the applicant's contractor's licence on the basis that he had contravened one of its conditions by failing to satisfy the relevant financial requirements – where on application for review of the cancellation decision, both that decision and the decision to suspend the licence were set aside by a member of the Queensland Civil and Administrative Tribunal (QCAT) – where the appeal tribunal of QCAT set aside the decision of the member and confirmed the respondent's decision to cancel the licence – where the applicant applies for leave to appeal from the appeal tribunal's decision – where the appeal

tribunal characterised the appeal to it as one on questions of law concerning the member's jurisdiction to set aside the suspension and his construction of the financial requirements – where, notwithstanding that it was an appeal on questions of law, the appeal tribunal received fresh evidence – where the appeal tribunal's powers on an appeal on questions of law were those conferred by s 146 of the *Queensland Civil and Administrative Tribunal Act* – where, having decided the questions of law, the appeal tribunal did not remit the matter to the member for a fresh exercise of discretion in accordance with its decision – where the appeal tribunal did not purport to conduct any rehearing under s 147 – whether the appeal tribunal misapprehended the nature of its jurisdiction

Building and Construction Industry Payments Act 2004 (Qld), s 29

Queensland Building Services Authority Act 1991 (Qld), s 35, s 48

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 19, s 20, s 136, s 137, s 138, s 142, s 146, s 147, s 150

Queensland Building Services Authority v Flea's Concreting [2013] QCATA 180, related

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

SOLICITORS: The applicant appeared on his own behalf
Queensland Building Services Authority Legal Division for the respondent

- [1] **HOLMES JA:** The applicant seeks leave to appeal against a decision of the appeal tribunal of the Queensland Civil and Administrative Tribunal (QCAT) which set aside the decision of a QCAT member. The QCAT member's decision, in turn, set aside the decision of the respondent, the Queensland Building Services Authority (QBSA), to cancel the applicant's contractor's licence to carry out building work. Section 150 of the *Queensland Civil and Administrative Tribunal Act 2009* permits an appeal against a final decision of an appeal tribunal only on a question of law and with the leave of this court.

The regulatory requirements

- [2] Section 48 of the *Queensland Building Services Authority Act 1991*¹ 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:

¹ Now the *Queensland Building and Construction Commission Act 1991* (Qld).

“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”² 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.³ Contractors with a turnover above a certain level must provide an “Independent Review Report”,⁴ the work in which is to be performed in accordance with Australian accounting and auditing standards.⁵ 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”.⁶

Acting on the accounting standard’s prescription that contingent assets were not to be recognised in financial statements,⁷ 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.⁸ 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*”,⁹ 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.

² Financial Requirements 2.4 and Table 1.

³ Financial Requirements 1.6.

⁴ Financial Requirements 2.1.2.

⁵ Financial Requirements 2.2.2.

⁶ AASB 137 Provisions, *Contingent Liabilities and Contingent Assets* cl. 10.

⁷ AASB 137 cl. 31, cl. 33.

⁸ AAS 36.

⁹ AAS 36 cl 9.1.

The tribunal member's decision

- [6] The applicant sought QCAT review of that decision, arguing that the QBSA had mischaracterised the amount of the trade debt as a contingent asset when it should have been regarded as a tangible asset. Section 29 of the *Building and Construction Industry Payments Act 2004* required a debtor to pay, within a prescribed time, an amount which an adjudicator had determined to be payable. That provision, the applicant contended, gave the trade debt the status of a tangible asset.
- [7] The tribunal member, acting under s 20 of the *Queensland Civil and Administrative Tribunal Act*, carried out a merits review of the QBSA decision to cancel the licence. The member noted that by reference to the applicable accounting standards, it was “hard to see” that the trade debt was a current asset, ie. realisable within the applicant’s business’ normal operating cycle. On the other hand, it was also “difficult to see” how the Financial Requirements’ object of promoting more financially viable businesses could be met by failing to acknowledge as a current asset a substantial debt which an adjudicator had determined to be owing, simply because it was disputed. That consideration should have had a strong bearing on the QBSA’s decision whether or not to suspend the licence.
- [8] However, it had become evident, from a report lodged by his accountant in September 2010, that the applicant’s current assets/liability ratio had fallen below the required 1:1 to 0.93:1. The QBSA had a discretion to cancel his licence for contravention of that condition, but it was relevant that the initial decision to suspend the licence was harsh, taking into account the favourable adjudication decision. That suspension had had a detrimental effect on the applicant’s financial position, rendering his business no longer viable. Given the contribution of the suspension decision to his current financial state and the fact that the ratio was not substantially below the required level, the tribunal member concluded that the decision to cancel the licence was also harsh. The licence should be reinstated. To that end, the member set aside the decision to cancel the licence, ended its suspension and imposed conditions that the applicant report on specified dates in relation to his financial circumstances.

The appeal to the QCAT appeal tribunal

- [9] Between the filing of submissions on the review and the making of those orders on 22 May 2012, the applicant became bankrupt.¹⁰ In June 2012, the QBSA sought to appeal the member’s decision to the appeal tribunal. Its “application for leave to appeal or appeal” raised as grounds, in summary, that the tribunal member erred in reading the objects of the Financial Requirements and, more particularly only one of the objects, as overriding the specific Requirements; that the evidence did not support his finding that the applicant’s business would have been viable but for the suspension of his licence; that those mistakes led him to err in purporting to terminate the suspension decision; that he had exceeded his jurisdiction because the suspension decision was not the subject of any review; and that he failed to have proper regard to the applicant’s financial difficulties. The QBSA’s written submissions took the position that its grounds raised only questions of law, so that

¹⁰ Bankruptcy does not necessarily preclude the holding of a licence. Section 56AD of the *Queensland Building Services Authority Act* permits a bankrupt contractor to apply to be categorised as a “permitted individual”, thus avoiding the status of “excluded individual”, which would result in cancellation of the contractor’s licence under s 56AF.

leave to appeal was not required under s 142(3)(b) of the *Queensland Civil and Administrative Tribunal Act*; but leave was sought in the event that the appeal tribunal took the view that questions of both fact and law were involved.

- [10] The applicant sought to have the application struck out as an abuse of process because the QBSA had not issued him with a new licence, which amounted, he contended, to a contempt of the tribunal member's decision. An affidavit placed before the tribunal showed that correspondence enclosing the licence card, having been sent to the applicant's address as it appeared on his email correspondence, had been returned to the QBSA marked "return to sender". The appeal tribunal found that, in fact, the QBSA had issued a new licence and sent it to the applicant.

Receipt of fresh evidence

- [11] The appeal tribunal accepted that the appeal was against a decision on questions of law only, and thus did not require leave under s 142(3)(b). Notwithstanding that conclusion, it received fresh evidence in the form of evidence of the applicant's bankruptcy. It is not clear on what basis it did so.
- [12] Section 146 of the *Queensland Civil and Administrative Tribunal Act* confers the appeal tribunal's powers in an appeal on a question of law:

"146 Deciding appeal on question of law only

In deciding an appeal against a decision on a question of law only, the appeal tribunal may—

- (a) confirm or amend the decision; or
- (b) set aside the decision and substitute its own decision; or
- (c) set aside the decision and return the matter to the tribunal or other entity who made the decision for reconsideration—
 - (i) with or without the hearing of additional evidence as directed by the appeal tribunal; and
 - (ii) with the other directions the appeal tribunal considers appropriate; or
- (d) make any other order it considers appropriate, whether or not in combination with an order made under paragraph (a), (b) or (c)."

Section 147 deals with appeals on questions of fact or mixed law and fact:

"147 Deciding appeal on question of fact or mixed law and fact

- (1) This section applies to an appeal before the appeal tribunal against a decision on a question of fact only or a question of mixed law and fact.
- (2) The appeal must be decided by way of rehearing, with or without the hearing of additional evidence as decided by the appeal tribunal.

- (3) In deciding the appeal, the appeal tribunal may—
- (a) confirm or amend the decision; or
 - (b) set aside the decision and substitute its own decision.”

[13] Section 146 does not, in contrast to s 147, suggest any element of re-hearing or power to receive additional evidence. The appeal tribunal cited ss 137 and 138 of the Act in the context of receiving the fresh evidence, but s 136 makes it plain that those provisions do not apply to an appeal to the appeal tribunal.

The appeal tribunal’s reasons and orders

[14] The appeal tribunal accepted the QBSA’s submission that the member had no power to review its suspension decision, which was not the subject of the application before him. It held that the QBSA’s characterisation of the Hansen Yuncken debt as not being a current asset was correct. The member had misdirected himself in his approach to how the debt should be treated. He should have considered, not only the object of the Financial Requirements for Licensing of “promot[ing] more financially viable businesses”, but the second object of “foster[ing] more professional business practices in the building industry”.

[15] Having addressed the questions of law raised as to the construction of the Financial Requirements, the appeal tribunal continued:

“[25] Finality in litigation is highly desirable because any further action beyond the hearing can be costly and unnecessarily burdensome on the parties. We are satisfied that we have sufficient evidence in the documents filed and on the basis of accepted fresh evidence to set aside the decision of the learned member and substitute our own.

[26] The Authority cancelled Mr Ericson’s licence because:

- i) [T]he report lodged with the Authority by Mr Ericson’s own accountant showed he had a then ratio of current assets to current liabilities of 0.93:1 (lower than the required 1:1 of the applicable Financial Requirements for Licensing);
- ii) He owed the Australian Taxation Office over \$3.3 million and superannuation contributions of approximately \$891,000;
- iii) His turnover had dropped to about \$313,000 for the year;
- iv) His income included profits from the sale of property, plant and equipment and his expenses included large amounts of interest to the ATO.

[27] We are satisfied that, by the time of the licence cancellation, Mr Ericson’s business did not meet the licensing financial requirements.

[28] The decision of the Authority of 11 October 2011 to cancel Mr Ericson’s licence is confirmed.”¹¹

(Footnote omitted.)

[16] The appeal tribunal made formal orders setting aside the member’s orders and confirming the QBSA’s decision to cancel the licence.

The finding that there was no contempt

[17] The applicant sought here to argue that there was error in the finding that the QBSA was not in contempt of the tribunal member’s orders. He should not obtain leave to appeal on that basis, for a number of reasons. The findings in question related to the tribunal’s decision not to strike out the QBSA appeal, which was not the “final decision” of the tribunal so as to permit an appeal under s 150(2) of the *Queensland Civil and Administrative Tribunal Act*. In any case, the questions of law which the applicant seeks to agitate in this regard do not arise unless one concludes that the tribunal erred as to the issuing of the licence. There was evidence that the licence was sent to support the tribunal’s finding of fact in that regard, so no error of law can be identified in respect of it to make it appellable.

[18] Even if the applicant could establish some appellable error in the finding, the failure to provide him with a licence card could by no stretch of the imagination amount to contempt of the orders of the tribunal member, which simply set aside the cancellation and suspension decisions and did not descend to detail of how the licence was to be re-instated. Nor could that failure render the QBSA’s appeal to the appeal tribunal an abuse of process.

The finding of error in construction of the Financial Requirements

[19] The applicant argued that the appeal tribunal erred in finding that the member had not taken into account both sets of aims in the Financial Requirements for Licensing when he had, early in his decision, mentioned both. It was also contended that s 20 of the *Queensland Civil and Administrative Tribunal Act* (which says that the purpose of review is “to produce the correct and preferable decision”) permitted the member to provide a decision that met those objects.

[20] Patently, to mention both objects was not necessarily to take them into account. More importantly, 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 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. The identification of error by the appeal tribunal in the member’s approach to the objects and, consequently, to the debt was, in my view, accurate.

The conclusion that there was no jurisdiction to review the suspension

[21] The next set of questions of law which the applicant identified concerned whether the member had power to review the licence suspension, the appeal tribunal having found that it was not open to him to do so. The applicant argued that because the

¹¹ *Queensland Building Services Authority v Flea’s Concreting* [2013] QCATA 180.

QBSA had a discretion under s 48 of the *Queensland Building Services Authority Act* as to whether it suspended or cancelled the licence, the member had the same powers in conducting a review. Review of the cancellation process also led inevitably to consideration of the suspension.

- [22] That argument, however, overlooks s 18(1) of the *Queensland Civil and Administrative Tribunal Act* which confers a review jurisdiction only where “a person has, under [the] Act, applied to the tribunal to exercise its review jurisdiction for a reviewable decision”. There had been no such application in respect of the reviewable decision to suspend the applicant’s licence. That is not to say that the circumstances in which the applicant’s licence was suspended did not form part of the factual matrix in which the decision to cancel it fell to be considered, but it was an error for the member to purport to exercise a power of review of the decision to suspend. There is no arguable error of law in the appeal tribunal’s conclusion that the jurisdiction did not arise.

The failure to exercise the discretion under s 48 of the QBSA Act

- [23] The remaining errors of law identified by the applicant concerned whether and how the appeal tribunal should have exercised the discretion under s 48 of the *Queensland Building Services Authority Act*. The applicant’s proposed grounds of appeal contained the following:

- “8. The presiding Senior Member erred in law in failing to exercise the discretion afforded by Section 48 of the QBSA Act.
9. The presiding Senior Member erred in law in failing to take into account the facts, matters and circumstances that led to the QBSA’s cancellation of the Appellant’s Licence whilst exercising its discretion pursuant to Section 48 of the QBSA Act.”

- [24] The applicant’s argument was largely focussed on the appeal tribunal’s conclusion that the prior suspension decision was not available for review, it being contended that the appeal tribunal had jurisdiction in relation to both the suspension and the cancellation. His written submissions argued that the appeal tribunal had the same powers of cancellation or suspension of the licence as the QBSA; that a review of the reviewable decision under s 20 of the *Queensland Civil and Administrative Tribunal Act* involved a fresh hearing on the merits, which would require all the circumstances leading to the cancellation of his licence to be taken into account in exercising the discretion under s 48 of the *Queensland Building Services Authority Act*; and that any appeal tribunal reviewing the decision of a tribunal member should similarly consider those matters in relation to the material which was before the original tribunal member and any other fresh evidence. Those submissions do, in my view, raise an arguable question of law, although perhaps not as broad in its implications as the applicant intended. It is necessary to examine what powers the appeal tribunal did purport to exercise and the orders it made.

- [25] As has already been pointed out, the appeal tribunal purported to proceed with the appeal as one limited to questions of law, so that its powers were those conferred by s 146 of the *Queensland Civil and Administrative Tribunal Act*. That provision 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 appellant'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.

- [26] 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.
- [27] It might be argued that, despite the characterisation of the appeal as one limited to a question of law, the appeal tribunal was, in fact, conducting a re-hearing under s 147. But that raises other difficulties. The tribunal professed itself satisfied that it had sufficient evidence in the material before the tribunal member and the fresh evidence (as to the applicant's bankruptcy) to allow it to set aside the decision appealed and substitute its own. It then proceeded to set out the QBSA's reasons for cancelling the licence and express itself satisfied that the applicant's business did not meet the Financial Requirements. That finding was a pre-condition to the exercise of a discretion to cancel the licence; it did not amount to a decision on whether the licence should be cancelled. Instead of substituting its own decision for that set aside, the appeal tribunal merely confirmed the QBSA's decision to cancel the licence. It did so although the correctness of the QBSA's decision was not in issue before it; the only decision under appeal was the tribunal member's decision.
- [28] If the appeal tribunal were to act under s 147 so as to substitute its own findings on the facts and its exercise of discretion for the member's decision, it was necessary for it to say as much and to give reasons for exercising the discretion against the applicant. As it happened, the tribunal did not address any factual matter beyond the failure to meet the Financial Requirements, the premise which enlivened the discretion. The applicant's argument that the appeal tribunal if exercising the discretion had to take into account "the facts, matters and circumstances" behind the cancellation of his licence is correct: the circumstances in which his business failed to meet the Financial Requirements were a relevant, although not necessarily a decisive, consideration. But the real difficulty is that the tribunal, while setting aside the member's exercise of discretion, did not itself exercise any discretion.

Conclusion

- [29] The applicant's appeal ground asserting a failure to exercise the discretion under s 48 of the *Queensland Building Services Authority Act* is made out. The applicant was entitled in the first instance to have the decision to cancel his licence reviewed by the tribunal member. If that decision were to be set aside on the basis of error of law, he was entitled to further review according to law, whether that be conducted by the tribunal member on a remission of the matter back to him, or by the appeal tribunal exercising powers under s 147 (if it considered that it was dealing with a mixed question of fact and law). The appeal tribunal, having misapprehended the nature of its jurisdiction, failed to exercise the relevant discretion or to remit the matter for that purpose. That was an error of law; the interests of justice require its correction.

Orders

- [30] The application for leave to appeal should be granted, the appeal allowed and the matter remitted to the appeal tribunal of the Queensland Civil and Administrative Tribunal for reconsideration in accordance with these reasons. The respondent QBSA should pay the applicant's filing fees on this application.
- [31] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Holmes JA. I agree with those reasons and with the orders proposed by her Honour.
- [32] **APPLEGARTH J:** I also concur with the reasons of Holmes JA and the proposed orders.
- [33] The appeal tribunal may have intended to exercise the discretion under s 48 of the *Queensland Building Services Authority Act* and been persuaded that the matters relied upon by the QBSA to cancel the licence, together with the applicant's subsequent bankruptcy, justified such a course despite the apparent source of the applicant's financial problems. Unfortunately, the appeal tribunal did not state or suggest in its reasons that it was exercising the discretion. Therefore, the applicant has succeeded in establishing that there was a failure to exercise the discretion.
- [34] The applicant otherwise has failed in his challenge to the appeal tribunal's decision. For the reasons given by Holmes JA the matter should be remitted to the appeal tribunal to exercise its discretion.