QCAT

Queensland Civil and Administrative Tribunal

CITATION:	*Jensen v Queensland Building and Construction Commission* [2017] QCAT 232
PARTIES:	Timothy Peter Jensen (Applicant) v Queensland Building And Construction Commission (Respondent)
APPLICATION NUMBER:	GAR091-16
MATTER TYPE:	General administrative review matters
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	**Member Traves**
DELIVERED ON:	22 June 2017
DELIVERED AT:	Brisbane
ORDERS MADE:	**1. The application for leave to make a further application for review pursuant to s 46 of the QCAT Act is refused.** **2. The application for an extension of time under s 61 of the QCAT Act is refused.**
CATCHWORDS:	ADMINISTRATIVE LAW - APPLICATION FOR LEAVE TO MAKE A FURTHER APPLICATION FOR REVIEW – APPLICATION FOR AN EXTENSION OF TIME - where original application for review of decision to refuse to categorise the applicant as a "permitted individual" under s 56AD of the *Queensland Building Services Authority Act* 1991 (Qld) withdrawn – where enabling Act amended since the time of original decision – which version of the enabling Act applies at the time of review – whether leave should be given under s 46(3) of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) – whether an extension of time to make a further application for review under s 61 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) should be given

Acts Interpretation Act 1954 (Qld), s 20
Professional Engineers and Other Legislation Amendment Act 2014 (Qld), s 60, s 61
Queensland Building and Construction Commission Act 1991 (Qld), s 31, s 56AC, s 56AD, s 56AE, s 56AH, s 57AF, s58, s 59, s 60, s 61, s 86
Queensland Building and Construction Commission and Other Legislation Amendment Act 2014 (Qld)
Queensland Building Services Authority Act 1991 (Qld), s 56AD
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 19, s 20, s 24, s 33, s 46(3), s 61

Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541; [1996] HCA 25
Builders Licensing Board (NSW) v Sperway Constructions (Sydney) Pty Ltd (1976) 135 CLR 616; [1976] HCA 62
Campaigntrack Victoria Pty Ltd v The Chief Executive, Department of Justice and Attorney-General & Ors [2016] QCA 37
Coppens v Water Wise Design Pty Ltd [2014] QCATA 309
Crime and Misconduct Commission v Chapman & Anor [2011] QCAT 229
D'Arro v Queensland Building and Construction Commission [2017] QCA 90
Drake v Minister for Immigration and Ethnic Affairs (1979) 2 ALD 60
Dreamstarter Pty Ltd v Lyons [2012] QCAT 65
Muirhead v The Uniting Church in Australia Property Trust (Q) [1999] QCA 513
O'Reilly v Mackman [1983] 2 AC 237
Re Costello and Secretary, Department of Transport (1979) 2 ALD 934; [1979] AATA 184
Shi v Migration Agents Registration Authority (2008) 235 CLR 286; [2008] HCA 31

APPEARANCES:

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) (QCAT Act).

REPRESENTATIVES:

APPLICANT:	Construct Law Group

RESPONDENT: Active Lawyer & Consultants

REASONS FOR DECISION

[1] On 14 April 2016 Timothy Jensen applied for a review of a decision made by the Queensland Building Services Authority on 2 June 2011 to refuse him "permitted individual" status within the meaning of s 56AD of the *Queensland Building Services Authority Act* 1991 (Qld) (QBSA Act). This was the second time Mr Jensen had sought to review this decision. On the first occasion, Mr Jensen applied within time but withdrew his application in November 2012, one week prior to the scheduled hearing date.

[2] The matter is important for Mr Jensen because the application for review related to a "second relevant event". Under the legislation as it stood when he withdrew the applications, when a person is categorised as an excluded individual in respect of two relevant events he or she is permanently excluded and prevented ever from holding a building licence. When Mr Jensen withdrew his application for review of the decision to be categorised a "permitted individual" in relation to the second relevant event he was permanently excluded and, consequently, unable to hold a building licence.

[3] However, there have been important legislative changes since. On 1 July 2015 amendments to s 56AC(5) of the *Queensland Building and Construction Commission Act* 1991 (Qld), commenced which meant that if the two relevant events arose out of the same facts or circumstances they would be considered as one event, not two, regardless of whether one event related to a corporate insolvency and the other to an individual's bankruptcy. Although it is not for me to finally determine the issue, the amendments potentially favour the applicant in that the 2015 amendments provide for an exception to permanent exclusion which previously did not exist. Further amendments were made which are also relevant to this matter. The legislation in its current form is the *Queensland Building and Construction Act* 1991 (Qld). A difficult issue arises as to which version of the enabling Act would apply on review.

[4] Ordinarily a person seeking review of such a decision must do so within 28 days of the decision. Mr Jensen is applying for review almost 5 years later. In order to proceed he would, therefore, need an extension of time under s 61 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) (QCAT Act). There is another legislative obstacle in his way. Under s 46(3) of the QCAT Act, if a person withdraws an application for review before it is heard, the person can not make a further application relating to the same facts or circumstances without leave.

[5] In order therefore to proceed with the application for review, Mr Jensen has made an application for:

a) An extension of time to make the application for review;[1] and

b) Leave to make a further application for review in circumstances where the original application was withdrawn.[2]

[6] The issue for me is to consider both interlocutory applications, not the application for review. In considering the applications I have taken into account submissions filed by both parties pursuant to Directions of the Tribunal.[3] I have also taken into account Further Submissions in Reply to the Respondent's Submissions dated 5 June 2017.

[7] Where the length of delay is relevant, I have not included the time since the matter was listed for determination on the papers. There was some delay due to my decision not to determine the applications until the Queensland Court of Appeal delivered its judgment in *D'Arro v Queensland Building and Construction Commission*.[4]

The background to the matter

[8] Mr Jensen held an open builder's licence from 30 August 2003 until 29 September 2009. Jensen Builders Pty Ltd (of which Mr Jensen was a director and shareholder) also held a building licence.

First Relevant Event

[9] On 16 September 2009, following the winding up of Jensen Builders Pty Ltd, the Queensland Building Services Authority (QBSA) gave notice to Mr Jensen that he was an excluded individual under s 56AC of the QBSA Act. He was an excluded individual on the basis that he was a director of the company that had been wound up. Mr Jensen applied to be a permitted individual in relation to that first relevant event, but his application was refused by the QBSA on 3 June 2011.

Second Relevant Event

[10] On 2 March 2010, Mr Jensen entered into bankruptcy under the *Bankruptcy Act* 1966 (Qld) and was subsequently declared bankrupt. On 21 March 2010 the QBSA gave notice that it considered him to be an excluded individual also in relation to this, which they regarded as a second relevant event. Under the QBSA, unless a person was successful in applying to become a permitted individual in relation to the second relevant event, the person would be regarded as a permanently excluded individual.

[11] Mr Jensen applied to be a permitted individual in relation to the second relevant event, but this application was also refused by the QBSA on 2 June 2011.

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1 Application for Extension of Time filed 14 April 2016.
2 Application for Leave pursuant to s46(3) filed 9 May 2016.
3 Directions made 20 June 2016.
4 [2017] QCA 90.

Original application for review

[12] On 4 July 2011 Mr Jensen applied to the Queensland Civil and Administrative Tribunal (the Tribunal) for review of both decisions declining him permitted individual status.[5] However, on 5 November 2012, approximately one week before the hearing of the review, he withdrew his application. Mr Jensen was, as a consequence, permanently excluded on 1 February 2013.

[13] Mr Jensen states:

> The reason I withdrew the Review Applications was because I could no longer afford legal representation and was not comfortable in continuing without expert legal advice and assistance.[6]

Cancellation of licence

[14] On 1 February 2013 the QBSA cancelled Mr Jensen's licence and gave him notice that he was a permanently excluded individual.

[15] Mr Jensen subsequently applied for a new licence. This application was refused on the basis he was a permanently excluded individual.

Further application for review

[16] Mr Jensen now wishes to make a further application for review of the decision made by the QBSA on 2 June 2011 to refuse to categorise him as a permitted individual in relation to the second relevant event (or to categorise him as an excluded individual).

[17] The motivation for the reapplication is understandable: if he had been categorised as a permitted individual on the second occasion he would not have been a person who had been excluded in relation to a second relevant event and would not, as a consequence, have been permanently excluded from holding a licence.

[18] The issue for the Tribunal is whether, in these circumstances, the Tribunal should give leave to Mr Jensen to make a further application for review. In considering this issue the Tribunal will also necessarily be considering whether it should exercise its discretion to extend time, considering that the application for review is almost 5 years out of time.

[19] Since the decision was made by the QBSA, the relevant statutory provisions have changed. The amended provisions, in Mr Jensen's view, improves his prospects of success and he would, accordingly, like an opportunity to make a further application for review in order to have the benefit of those amendments.

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5 This was the reviewable decision pursuant to s 86(1)(j) of the QBSA Act. There is no decision that someone is an excluded individual. That is an automatic consequence of a relevant event as defined in s 56(5) and (6).

6 Statutory Declaration of Timothy Peter Jensen dated 12 January 2016, [14].

[20] Mr Jensen also says that he received erroneous advice from the former Commissioner of the QBCC to the effect that he would be better placed applying for a new licence under the new provisions than applying for a review of the decision not to categorise him as a permitted individual.

[21] Further, Mr Jensen, argues that since the QBCC decisions giving rise to his permanently excluded status, new information has come to light which explains why an entry for "director's wages" in the company's accounts was incorrect.

[22] These are the principal grounds upon which Mr Jensen seeks leave to make a further application for review. Alternatively, Mr Jensen argues that leave is not required because the application does not refer to the "same facts or circumstances" as required by s 46(3) of the QCAT Act.

The merits of the application for review – what law applies?

[23] I regard the merits of the application for review as relevant to my decision on leave. The question is whether I should consider the merits according to the law as it existed at the time of the original decision or in its current form.

[24] Section 19 of the QCAT Act provides that in exercising its review jurisdiction, the Tribunal must decide the review in accordance with the QCAT Act and the enabling Act under which the reviewable decision being reviewed was made.

[25] Section 20 provides that the Tribunal is to hear and decide a review by way of a fresh hearing on the merits.[7] The Tribunal is to arrive at the "correct and preferable decision". In the exercise of its review function the Tribunal has all the powers of the decision-maker.[8]

[26] Ordinarily, a fresh hearing means that the Tribunal is to hear the matter again and decide it afresh based on the facts and law that exist at the time of the review.[9] Difficulties can arise when the law has changed between the time of the original decision and the review.

[27] This is the case here. The Act that applies now, the *Queensland Building and Construction Commission Act* 1991 (Qld) effective from 1 March 2017, is different in a number of material respects from the Act which applied at the time of the original decision, namely, the QBSA Act effective from 1 January 2011.

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7 An "appeal" to a court or administrative tribunal against an administrative decision will normally involve a full rehearing on the merits before the court or tribunal: *Builders Licensing Board (NSW) v Sperway Constructions (Sydney) Pty Ltd* (1976) 135 CLR 616.

8 QCAT Act, s 19(c).

9 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60; 24 ALR 577; *Re Costello and Secretary, Department of Transport* (1979) 2 ALD 934.

[28] Whether the current legislation applies depends upon the construction of that legislation and the nature of the decision under review.[10] The statute may make clear, for example, that it is only to apply prospectively to future licence applications. If there is no clear indication as to whether the legislation in force at the time of review is to apply, it will be a question of examining what the effect of applying that legislation to the relevant reviewable decision would be.

[29] If its application would affect an accrued right or liability it will not be applied because that would be giving the legislation a retrospective operation. If, on the other hand, its application relates to the question of whether the applicant has a present entitlement to the grant of a right or privilege, then, unless the legislation provides otherwise, it should be applied on review. This is because such an application does not mean the legislation is operating retrospectively.

[30] Does the amending law in this case affect an accrued right or liability? This was considered recently by the Queensland Court of Appeal in *D'Arro v Queensland Building and Construction Commission*.[11]

[31] In *D'Arro* the respondent had decided in 2009 that the applicant was an excluded individual due to the appointments of liquidators to four companies of which he was a director and that he was also an excluded individual due to becoming a bankrupt. The applicant's application to be categorised as a permitted individual for each of the 5 events was refused in 2012. The applicant applied for review to the Tribunal to review the decision not to categorise him as a permitted individual and the decision under s 56AF or 56AG that a person was an excluded individual or excluded company. The hearing proceeded only in relation to the decision that the applicant was an excluded individual for Developments and the decision to refuse to categorise him as a permitted individual for his bankruptcy. On 30 March 2015 the Tribunal confirmed both decisions.

[32] There were relevant amendments made to the enabling Act effective from 10 November 2014. The issue was whether the amended provisions applied on review. One of the amendments was the introduction of a new s56AC(5) which, in effect, treated as one event a situation where a person became an excluded individual twice but the commission was satisfied the two events were consequences flowing from what was, in substance, one set of circumstances.

[33] Because this subsection had not existed at the time the respondent made its original decision, the applicant had been permanently excluded on the basis he was an excluded individual for two relevant events. As a consequence, his licence was duly cancelled and he was permanently excluded.

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10 *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286; [2008] HCA 31.

11 [2017] QCA 90.

[34] The reasoning in *D'Arro* is difficult to follow. However, it was held that the amendments could be applied because to do so did not attribute to them a retrospective operation. This was because the underlying sections which described when a person was an excluded individual, s 56AC(3) and 56AC(4) did not operate themselves upon the date of a relevant event to create a liability or other consequence that would fall within s 20 of the *Acts Interpretation Act* 1954 (Qld). The liability or thing suffered would be created by the subsequent cancellation of a licence flowing from the decision that a person was an excluded individual. So, amending the excluded individual provisions by adding s 56AC(5) did not affect an accrued liability.

[35] The Court of Appeal explained further as follows:

> [31] The application of the amendments made by the PEOLA Act would operate retrospectively if they changed the applicant's licence status as it was at a time before that Act was enacted. For example, the PEOLA Act would operate retrospectively if the QBCC Act as amended entitled the applicant or one of his companies to be regarded as having held a licence in a period before the commencement of the amendments even though in that period the respondent had duly refused an application for the licence or duly cancelled the licence under s 31(1)(e) or s 56AE of the QBCC Act or had duly cancelled the licence under s 56AF(3) of the QBCC Act. The respondent did not argue that the PEOLA Act would have any such effect if those amendments were applied by the Tribunal in the review of the relevant decisions. The possible consequences that after the PEOLA Act had commenced any application by the applicant for a licence could not lawfully be refused in reliance upon s 31(1)(e) or s 56AE and the respondent could not lawfully cancel the applicant's licence in reliance upon s 56AF(3) would not attribute a retrospective application to the PEOLA Act; although the PEOLA Act would apply with reference to events that had occurred before its enactment, it would not apply "in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events".

[36] Although in that case, as here, the effect of the amendments if applied on review would potentially be to result in a change of licence status on review, this would not, in the court's view, be enough to make its operation retrospective. The sections affected by the amendment had to, of themselves, be responsible for a cancellation (cancellation amounting to an accrued liability) and, upon analysis, they were not. A number of further steps had to take place: either the applicant had to subsequently apply for a licence or the respondent had to make a decision that a person was an excluded individual applying evaluative factors (as per s 56AC(5) and (6)).[12]

[37] Fraser JA observed:

> It might be said that the statutory description of the applicant as an excluded individual disadvantaged the applicant in the sense that any licence he held might be cancelled and any application for a licence he

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12 Ibid, [29] (Fraser JA).

> might make would be refused, but until such an event occurred the disadvantage should not be regarded as an accrued liability or a completed transaction.[13]

[38] In *D'Arro* the applicant's licence had been cancelled.[14] The court said that this may have led to an argument that if the Tribunal made a decision favourable to the applicant on review that it would render the cancellation ineffective. The court said that this had not been argued and that, in any event, there was power in s 24(2) of the QCAT Act to make an order which avoided any unwarranted retrospective effect, for example, by making the order applicable from the date of review as opposed to the date of the original decision.

[39] In this case, therefore, despite the cancellation of the applicant's licence, because the amended provisions did not of themselves effect that cancellation, the amended provisions did not affect an accrued right or liability and were not retrospective in operation. The consequence is that the amended provisions would apply on review.

What is the reviewable decision?

[40] In his application for further review, Mr Jensen says that he is applying for a review of the decision by the QBSA on 2 June 2011 to refuse to categorise him as a permitted individual under s 56AC of the QBSA Act. He also states in the application that he seeks to be categorised as a permitted individual with respect to the second relevant event and to have the decision to categorise him as an "excluded individual" for the purposes of s 56AC set aside.

[41] It is necessary therefore to consider the relevant provisions of the *Queensland Building and Construction Commission Act* 1991 (Qld) (QBCC Act) in its current form.

[42] Section 86 sets out what are reviewable decisions. They include in s 86(1)(a) a decision to refuse an application for a licence, in s 86(1)(c) a decision to cancel a licence and, in s 86(1)(k)(i) a decision under section 56AF or 56AG that a person is an excluded individual or excluded company. Notably, there is no longer an option to review a decision whether to categorise a person as a permitted individual.

[43] However, the transitional provisions of the *Queensland Building and Construction Commission and Other Legislation Amendment Act* 2014 (Qld), (QBCCOLA Act) provide, relevantly:

> 54 Continuation of particular reviews
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> This section applies if, before the commencement, a person could have applied to the commission or tribunal for a review of any of the following decisions under former part 7, division 3—

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13 Ibid, [33].
14 Ibid, [38].

> (a) a decision to direct or not to direct rectification or completion of tribunal work;
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> (b) a decision that tribunal work undertaken at the direction of the commission is or is not of a satisfactory standard;
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> (c) a decision not to categorise an individual as a permitted individual for a relevant event.
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> (2) If the person had not applied before the commencement, the person may make the application in compliance with the requirements of former part 7, division 3 and the commission or tribunal may review the decision.
>
> (3) …
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> (4) For the purpose of starting, continuing or deciding a review to which this section applies, this Act, as in force immediately before the commencement, has effect as if this Act had not been amended by the Amendment Act.
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> (5) A decision of the commission or tribunal made after reviewing a decision under subsection (2) or (3) has effect despite the amendment of this Act by the Amendment Act.
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> (6) A decision of the commission made after reviewing a decision under subsection (2) or (3) is taken to be a reviewable decision for part 7, division 3, subdivision 2 and a person affected by the decision may apply to the tribunal under section 87 for a review of the decision.

[44] Here, as Mr Jensen could have applied to the Tribunal for review of the decision not to categorise him as a permitted individual for a relevant event, prior to the commencement of s 54 of the amendment Act, that is, prior to 15 December 2014, his right to make the application is preserved.

[45] For the purposes of deciding that review, the Act in force immediately before 15 December 2014 has effect as if it had not been amended by the QBCCOLA Act.

[46] The substance of Mr Jensen's application demonstrates that he is also applying for review of the decision that he is an excluded individual, although he refers to s 56AC not s 56AF. However, as I am required to act according to the substantial merits of the case, I have considered the applications before me on the basis that Mr Jensen has also applied for review of the decision that he is an excluded individual.[15]

[47] If the current legislation applies, Mr Jensen would be applying for review of the decision that he is an excluded individual under s 56AF. In that review he would be seeking to argue that under s 56AC(5) he could not be regarded as an excluded individual because both events (the second relevant event and the first) were consequences flowing from what is, in substance, one set of circumstances.

[48] I have, accordingly, approached the interlocutory applications on the basis that Mr Jensen is seeking review of both the decision not to categorise

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15 QCAT Act, s 28(2).

him as a permitted individual and the decision that he is an excluded individual for a relevant event.

Application for leave to make a further application under s 46(3) of the QCAT Act

[49] An applicant is entitled to withdraw an application before the matter is heard and decided by the Tribunal.[16] This is done by filing a notice in the approved form and giving a copy of that notice to each other party.[17]

[50] Unlike the situation with respect to the dismissal of an application for review, there is no provision which states what the effect of a withdrawal is.[18] In this case however, the withdrawal left operative the QBSA's reviewable decision and thus the permanent exclusion applying to the applicant in place.

[51] Section 46(3) provides:

> If an applicant withdraws an application or referral, the applicant can not make a further application or referral, or request, require or otherwise seek a further referral, relating to the same facts or circumstances without leave of the tribunal.

[52] Mr Jensen argues that he does not require leave because his application for review made on 14 April 2016 does not relate to the same facts or circumstances as the original applications withdrawn in November 2012 (OCR151-11 and OCR152-11).

[53] The main difference, Mr Jensen says, is that there was an erroneous entry relating to directors wages in the accounts for the year ending 30 June 2009, relied on by the QBSA in making their decision, which Mr Jensen says he now knows was false. In support of his claim, Mr Jensen refers to a statement by Mr Paul Hopkins of Positive Accounting to the effect that the accounting records prepared by Accounting North Pty Ltd were unreliable and the director's wages raised in the reports questionable.

[54] There is no further detail provided in relation to this alleged discrepancy in the accounting records.

[55] In these circumstances I am not prepared to find that the facts and circumstances are not the same. In my view the current application does arise out of the same facts and circumstances. A factual discrepancy in relation to the categorisation of one entry in the accounts of one financial year is not sufficient to displace the fact that, overall, the application relates to the same facts and circumstances that existed when Mr Jensen made his original applications for review.

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16 Ibid, s 46(1).

17 QCAT Rules, rule 57A.

18 In contrast to, for example s 42A of the *Administrative Appeals Tribunal Act* 1975 (Cth) (AAT Act) which provides that "…the Tribunal is taken to have dismissed the application without proceeding to review the decision."

Should leave be given?

[56] The section prevents a person from making another application relating to the same facts or circumstances unless the Tribunal gives leave to do so.

[57] It is noted that, unlike the situation where a proceeding has been dismissed under ss 47 or 48, there is no equivalent provision to s 49(4) which states that:

> In giving leave to start another proceeding or part of a proceeding, the president or deputy president may extend any time limit for starting the proceeding or part.

[58] In my view, the absence of an extension of time provision specifically relating to applications under s 46 does not mean that the Tribunal can not grant leave if the application would be out of time. Provided the enabling Act does not provide otherwise, there is nothing to prevent, in my view, the Tribunal from considering an extension of time pursuant to its general power in s 61.

[59] There have been no decisions in the Tribunal which set out what factors are to be applied in granting leave under this provision.[19] It is an unfettered discretion.

[60] In considering whether to grant leave I have taken into account the fact that the decision to withdraw was a late and deliberate tactical change by the applicant in its conduct of the review application; the length of delay from the time of the original application; the purpose of a 28 day time limit in the context of the administrative review scheme; that the applicant now wants to take advantage of a legislative amendment that was not available to him at the time of his original application; the explanation for delay and the prejudice caused in permitting the review to go ahead. In view of these factors I am not prepared to grant leave.

[61] If, however, I am wrong in refusing leave, I will consider the application for an extension of time.

[62] Assuming I granted leave to make a further application, because the application is out of time, I would then have to grant a significant extension of time to the applicant in which to make that application.

Extension of time under s 61 of the QCAT Act

[63] Section 61 of the QCAT Act generally enables an extension of time to be granted or procedural requirements to be waived where they are imposed by the QCAT Act or by the enabling Act. An extension can be sought under s 61 even where the time for compliance has passed. Section 61 will not apply where the enabling Act provides otherwise, for example, by providing that an application must be brought within 28 days failing which

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19 *Dreamstarter Pty Ltd v Lyons* [2012] QCAT 65.

the Tribunal shall not decide the application.[20] Although this applies to time limits in respect of some reviewable decisions under the QBCC Act, this decision is not one of them. Section 61 can, therefore, theoretically be applied to the 28 day time limit for applying for a review of a decision that a person is an excluded individual.

The requirements for the extension

[64] Section 61 provides, relevantly:

> 61 Relief from procedural requirements
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> (1) The tribunal may, by order—
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> (a) extend a time limit fixed for the start of a proceeding by this Act or an enabling Act; or
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> (b) extend or shorten a time limit fixed by this Act, an enabling Act or the rules; or
>
> (c) waive compliance with another procedural requirement under this Act, an enabling Act or the rules.
>
> (2) An extension or waiver may be given under subsection (1) even if the time for complying with the relevant requirement has passed.
>
> (3) The tribunal can not extend or shorten a time limit or waive compliance with another procedural requirement if to do so would cause prejudice or detriment, not able to be remedied by an appropriate order for costs or damages, to a party or potential party to a proceeding.
>
> (4) ….

[65] The Tribunal must not, therefore, extend a time limit if that would cause prejudice or detriment to a party to a proceeding which was not able to be remedied by an appropriate order for costs or damages.[21]

[66] Applications under s 61 have been approached by the Tribunal as a two stage process: first, by determining whether an order under s 61 would cause prejudice or detriment not able to be remedied by a costs order or damages; and secondly, in the absence of prejudice or detriment, consideration of other factors relevant to the exercise of the discretion contemplated by s 61.[22]

[67] There was no evidence of prejudice or detriment provided by the respondent. I move then to consider other factors relevant to the exercise of my discretion under s 61.

[68] In the case of *Crime and Misconduct Commission v Chapman*[23] Judicial Member, Mr James Thomas AM QC outlined the following factors as being relevant:

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20 *Campaigntrack Victoria Pty Ltd v The Chief Executive, Department of Justice and Attorney-General & Ors* [2016] QCA 37, [48]-[49].

21 QCAT Act, s 61(3).

22 *Coppens v Water Wise Design Pty Ltd* [2014] QCATA 309.

23 [2011] QCAT 229.

i) Whether a satisfactory explanation (or "good reason") is shown to account for the delay.

ii) The strength of the case the applicant wishes to bring (assuming it is possible for some view on this to be formed on the preliminary material).

iii) Prejudice to adverse parties.

iv) Length of the delay, noting a short delay is usually easier to excuse than a lengthy one.

v) Overall, whether it is in the interests of justice to grant the extension. This usually calls for some analysis of the above factors considered in combination.[24]

[69] The factors in *Chapman* were applied by the President of the Tribunal, Justice Thomas, in *Coppens v Water Wise Design Pty Ltd*.[25] There Thomas J held:

> [13] As was noted by Judicial Member Thomas, the legislature must have had a good reason for fixing a time limitation period. Clear definition of time limits assists in achieving the object outlined in section 3(b) of the QCAT Act to deal with matters in a way that is accessible, fair, just, economical, informal and quick.
>
> [14] Each party is aware of the required time limits and the fair approach is to require that limits be complied with unless there is a compelling reason (such as those listed above) to the contrary. This is fair for all parties. Compliance with time limits also will lead to disposition of matters in the most efficient and quick way. Compliance with time limits is also consistent with the public interest in finality of litigation [*R v Twindale* [2009] QCA 200].
>
> [15] For these reasons, the underlying premise is that, in the absence of compelling circumstances, time limits must be complied with and should be enforced by the Tribunal. It is a matter for the applicant to establish any circumstances which would, in the interests of justice, require a departure from this position.

[70] I turn now to consider the relevant factors.

Explanation for delay

Impecuniosity:

[71] In his application for an extension of time, Mr Jensen says that the "primary reason" for delay in making a further application for review was that he could not afford the cost of representation until now. At the time of the original application for review, Mr Jensen was represented by Hemming & Hart Lawyers but said he "ran out of funds to continue with the applications".[26] Mr Jensen says that "he made the decision that he

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24 Ibid, [9].
25 [2014] QCATA 309.
26 Application to extend or shorten a time limit dated 14 April 2016, Annexure, [5].

could not proceed with the review applications without expert legal representation because of the complexity of the issues involved."[27]

[72] Section 43(1) of the QCAT Act provides:

> The main purpose of this section is to have parties represent themselves unless the interests of justice require otherwise.

[73] It is argued that here, the interests of justice required that Mr Jensen be legally represented due to the highly technical legislation involved.

[74] In my view, the applicant's inability to afford legal representation in circumstances where the issues were complex and where the consequences of any decision had important consequences for Mr Jensen, is something I should take into account in considering whether to grant leave.

[75] However, while I accept that legal costs and the inability to afford them may have been a factor in the applicant's decision to withdraw in 2012, I have not been provided with evidence that shows that the impecuniosity of the applicant prevented him from filing an application for further review until April 2016. The costs involved in filing an application for further review would have been minimal and the costs in formulating the argument for leave not substantial.

Wrong advice:

[76] Mr Jensen says the delay can also be explained by the fact that he was advised (in 2014) to apply for a new licence in view of amendments to the relevant legislation rather than to reapply for review of his permanently excluded status.

[77] Mr Jensen says that, as a member of the Queensland Master Builders Association in late 2014, he sought the advice of its Deputy Executive Director, Mr Paul Bidwell to "contest the finality of the QBCC's decision" in relation to his permanently excluded status. Mr Bidwell made enquiries of the then QBCC Commissioner, Mr Steve Griffin.

[78] Mr Bidwell wrote to the Commissioner with a list of concerns for them to discuss. One issue was described as follows:

> Permanent exclusion of contractors
>
> As a result of changes to the QBCC Act a contractor affected by 2 connected insolvency/bankruptcy events (one personal, one company) will have them treated as a single event & will lose his license for 3 years (down from 5 years). If the events are not connected the penalty is still permanent exclusion.
>
> Under the previous rules the 2 connected events were (generally) treated as separate events and the contractor was excluded permanently.

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27 Ibid, [6].

> However, the new rules are not retrospective. We have several members who were permanently excluded in these circumstances. In some cases the insolvency events did not even relate to a building company.
>
> The Parliament has decided that it is fair to join the events & that a reasonable penalty for a single event is 3 years exclusion. But for those who were dealt with under the previous regime, the penalty is permanent exclusion. We believe it is unfair that a contractor dealt a life ban has no opportunity to have their case considered under the new rules.
>
> We are not suggesting that the new rules should have been retrospective. However, given that permanent exclusion actually means a life ban it seems grossly unfair when the new legislative framework, for the same set of events, would now exclude the person for 3 years.
>
> We are exploring whether there is any opportunity for a case to be made – perhaps to QCAT.

[79] Mr Griffin replied to Mr Bidwell by email the next day as follows:

> Paul,
>
> Thanks for the early Xmas present! Just kidding, I can respond to most of these now.
>
> …
>
> 7. Permanent Exclusion – QCAT would not be the best avenue for these individuals. They would be best advised to lodge an application for a licence with the Commission seeking to rely upon the new rules.
>
> ….
>
> I hope this clarifies some of the issues for you. I hope you and your family have a joyous and safe Xmas break. See you again in the New Year.
>
> Regards,
>
> Steve Griffin
>
> Commissioner
>
> Queensland Building & Construction Commission [28]

[80] This email was forwarded by Mr Bidwell to Mr Jensen.[29]

[81] Mr Jensen says that, given this advice, there was no need to apply for review and "no urgency" for him to make the new licence application. In fact, Mr Jensen claims, when he had finally completed his application for a new licence, that the QBCC refused to accept it, let alone consider it.

[82] Mr Jensen argues that:

> 19. Had the former Commissioner not provided advice that permanently excluded individuals should make fresh licence applications to the QBCC, the Applicant would have made an application to the Tribunal much earlier given that no other options were available to him.

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28 Email from Steve Griffin to Paul Bidwell dated 18 December 2014.

29 Ibid, [13].

> 20. The Applicant, by reason of the QBCC's change of position, has no other avenue available to him to contest his status as a permanently excluded individual other than by making the Review Application to the Tribunal.
>
> 21. The fact that the Applicant's reliance on the former Commissioner's advice resulted in delay in bringing this Application supports the Tribunal granting leave to re-visit the Decision in the interests of justice and on the grounds of public interest.
>
> 22. Members of the public, including the Applicant, should have confidence that advice provided by government bodies can be relied upon. In this case the advice came from the former Commissioner of the QBCC. This was not advice provided over the phone by some unknown person within the QBCC.[30]

[83] The relevant amendments to s 56AC(5) were those made by the *Professional Engineers and Other Legislation Amendment Act* 2014 (Qld) ("the PEOLA Act") which were enacted on 10 November 2014 and came into effect on 1 July 2015.

[84] The amended section provides that an individual does not become an excluded individual for two events that flow from what is, in substance, one set of circumstances.

[85] It seems that the effect of the email was that an application for a new licence would not be rejected on the basis the applicant was a permanently excluded individual under the old law. However, a person categorised as a permanently excluded individual under the old law remained as such unless that status had been successfully reviewed in the Tribunal. The advice, therefore, was incorrect if it was suggesting that a new application, including whether a person was permanently excluded, would be assessed under the new law.

[86] Assuming this was the effect of the email and that it was not correct, it was, in my view, unreasonable for Mr Jensen to base such an important decision involving new and complex legislative provisions on a few lines in a long end-of-year "wrap up" email from one head of department to another. The email was written in a conversational style, it did not purport to be legal advice and was not directed to the applicant or to his personal circumstances.

[87] However, even if I accept that Mr Jensen relied on the email and did not reapply for review as a consequence, it does not explain why he did not reapply for review in the time period prior to receiving that advice, that is, from 5 November 2012 to 18 December 2014.

[88] There was also a considerable delay by Mr Jensen in applying for a new licence after receiving that advice. Although Mr Jensen states that he needed time to ensure he had addressed all the concerns raised by the QBCC in his licence application this, in my view, does not explain the length of the delay.

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30 Ibid, [19] – [22].

[89] This reason is not, in my view, a basis for granting leave.

Strength of case if allowed to proceed

[90] In this case, I have already decided that Mr Jensen would have the benefit of the amended provision which allows a company and an individual event to be treated as one event where they arise out of the same set of circumstances. This may mean that, on review, s 56AC(5) would have applied with the effect that the second relevant event would not have been taken into account in determining whether he was a permanently excluded individual.

[91] This, in my view, is a factor in favour of granting leave because it means Mr Jensen's prospects of success in a review of a decision under s 56AF would be reasonably high.

[92] However, even if I accept that the law in its amended form favours Mr Jensen and that this is the law that would be applied, this does not necessarily mean that Mr Jensen should be given leave to make a further application. The fact is that the law changed well after his initial application for review. The interlocutory applications suffer from very substantial delay. The fact that they are to be determined on the current, more favourable law, does not, in my view, outweigh the delay and lack of compelling reasons for it. Moreover, it is also relevant that had the application for review been brought within time Mr Jensen would not have had the benefit of the new legislation.

Prejudice

[93] There would be an irreparable element of unfair prejudice to the respondent in permitting the application to be re-made under new law more than 5 years out of time.

[94] The 28 day time period is there for a reason. In administrative review proceedings it is important that time limits are observed so that the processes and procedures followed by the administrative decision-maker are not hampered or detrimentally affected and so that the statute, more broadly, operates effectively. The importance of adherence to time limitations in the context of judicial review was put strongly by Lord Diplock in *O'Reilly v Mackman*:[31]

> The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision.[32]

[95] The effect of delay on the quality of justice generally has been held to be one of the most important influences motivating legislatures to enact

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31 [1983] 2 AC 237.

32 Ibid, 280-1.

limitation periods for commencing actions.[33] Other rationales are: that relevant evidence is likely to get lost; it is oppressive to a defendant to allow an action to be brought long after the circumstances which give rise to it have passed; people should be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them; insurers, public institutions and businesses have a significant interest in knowing that they have no liabilities beyond a definite period.[34] The final rationale for limitation periods is that the public interest requires that disputes be settled as quickly as possible.[35]

[96] In *Brisbane South Regional Health Authority v Taylor* the High Court held:

> In enacting limitation periods, legislatures have regard to all these rationales. A limitation period should not be seen therefore as an arbitrary cut off point unrelated to the demands of justice or the general welfare of society. It represents the legislature's judgment that the welfare of society is best served by causes of action being litigated within the limitation period, notwithstanding that the enactment of that period may often result in a good cause of action being defeated. Against this background, I do not see any warrant for treating provisions that provide for an extension of time for commencing an action as having a standing equal to or greater than those provisions that enact limitation periods. A limitation provision is the general rule; an extension provision is the exception to it. The extension provision is a legislative recognition that general conceptions of what justice requires in particular categories of cases may sometimes be overridden by the facts of an individual case. The purpose of a provision such as s 31 is "to eliminate the injustice a prospective plaintiff might suffer by reason of the imposition of a rigid time limit within which an action was to be commenced." But whether injustice has occurred must be evaluated by reference to the rationales of the limitation period that has barred the action. The discretion to extend should therefore be seen as requiring the applicant to show that his or her case is a justifiable exception to the rule that the welfare of the State is best served by the limitation period in question. Accordingly, when an applicant seeks an extension of time to commence an action after a limitation period has expired, he or she has the positive burden of demonstrating that the justice of the case requires that extension.[36]

[97] Once the legislature has selected a limitation period, to allow the commencement of an action outside that period is prima facie prejudicial to the defendant who would otherwise have the benefit of the limitation.[37]

[98] I am conscious that review of administrative decisions is different from litigation inter se between parties. Nonetheless I regard the principles I have cited as relevant to my discretion.

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33 *Brisbane South Regional Health Authority v Taylor* [1996] HCA 25; (1996) 186 CLR 541.

34 Ibid.

35 Ibid.

36 Ibid, Toohey and Gummow JJ.

37 Ibid, Dawson J.

[99] Finally, there is also prejudice caused by the necessary inefficiency a further review would entail. The time of the Tribunal is a publicly funded resource. Inefficiencies in the use of that resource arising from inordinate time delays are to be taken into account. The applicant had a sufficient opportunity, like everyone else, to bring his review application at the relevant time. Allowing him to have another "bite at the cherry" more than 5 years later after expiration of the time limit has the potential to undermine public confidence in the administrative review process. .

Length of delay

[100] In this case, the applicant's significant delay in bringing the application is a relevant factor in deciding whether to grant leave.

[101] Under s 33(3) of the QCAT Act, an application for the review of a reviewable decision must be made within 28 days after the relevant day. The relevant day is the day the applicant is notified of the decision.[38]

[102] Mr Jensen was notified of the decision he is seeking to review on 2 June 2011. The Act requires that an application for review be made within 28 days of that date, that is by 30 June 2011. Mr Jensen's application, were he given leave, would be more than 5 years outside the statutory time period and more than three and a half years since the withdrawal of his first application for review.[39]

[103] In the context of a 28 day time period, an extension of more than 5 years is excessive. The length of delay is, in my view, a factor against granting Mr Jensen leave.

[104] The relevant amendments to s 56AC(5) of the QBCC Act were made on 10 November 2014 and came into effect on 1 July 2015. Mr Jensen did not make an extension of time and an application for leave until April 2016 and May 2016 respectively. Even if it was considered reasonable to want to bring the application once the new amendments were in force this does not explain why Mr Jensen took another 9 months to file the application. This is 9 months in the context of a usual 28 day time limitation.

Interests of justice:

[105] Mr Jensen says that "new facts" have come to light which could improve his chances of successfully reviewing the relevant decision. In short those facts appear to be that in the accounts of the company in 2008 and 2009, Mr and Mrs Jensen were recorded as having received $235,200 by way of "commercial wages". Mr Jensen says that he and his wife never received these amounts and refers to his income tax assessments in support. Mr Jensen says that the company's previous accountants, Accounting North Pty Ltd, were not able to adequately explain why the accounting anomaly

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38 QCAT Act, s 33(4)(a).

39 Matter number OCR152-11.

had been included in the company's financial records but that it was an error relating to "commercial wages".[40]

[106] On 22 December 2011 at 8:32am Mrs Jensen sent an email to Grant Callaghan of Accounting North which provided:

> Thankyou for sending through all the information yesterday. We are now just chasing a letter to explain the reason for the directors wages increasing from $16 000 - $235, 200 in 2009 (item 3.31 Statement of reasons for the decision with the application to be categorised as a permitted individual dated 3/6/11. This was to do with when we sold our house at 27 Kerenjon Ave Buderim we paid the excess $200, 000? off the Jensen Development loan for the display home. Then when we had the REK (Home Design) Supreme court claim to fight, the Barister [sic] said this figure should be taken out of the Jensen Development figures as a loan to show more correct figures for Jensen Builders.
>
> Tim said he discussed this with you. Are you able to send something through this morning for this please?[41]

[107] By Letter to Mr and Mrs Jensen dated 22 December 2011, Mr Grant Callaghan, of Accounting North states:

> As per our discussions, the 2009 Interim reports showed Directors wages of $235, 200 paid.
>
> This is simply to recognise (on our instructions) commercial wages for both Tim and Cathy for 2008 and 2009 years that had been drawn over that time.

[108] No further explanation in relation to the accounting entry is provided in the material. The issue of "director's wages" directly concerned the first relevant event, and was not raised in relation to Mr Jensen's personal bankruptcy. Mr Jensen however submits that whether or not he drew wages of that amount is relevant to whether he "took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of a relevant event".

[109] The relevant provision is s 56AD(8) of the QBSA Act 1991 which provides:

> The authority may categorise the individual as a permitted individual for the relevant event only if the authority is satisfied, on the basis of the application, that the individual took all reasonable steps to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event.

[110] The provision requires the authority to be satisfied that the individual took "all reasonable steps" to avoid the coming into existence of the circumstances that resulted in the happening of the relevant event.

[111] Whether the entry represented an amount for wages or the repayment of a loan would not, on its own, have made the difference. This is because the

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40 Applicant's Submissions in Reply to the Respondent's Submissions dated 1 August 2016, [6].

41 Statutory Declaration of Timothy Peter Jensen dated 12 January 2016, Attachment FF.

authority or decision-maker on review would need to be satisfied that all other reasonable steps had been taken.

[112] Under this factor I have also taken into account the hardship that will be caused to the applicant in refusing leave.[42] Although the applicant will be permanently excluded, it is by no means certain that this would not be the outcome on review, whether or not the amended provisions were applied. Moreover, denial of an opportunity to pursue an apparently worthwhile action is a feature that will be present in every case where an extension of time is sought. It cannot therefore, of itself, be the sole determinant for granting that extension.

[113] It is a fundamental aspect of the rule of law that all those who come before the courts are treated equally. The time limit for applying for review, applies equally to all applicants. In my view, the legislative intent underlying the QCAT Act and the QBCC Act is that review proceedings are to be commenced promptly. There is a strong public interest in complying with time limits, particularly in the context of administrative review when the review of decisions by public authorities often occurs at stages of a broader process, here the licensing of builders.

[114] Finally, the absence of a compelling explanation for the length of delay, the very substantial magnitude of that delay combined with the possible prejudice to the QBCC and the public interest in good administration and in the fair and efficient conduct of review processes were time to be extended, lead me to refuse the extension of time sought by the applicant.

Conclusion

[115] Mr Jensen's application for leave to proceed to make a further application for review is refused as his application for an extension of time.

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42 *Muirhead v The Uniting Church in Australia Property Trust (Q)* [1999] QCA 513, [4] (Pincus JA).