

SUPREME COURT OF QUEENSLAND

CITATION: *Queensland Building and Construction Commission v Arthurs*
[2014] QCA 307

PARTIES: **QUEENSLAND BUILDING AND CONSTRUCTION
COMMISSION**
(applicant)
v
MICHAEL JAMES ARTHURS
(respondent)

FILE NO/S: Appeal No 5784 of 2014
QCAT No 349 of 2013

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: 28 November 2014

DELIVERED AT: Brisbane

HEARING DATE: 4 November 2014

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

ORDER: **Application for leave to appeal refused.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – PRACTICE
AND PROCEDURE – QUEENSLAND – WHEN APPEAL
LIES – BY LEAVE OF COURT – GENERALLY – where
the respondent was a registered builder – where the
respondent was a shareholder in a company that had
a liquidator appointed – where the applicant cancelled the
respondent’s builder’s license because they determined him
to be an “excluded individual” – where the respondent’s
license was reinstated by the Appeal Tribunal of the
Queensland Civil and Administrative Tribunal – where leave
to appeal is only open on questions of law and by leave of the
Court – where the applicant contends that Appeal Tribunal
misconstrued the definition of “influential person” – whether
an error of law has occurred

Corporations Act 2001 (Cth), s 53, s 233, s 461, s 491
Queensland Building and Construction Commission Act 1991
(Qld), s 3, s 56AC
Queensland Civil and Administrative Tribunal Act 2009 (Qld),
s 150

Arthurs v Queensland Building and Construction Commission
[2014] QCATA 155, cited
Bagumya v Kakwano [2010] NSWSC 600, cited
Edwards (Inspector of Taxes) v Bairstow [1956] AC 14, cited
Robb v Tunio [2014] QCA 127, cited

COUNSEL: R Anderson for the applicant
L D Bowden for the respondent

SOLICITORS: Robinson Locke for the applicant
Quinn and Scattini for the respondent

- [1] **HOLMES JA:** I agree with the reasons of McMeekin J and the order he proposes.
- [2] **FRASER JA:** I agree with the reasons for judgment of McMeekin J and the order proposed by his Honour.
- [3] **McMEEKIN J:** A liquidator was appointed to MTS Developments Pty Ltd on 16 September 2011. Mr Arthurs, the respondent here, was a 50 per cent shareholder in that company. He was also a registered builder – he held a licence under Part 3 of the *Queensland Building Construction and Commission Act* 1991 (Qld) (“the Act”).¹ The appointment of the liquidator triggered the “excluded individual” provisions of s 56AC of the Act, an outcome apparently not anticipated by Mr Arthurs.
- [4] The Queensland Building and Construction Commission – “QBCC”² - determined that Mr Arthurs was an “excluded individual for the relevant company event” within the meaning of ss 56AC(4) of the Act, the event being the appointment of the liquidator to MTS Developments Pty Ltd. The effect of the finding that Mr Arthurs was an “excluded individual” was an automatic cancellation of Mr Arthur’s builder’s license.
- [5] Mr Arthurs appealed. QBCC’s decision was confirmed by a member of Queensland Civil and Administrative Tribunal (QCAT) but overturned by the Appeal Tribunal of QCAT. This is an application for leave to appeal that decision.
- [6] An appeal from the Appeal Tribunal to this court against the decision of the Appeal Tribunal lies only by leave of this court and only on questions of law.³
- [7] The questions of law that the applicant submitted arose and deserved to be agitated on appeal were:
 - (a) That the Appeal Tribunal misconstrued the definition of “influential person” by requiring that QBCC show that Mr Arthurs was in position to control, rather than be in a position to substantially influence, the conduct of the affairs of the company;
 - (b) That the Appeal Tribunal failed then to apply the definition to the facts in the case, there being only one possible answer.

Leave

- [8] In my view leave should not be given.

¹ Formerly the *Queensland Building Services Authority Act* 1991 (Qld).

² Formerly, and at the commencement of this matter, the Queensland Building Services Authority.

³ *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) s 150.

- [9] First, I am not persuaded that there was any error of law. Rather the correct test was applied and the decision of the Appeal Tribunal was essentially on an issue of fact, and what is more one based on inadequate materials.
- [10] Secondly, even if an error of law had been demonstrated, the inadequacy of relevant information makes this an unsatisfactory vehicle to investigate the complexities of the legislation and provide the guidance that was said was needed.
- [11] In order to understand the issues agitated it is necessary to say a little more about the relevant legislation and the factual background.

Relevant Legislation

- [12] Section 56AC of the Act relevantly provides:

56AC Excluded individuals and excluded companies

....

- (2) This section also applies to an individual if—
- (a) after the commencement of this section, a company, for the benefit of a creditor—
 - (i) has a ... liquidator ... appointed; ... and
 - (b) 5 years have not elapsed since the event mentioned in paragraph (a)(i) ... (***relevant company event***) happened; and
 - (c) the individual—
 - (i) ...
 - (ii) was, at any time after the commencement of this section and within the period of 1 year immediately before the relevant company event happened, a director or secretary of, or an influential person for, the company.

...

- (4) If this section applies to an individual because of subsection (2), the individual is an ***excluded individual*** for the relevant company event.

- [13] Whether Mr Arthurs should be deemed an “excluded individual for the relevant company event” depends on the construction of the definition of “influential person” where it appears in s 56AC(c)(ii) of the Act. That definition appears in Schedule 2 to the Act which relevantly reads as follows:

“... for a company, means an individual, other than a director or secretary of the company, who is in a position to control or substantially influence the conduct of the company's affairs, including, for example a shareholder with a significant shareholding, a financier or a senior employee.”

- [14] The interpretation and application of that definition must be undertaken bearing in mind the objects of the Act. Section 3 of the Act provides:

“3 Objects of Act

The objects of this Act are—

- (a) to regulate the building industry—
 - (i) to ensure the maintenance of proper standards in the industry; and
 - (ii) to achieve a reasonable balance between the interests of building contractors and consumers; and
- (b) to provide remedies for defective building work; and
- (c) to provide support, education and advice for those who undertake building work and consumers.

Factual Background

- [15] As mentioned, Mr Arthurs was a 50 per cent shareholder in the relevant company, MTS Developments Pty Ltd. There was one other shareholder Shaun Davison. He too held 50 per cent of the shares in the company. Mr Davison's wife was the sole director of the company. According to the articles of association she held a casting vote if there was a deadlock at a general meeting of the company.
- [16] Mr Arthurs and Mr Davison had been business associates since 2007. Their business was to acquire land, construct houses thereon and sell off the improved lots for profit. The evidence disclosed that they had undertaken three prior projects. In one of those the corporate vehicle used for the project had two blocks left over that had not been developed or on sold. The two men determined to incorporate a new company, MTS Developments Pty Ltd, for the purpose of developing and selling those two blocks. The prospective profit hoped for was \$50,000 approximately. They were to split the profits equally.
- [17] Thus it appears that prior to incorporation of MTS Developments Pty Ltd the two men agreed on a joint venture, determined to use a corporate vehicle to carry out their intention, and agreed on an equal shareholding in that corporation. The evidence shows that they agreed that Mr Arthurs' role was to build the two houses required. He was to fund the construction costs. He was to be paid those costs plus five per cent.
- [18] Beyond that the evidence is completely opaque as to what transpired. The evidence as to when things were done and what precise role each of the three actors played in the "conduct of the affairs of the company" was quite obscure.
- [19] The sole director of the company, Mrs Davison, provided an affidavit in which she swore that "it was never contemplated that Arthurs would take part in the decision making or management of MTS and all decisions with respect to the management of the company were made by me in my capacity as a director". She was not cross examined. What decisions she made and what she meant by "the management of the company" were not made clear.
- [20] Mr Arthurs swore that he took no part in the management of the company.
- [21] What Mr and Mrs Davison were to do in relation to the business of MTS Developments Pty Ltd was unexplored. In response to a series of questions Mr Arthurs said that Mrs Davison had no role in the building operation, the sourcing of the land, the sourcing of the financing, or the agreement to distribute the profits. When asked what role she had in "the decision to do the development in the way it was done" he replied that everything was done between him and Mr Davison.⁴

- [22] No evidence was led as to what contracts were entered into by the company, either to obtain the land, or to construct the houses thereon, or to sell off the developed blocks. Presumably there must have been such contracts. Mr Arthurs was not asked whether he had any input into the decisions behind any such contracts eg for what price the lots might be purchased or sold, whether the construction costs should be capped in some way, what standard of buildings should be constructed, or the completion dates for the construction contracts.
- [23] The developed lots were sold, with what profit is unknown, and, as mentioned, a liquidator appointed on 16 September 2011.

The Arguments

- [24] The argument advanced by QBCC was that in the circumstances here, that is with only one other shareholder, the 50 per cent shareholding held by Mr Arthurs meant that he was potentially a “significant shareholder” within the meaning of the definition. That fact, combined with his prior business association with Mr Davison, it was submitted led inexorably to the conclusion that Mr Arthurs was in a “position to influence the conduct of the company’s affairs”. The Appeal Tribunal erred, it was said, in that it did not ask itself the correct question – rather than determining whether Mr Arthurs was “in a position to control or substantially influence the conduct of the company's affairs” the tribunal determined that there was no evidence that he had in fact controlled or influenced the company’s affairs.
- [25] QBCC contended that leave should be given as not only was there a clear error of law, but, as well, there is no decision of a superior court to guide members of QCAT, the Appeal Tribunal and QBCC in their application of the definition, the definition is a pivotal one, and its application involves important consequences both for builders and those who deal with them.
- [26] Mr Arthurs submitted that there is no reasonable argument that the Appeal Tribunal erred at all and, even if that is not right, that there was no error on any question of law; the matter was determined on its facts; and even if it be thought that the case involved an important question of law this was an unsatisfactory vehicle to debate the question given the factual findings.

No Error of Law

- [27] The argument was that the Appeal Tribunal had failed to advert to the plain words of the definition. Reliance was essentially placed on the following passage in the reasons below and the sentence that I have highlighted:

“One must not allow examples in legislation to limit the ordinary meaning of words used in the legislation, or the meaning of words used in definitions. To conclude as suggested that a shareholding of 50% by itself constitutes a person an influential person for a company limits and gives no meaning to the preceding words of the definition “*an individual other than a director or secretary of the company, who is in a position to control or substantially influence the conduct of the company’s affairs....*” **The focus of issue intended by the definition is control of a company’s affairs, de jure (director or secretary) or de facto (influential person).** The examples given in the definition identify, and also limit, the class of individuals having a connection with the company suggestive by that

very connection of having the potential to control or influence the affairs of a company. But such individuals must still be shown to be in a position to control or substantially influence the conduct of the company's affairs.”⁵

[28] While the phrase “the focus of issue intended by the definition is control of a company's affairs” is infelicitous, it needs to be read in context. It is evident from a reading of the reasons in their entirety that the members of the Appeal Tribunal were conscious that the definition was not limited to the concept of “control” but went further. The passages that preceded and followed the sentence complained of, containing as they do a precise statement of the definition and a reference in each of the next two sentences that followed to the correct test, make so much plain.

[29] As well the repeated references to the relevant part of the definition throughout the reasons (see paragraphs [22], [32] and [35]) and the statement of conclusion in the paragraph that immediately followed the passage criticised reinforces that view:

“Mr Arthurs 50% shareholding in MTS did not of itself establish him to be a person in a position to control or substantially influence the conduct of the affairs of MTS”.⁶

[30] The only passage in which the Appeal Tribunal directly discussed the issue of actual control⁷ was one in which the Tribunal responded to submissions made to it – evidently thinking that appropriate to meet the argument advanced and not as representing their view as to the required test.

[31] The reasons, read fairly, make plain that the Appeal Tribunal considered the correct question – was Mr Arthurs in “a position to control or substantially influence the conduct of the company's affairs”.

[32] The second supposed question of law – that had the Appeal Tribunal applied the correct definition to the facts in the case, there was only one possible answer – is a complaint about the determination of the factual issue made here.

[33] In *Edwards v Bairstow*⁸ Lord Radcliffe, in a much cited passage, said that there is an error of law if “no person acting judicially and properly instructed as to the relevant law could have come to the determination” appealed from. While I would not wish to be seen as necessarily endorsing the decision below I do not think it can be so categorised.

[34] The issue that was argued – that the 50 per cent shareholding combined with the prior association between the two men required a finding that Mr Arthurs was in a position to control or substantially influence the conduct of the company's affairs – glosses over the absence of evidence going to what that prior association had involved. That the relationship extended to doing what happened here, that is, the acquiring and developing of land is clear. But the precise role that each had and the influence that each had previously exercised on the crucial decisions affecting those ventures are unknown. Absent that evidence it is difficult to draw any inference. That difficulty is compounded when consideration is given to the uncontested evidence of Mrs Davison to which I have referred.

⁵ *Arthurs v Queensland Building and Construction Commission* [2014] QCATA 155 at [37] – my emphasis.

⁶ *Ibid* at [38].

⁷ *Ibid* at [40]-[41].

⁸ [1956] AC 14 at 36.

[35] The circumstances in which a disappointed litigant before QCAT may appeal to this Court is severely circumscribed. Section 150(3) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) makes plain that appeals to this Court “may be made only on a question of law” and are by leave. Absent a question of law the application for leave must be refused.

[36] As Rothman J neatly summarised in *Bagumya v Kakwano*:

“An exercise of discretion, the admission of evidence, findings on evidence and the determination of fact based upon the totality of evidence before a tribunal, are not solely questions of law and an appeal from such decisions does not raise solely a question of law: see *Williams v R* [1986] HCA 88; (1986) 161 CLR 278 at 287 and 301–302.”⁹

[37] Here the complaint is as to a finding on the evidence led. The review of those findings is not within our jurisdiction.

The Appeal Tribunal’s Decision

[38] As mentioned I would not wish it to be assumed that I necessarily agree with the decision below nor should the decision be seen as setting some form of precedent.

[39] There are at least three issues that merit closer examination:

- (a) whether the mere fact of the 50 per cent shareholding was sufficient to deem a shareholder an “influential person”, particularly given that such a shareholding is sufficient to defeat a motion to wind up the company by resolution of the shareholders where a 75 per cent majority would be required: see s 491 *Corporations Act 2001* (Cth);
- (b) whether a person in a position to control the building side of the operations as both builder and representative of the relevant company (here MTS Developments Pty Ltd), and hence in a position to possibly control the costs and ultimate profitability of the venture was sufficient to deem him or her, when a shareholder in the relevant company, an “influential person”; and
- (c) whether the arrangements made between individuals (here Mr Arthurs and Mr Davison) prior to the registration of the relevant company were within the scope of the phrase the “the conduct of the company’s affairs”, at least where, as here, the parties take up shares in the company that comes into being, that shareholding entitling the holder to seek a winding up (see s 233, s 461(1)(e) and the definition of the “affairs of a body corporate” in s 53(a) of the *Corporations Act 2001* (Cth)).

[40] The determination of the issue before the Appeal Tribunal depended on a close examination of both the facts of the case and the intricacies of the legislation. None of these issues were explored in argument before us. The facts were left largely unexplored before the member who originally heard the matter. The resolution of these issues will need to await another day.

Conclusion

[41] In my opinion leave to appeal should be refused.

⁹ [2010] NSWSC 600 at [29]. See also *Robb v Tunio* [2014] QCA 127 at [23] per Jackson J, MuirJA and Martin J agreeing.