QCAT

Queensland Civil and Administrative Tribunal

CITATION:	*Nalee Pty Ltd t/as Coastal Building Approval Service v Ottaway* [2017] QCATA 144
PARTIES:	**Nalee Pty Ltd t/as Coastal Building Approval Service** **(Applicant/Appellant)** **v** **Sally Johanna Ottaway** **(Respondent)**
APPLICATION NUMBER:	APL231-17
MATTER TYPE:	Application and Appeals
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	**Justice Carmody**
DELIVERED ON:	19 December 2017
DELIVERED AT:	Brisbane
ORDERS MADE:	**THE APPEAL TRIBUNAL ORDERS THAT:** **1. The appeal is allowed on the question of the interest payable on the order.** **2. The order is varied to the extent that the interest amount of $274.15 is substituted for the $1415.06 awarded by the tribunal.** **3. The tribunal's order is otherwise confirmed.**
CATCHWORDS:	APPEAL – LEAVE TO APPEAL – MINOR CIVIL DISPUTE – CONSUMER DISPUTE – where the applicant was ordered to refund money paid by the respondent for building certification services – where the applicant contends the engagement lapsed due to the respondent's non-compliance with legislative provisions – whether the applicant's conduct indicated the engagement had not lapsed – where the applicant seeks to raise new grounds on appeal – where the interest calculation on the order was substantially

unjust

Queensland Civil and Administrative Tribunal Act 2009 (Qld) ss 14, 48(3), 95

Sustainable Planning Act 2009 (Qld) (repealed) ss 276, 277, 278, 279

Whisprun Pty Ltd v Dixon (2003) 200 ALR 447

APPEARANCES and REPRESENTATION (if any):

This matter was heard and determined on the papers without the attendance of either party in accordance with s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCAT Act).

REASONS FOR DECISION

[1] The respondent filed a minor civil dispute claim in the tribunal on 27 January 2016 for a refund of $2741.51 she paid the applicant, CBAS, for building certification services plus interest calculated at 24% for 785 days.

[2] The claim was based on substantial non-performance of the services agreement due to there being:

(a) no building approval;
(b) no frame inspection documents; and
(c) "extensive" non-response to emails and telephone calls for "over 6 months".

[3] As a respondent to a tribunal debt claim the applicant could have responded by denying it altogether or saying why less than the claim was owed but did neither.

[4] The only live dispute before the tribunal concerned the respondent's alleged entitlement to a refund for failure of consideration.

[5] The applicant did not seem to come to grips with or squarely address that issue.

[6] It did not present any evidence or raise any positive defence to its alleged liability at the hearing or challenge the basis on which it was alleged. Instead it insisted that the tribunal had no power to adjudicate because the respondent's complaint should have been referred to the Queensland Building and Construction Commission (QBCC) for dispute resolution under the *Building Act 1975* (Qld) before making an application to QCAT.

[7] The tribunal's obligation was to make orders it considered "just and equitable" to the parties in order to resolve it.

[8] The applicant told the tribunal on 1 June 2017 that the matter "hasn't … been through QBCC" as required by the QCAT website.[1] The hearing was adjourned part-heard to 7 July 2017 for further argument about jurisdiction. The tribunal then overlooked the objection and proceeded to hear the claim because the value of the contract at issue was under $3300.[2]

[9] The transcript records the tribunal's decision at 2-5:25-45:

> This is QCAT claim number Q9 of 2017. The parties Ms Sally Ottaway, respondent Nalee Pty Ltd, trading as Coastal Building Approval Service. In this matter, the claimant has brought action in QCAT for the recovery of moneys paid to the respondent. As part of the case presented by the applicant, there is annexed to her claim a service tax invoice provided to her by Coastal Building Approval Service, as I will refer to the respondent, in the amount of $2741.51. With respect to the details of the claim, the applicant claims that the agreement was reached between the respondent and the applicant on the 1st of March 2015 and the applicant paid the fee of $2741.51 on the 12th of May 2015.
>
> The applicant states that there were attempts to contact the respondent on numerous occasions via email and telephone, however, he failed to respond to email communications, to return any telephone messages or to keep appointment times. After a period of six months, without any response, the applicant issued a disengagement of engagement and sought the services of a new certifier. There is nothing before me to contradict that particular statement and that claim in the claim.
>
> Accordingly, I intend to find for the applicant. The amount of the claim is $2741.51 representing the moneys paid to Coastal Building Approval Service. There is a filing fee of $108.70 and there is an interest component, which has been calculated by the applicant, and which I accept, of $1415.06. That is calculated at the rate of 24 per cent, which is the rate specified in the copy of the contract between the parties, which has been provided in these proceedings. Do you have a total amount?

[10] The applicant now wants leave to appeal and new orders made because of:

- the alleged failure of the tribunal to consider 43 pages of material contradicting its finding that the applicant had been validly disengaged on 12 December 2016 and showing that her file had been automatically closed for non-compliance with statutory time limits; and
- "work … undertaken in good faith" outside the scope of the engagement that should be offset against any refund.

[11] The applicant basically contends that the tribunal cannot have adequately considered or properly understood its filed submissions in response to the claim because if it had it would have reached the opposite conclusion or,

---

1 T1-3:30-40.
2 T1-2:10.

at least, fully explained their rejection by reference to the 43 page document.

[12] The respondent opposes leave, in effect, because the only point the applicant raised at the hearing was that Queensland Building and Construction Commission (QBCC) not QCAT had jurisdiction to decide the claim.

The context

[13] Approval of a building application certified as complying with the *Building Act 1975* (Qld) is required before any building work starts.

[14] CBAS is a private certifier. It agreed to provide private building certification services for the respondent's application to build a dwelling, shed and donga under the terms and conditions of the engagement and fee arrangement from 1 March 2015.

[15] CBAS agreed to carry out footing, floor, frame and final inspections in accordance with applicable building codes and to issue a certificate after completion of the building work but before occupation of the building and lodge approval documents with Mackay City Council. In return, the respondent was to ensure that statutory and other development approvals and permits were in place.

[16] Other conditions relating to the issues to be decided from the applicant's point of view were:

(i) Clause 7 Additional Fees

> Please note, Should the work become unduly protracted, for example unforeseen circumstances, matters beyond our control, inadequate documentation etc, we reserve the right to charge additional fees.

(ii) Clause 12 Disengagement of Private Certifier

> The engagement of the Coastal Building Approval Service as a private certifier may be terminated by either party of this contract, in accordance with SPA 2009.
>
> Where the disengagement occurs, Coastal Building Approval Service may, at its discretion, refund a portion of the fees paid based on the amount of work already expended on the application. Additional fees may be payable due to the administrative process of disengagement.
>
> Where there are outstanding fees owing to Coastal Building Approval Service they must be paid within 14 days from the date of disengagement. CBAS and the Client agree that any overdue payment shall attract an interest rate of 24% p.a.

(iii) Clause 18 Dispute

> By agreement between the parties, a dispute arising from the Engagement may be referred to the Queensland Master Builders Association for conciliation at any time provided that one of the parties is a member of Queensland Master Builders Association.

[17] CBAS sent invoice BA15-0048 dated 27 February 2015 in the amount of $2741.51 payable on 12 May 2015 for:

Qty	Description	GST	GST Excl Amount
1	Administration – Creating File, etc.	25.49	254.90
1	Titles – DNR Search Fee	5.50	55.00
1	Dwelling Assessment up to 300m^2	82.29	822.85
1	Shed & Donga Assessment – Class 10a – 21m^2 to 150m^2	29.10	291.01
4	Inspection Fee 26km to 50km	97.40	974.00
1	Lodgement Fee for Class 1 & 10 – MRC (14/15 fees)	0.00	104.00

[18] The respondent was advised that:

> The quote has been prepared based on the information provided and does not include items that may require approval against relevant current legislation. Eg, Material Change of Use, Boundary Relaxation, Flood Prone Area application, Character and Heritage Protection application, Energy Efficiency, etc.

[19] The respondent paid the invoiced amount in full on the due date.

[20] When the building approval application was lodged for the respondent's dwelling and outbuildings work was well under way in breach of the building rule and regulations.

[21] The *Sustainable Planning Act 2009* (Qld)[3] (SPA) building approval system is applicant driven, thus requiring the applicant to provide all information for building assessment. On 25 May 2015 CBAS' project manager Yan Lu sent the respondent a written request for provision of information about:

1. council plumbing approval for the on-site sewerage facility;

2. whether the proposed shed on the site plan is included in the application;

3. energy efficiency assessments confirming compliance with requirements;

4. council approval for minimum road setback relaxation from 20m to 9.6m or any amended plan; and

5. engineering documents to confirm the compliance of the truss design and layout with Australian standards.

---

3 SPA was repealed on 3 July 2017.

[22] The respondent was advised consistently with SPA that the application would be held in abeyance until her written response to the information request was received.

[23] CBAS informed the respondent in line with s 278(1) SPA that she could respond by notifying it that:

> (a) all of the documents requested, together with a written notice requesting Coastal Building Approval Service to proceed with the assessment of the application; **or**
>
> (b) part of the information requested, together with written notice requesting Coastal Building Approval Service to proceed with the assessment of the application; **or**
>
> (c) a written notice –
>
> (i) stating that the applicant does not intend to supply any of the information requested; and
> (ii) asking Coastal Building Approval Service to proceed with the assessment of the application as submitted.

[24] Information requests are dealt with in Ch 6 Div 3 SPA. Section 276 allows the assessment manager (Mackay Regional Council) and each concurrent agency (CBAS) to ask an applicant for more information needed for assessment within 10 business days of its referral day.

[25] The applicant's response period may be extended beyond the statutory 6 month timeframe if agreed between the applicant and the requesting entity CBAS.[4] Otherwise her application was due to lapse if the information notice from CBAS was not responded to by 25 November 2015 under s 279(1)(b) SPA.

[26] A lapsed application can be revived if the applicant requests within 5 days which gives the applicant a further stated period to be agreed to comply with the information request under s 278(1) SPA.

[27] On 10 June 2015 CBAS was asked by the Council why the respondent's dwelling had been constructed without a building site inspection approval. On 13 June 2015 CBAS confirmed that the house was "past frame stage" and the dwelling was "at lock up" meaning that the boundary relaxation report needed "a total rewrite" as the original draft "will no longer be relevant".

[28] The respondent was told by CBAS in an email on the same date that once the boundary relaxation and septic approval was secured from the Council "a building approval will be processed". No mention was made of any outstanding information request items.

---

4 SPA s 277(3), (4).

[29] On 13 July 2015 the Council sent CBAS a concurrence agency response stating that a building permit for both the dwelling and shed structure had to be obtained and landscaping provided. It noted that no building permit or plumbing compliance inspections were recorded for the site.

[30] On 29 July 2015 CBAS wrote to the respondent in the following terms:

> We are reviewing all current files, the record shows there are still some documents outstanding for the above project. Could you please advise if the following items are available:
>
> 1. Council plumbing approval for the onsite septic system.
>
> 2. Amended architectural plans (Dwelling) showing the variations as mentioned in your previous email.
>
> 3. Shed details including the plans and form 15 structural design certificate, if the shed will be included in this building approval.
>
> 4. The current QBCC insurance is only for the 1xDwelling. Please update the QBCC insurance if the shed will be included in this building approval.
>
> 5. Regarding the value of the project, we have been advised that the QBCC will randomly perform auditing on QBCC insurance payment. Normally, if they doubt the value of a project, they would request 2 to 3 quotes from different builders. If the quotes are significantly different to the value claimed, they would investigate all the paper work. Please be aware "The value of building work includes all labour and material costs, regardless of who supplies the materials." We suggest all the builder we have been working with review their contact value to ensure the correct QBCC insurance premium has been paid.

[31] The respondent replied on 3 August 2105:

> In response to your items below:
>
> 1. I received updated plans from our draftsman last week whist I was working in remote QLD, so have now been able to forward the required plans to the consultant for design of the drainage plan which is required by Council for the plumbing for the septic system. I will then forward said plan to Council as this is the only document outstanding for the approval.
>
> 2. I shall forward amended plans directly
>
> 3. Are you able to provide any update regarding the shed as last communications we received was requests for photographs and details by Fiona Allan, which we forwarded to her on 12/7/15?
>
> 4. As per point 3, we are waiting to find out where we stand regarding the shed.
>
> 5. Thank you for your update regarding QBCC audits, I shall let Scott know.

[32] By 14 October 2015 the respondent has supplied 3 out of the 5 requested documents. Council plumbing approval and shed details were the two responses holding up the building approval.

[33] On 15 October 2015 Yan Lu confirmed 25 November 2015 as the date for responding to the information request.

[34] The respondent explained that the project was at stand still due mainly to her "rapidly approaching wedding" in 3 weeks and that she didn't have either the time or money to progress it until she returned from overseas.

[35] The outstanding information request items as at 17 November 2015 were:

1. Council plumbing approval for the onsite septic system.

2. Shed details including the plans and form 15 structural design certificate, if the shed will be included in this building approval.

3. The current QBCC insurance (attached) is only for 1xDwelling. Please update the QBCC insurance if the shed will be included in this building approval.

4. It is noted on the architectural plan (attached) sheet 5 of 13, all framing size and tie downs are to transportable building manufacturer's details. Could you please forward the detail and specification from your transportable dwelling supplier? A (sic) inspection certificate is also required from a R.P.E.Q. engineer to confirm all structural framing complies with the relevant Australian Standard. I have attached an example of the inspection certificate from a similar project.

[36] On 19 November 2015 the respondent provided the following update:

1. …spoken to Council regarding the septic and steps for the approval … sent an email to the designer who apparently needs to do an inspection on the waste system and am waiting on their guidance for an appointment for same. I think the compliance permit provided for 2 years if I recall correctly, but now that the wedding is behind us and not draining all our money, we can move forward with this.

2. Shed – the draft plan was sent from our draftsman to our engineer while we were overseas. We have followed the engineer up both Monday and Tuesday, but I will follow him up again today and forward to you ASAP.

3. … we contacted QBCC Tuesday and not only added the shed and also increased the notified amount to $200,000. They were unsure how to treat the transaction as we have already paid the insurance on the first $40,000, so they will be emailing us with confirmation on how they would like to treat this transaction.

4. … (no) certification in regards to the donga. We always planned to modify the structure of the original donga and we will be taking off the existing external cladding and internal lining. That way we can make sure all the frame work is to specification and get the wiring and plumbing redone so that so that (sic) we are satisfied that all is to standards and no potential unknowns of the existing donga might cause problems in future years. Also that way it can just be inspected at frame stage along with the frame inspection of the rest of the dwelling, so that we can be sure that the entire dwelling is built to the correct standards rather than relying on a previously constructed portion of the building. We also have 3 windows yet to be installed in the donga section.

> Hopefully this provides you with some guidance as to where we are at. When I get the info back from the engineer re the shed I will forward to you immediately.

[37] The respondent emailed the applicant again on 24 November 2015:

> Hi again Yan,
>
> I am keenly aware that we have the 25 November deadline looming, but I am STILL waiting to hear back from our engineer.
>
> I am so sorry, I am actually quite p!ssed off that we still haven't heard back as I confirmed all details and directives to both the draftsman AND the engineer before we left for Samoa on 22 October, and now this is just getting ridiculous, however there is not much more I can do! I have sent a number of emails, and Scott has left telephone messages but still, no response.
>
> I will try yet again to contact him today, but I just wanted to let you know what is going on.
>
> Kind regards,
>
> Sally.

[38] The respondent admits not being able to get full engineering plans within the six month period but was not told that the application had lapsed for delay and in any case assumed the engagement was still in force because she was never told otherwise. Nor did CBAS ever tell her about the possibility of extending the statutory limitation period by agreement.

[39] The respondent had a meeting with CBAS on 18 January 2016 and Yan Lu conducted a frame inspection on 29 January 2016 (both after the applicant claims the file was closed on 25 November 2015).

[40] On 1 April 2016 Yan Lu resigned.

[41] On 2 June 2016 engineering details were provided to CBAS to satisfy all frame inspections items. Follow up attempts by the respondent via telephone calls, messages and email over the ensuing months were unsuccessful.

[42] In an email on 7 December 2016 the respondent confirmed that:

- CBAS had not responded to telephone messages for the last 2 months or emails in 6 months;
- all items requested on 3 February 2016 had been addressed;
- the Form 16 requested from the engineer was provided on 2 June 2016;
- the frame inspection report still had not been finalised to allow the project to be progressed; and
- building approval had still not been issued by Council.

[43] On 12 December 2016, the respondent sent the applicant a Form 22 discontinuance of engagement citing the failure of the applicant's Managing Director, Gordon Heelan, to reply to telephone calls or emails for more than six months as impeding the progress of the project leaving the respondent with no option but to "seek the services of a new certifier".

[44] The applicant responded asserting that the building application had automatically lapsed on 25 November 2015 under s 279(1)(b) SPA due to the respondent's failure to provide required engineering and other information within the 6 month response period to enable the application to be assessed and approved. This 'defence' was raised for the first time in argument on the leave to appeal application.

[45] The applicant refused to refund any fees because the job became "unduly protracted" by "matters beyond our control" necessitating "additional work" taking more than 10 hours with a total dollar value of $4269.06, or twice as much as the respondent's claim.

The 43 page document

[46] In response to a direction for filing submissions the applicant stated:

> ...(t)he evidence and facts present has clearly demonstrated that CBAS has NOT under performed in relation to the contract.
>
> On Monday 2nd March 2015 – CBAS received the signed Contract but without the required paperwork for a building assessment. For whatever reason there as a holdup with the paperwork being lodged by the **applicant** to the CBAS office. The paperwork was lodged by the **applicant** over 2 months later on 12 May 2015.
>
> CBAS entered in to a contract with the **applicant** on the understanding the applicant/builder having had some 12 years' building experience, would be well aware of the building approval process and that the project would not be unduly protracted or held up from any unforeseen circumstances. A notice of Engagement was issued by CBAS on Friday 15 May 2015 and assessment commenced Friday 22nd May 2015.
>
> However upon assessing the building application it was identified 5 additional items were required for the assessment of the building project. This included a copy of Council Plumbing approval, and a copy of Council Boundary Relaxation approval & 3 other items.
>
> An ***'information request'*** **letter** was issued on 25/05/2015 to the building application **applicant** detailing 5 additional items that are required to assess the building project on the 6th business day after we became engaged for the project. The letter was issued will within the legislated 10 business days.
>
> The **applicant** was advised that SPA2009 provides a maximum of 6 months or until 25/11/2015 to provide the outstanding 5 items as requested within the ***information request*** **letter**.
>
> The **applicant** failed to provide all of the requested information within the 6 months or by 25/22/2015 (sic) resulting in the application lapsing and the file closing.

> In the event all outstanding items are not provided within the 6 months or by 25/11/2015 the building application lapses in accordance with the SPA2009 and the file is closed.
>
> The Engagement & Fee agreement (contract) is issued in accordance with the BA1975 – so **no refund of money paid is applicable**.
>
> The BA1975 Clause 146 – *if a private certifier has refused to issue a building approval because an applicable code under IDAS has not been complied with, or another valid reason* (and in this case the approval lapsed in accordance with the SPA 2009) *the client must, despite the refusal*, ***pay the private certifier the fee under the engagement with the certifier***. (emphasis in original)

[47] There is no direct evidence (either presented by the applicant or from a reading of the transcript) indicating whether the tribunal had access to the applicant's 43 page document but the applicant's contention that natural justice has not been afforded is not made out just because it was not specifically referred to.

[48] The transcript shows that the applicant was given a reasonable opportunity to answer or qualify the claim but he did not assert one.

[49] There is, in any case, nothing in the 43 page document likely to have produced a different result more favourable to the applicant because, for example, there is no reason to suppose that the lapsing of the respondent's building application under the SPA somehow automatically relieved the applicant of its contractual responsibility to provide agreed services under the terms of the engagement.

[50] The actions of CBAS after 25 November 2015 are also incompatible with the asserted closure of the respondent's file.

[51] On 1 December 2015, for instance, CBAS informed the Council that:

> We are still waiting for the outstanding items including the structural engineering details. The owner Sally Ottaway has advised the delay is caused by the engineer, and she confirmed that the engineer will complete the plans somethime (sic) this week. We will continue our assessment after we receive the structural plans.

[52] In addition, CBAS emailed the respondent on 18 December 2016 advising "we have reviewed a discontinuance notice from Sally, and as such all work associated with this file has stopped as from the date of disengagement".

[53] The frame inspection and site meeting in January 2016 also strongly suggest CBAS' ongoing involvement with the project and it was reasonable for the respondents to assume that the paperwork asked for in the information request was in order. A tacit agreement to extend the due date can be reasonably implied.

[54] A party to a minor debt claim must make all relevant documents available at the hearing of the proceeding. Filing written evidence or submissions may suffice for the purposes of s 95 QCAT Act but it is incumbent on a party, even self-representing litigants, to take positive steps to protect its own interest even if it is simply alerting the tribunal to filed material. It cannot expect or assume that the tribunal will examine every document in a bundle looking for some undisclosed response to an issue or an un-pleaded defence to a claim.

[55] The applicant got what the law entitles it to – a regular merits hearing on relevant evidence.

[56] It is bound by the conduct of the case and there are no exceptional circumstances justifying any departure from established principle to allow it to present a brand new case after the first decision on the jurisdiction point went against it.[5]

[57] The first ground is not arguable enough to warrant leave.

The reasonableness of the order

[58] The applicant complains that a full refund is unreasonable in light of alleged "good faith" work double its value.

[59] However, the applicant is statute barred from setting-off or counter applying against a liquidated money claim in the same proceeding.[6]

[60] Any action to recover fees for work outside the scope of the engagement has to be pursued in fresh proceedings. The leave application on this ground fails.

The interest component

[61] Section 14 QCAT Act permits the tribunal to include an interest component in an order to resolve a minor civil dispute for all or part of the amount payable at the rate the tribunal considers appropriate. There is no upper statutory limit.

[62] The respondent included a claim for interest calculated at the "gazetted" amount in the applicant's contract.[7]

[63] The applicant submitted that the prevailing bank interest rate of 2.5% be used to calculate interest giving a figure of $115 but the tribunal said it would apply the interest rate set down in the engagement contract instead.

[64] Although the terms of the engagement provided that fees outstanding to CBAS at disengagement would attract an interest rate of 24% there was

---

5 *Whisprun Pty Ltd v Dixon* (2003) 200 ALR 447 [51].
6 QCAT Act s 48(3).
7 T1-5:25.

no similar provision in relation to payments or refunds of money in the other direction.

[65] Interest is to compensate the successful party for the loss of use of the money recovered between the date their cause of action arose and the day the order was made. The value is a question of fact and depends on the rate of market interest. The calculation of the interest component of the applicant's loss at 24% under the mistaken belief that it was agreed is so exorbitant that it suggests an appellable error in need of correction on appeal.

[66] Leave to appeal is granted and the appeal allowed because the calculation used was substantially unjust. The order is varied to the extent that the interest amount of $274.15 (or $2741.51 divided by 10) is substituted for the $1415.06 awarded by the tribunal.

[67] Otherwise the decision is confirmed and the application for leave is refused.