

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *LKB Holdings Pty Ltd v Gacayn* [2019] QCATA 13

PARTIES: **LKB HOLDINGS PTY LTD**
(appellant)
v
CESAR GACAYN
(respondent)

APPLICATION NO/S: APL170-18

ORIGINATING APPLICATION NO/S: MCDO 50073/17 (Redcliffe)

MATTER TYPE: Appeals

DELIVERED ON: 6 February 2019

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Hughes

ORDERS: **Leave to appeal refused.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – where applicant applied for leave to appeal – where Tribunal dismissed claim for want of jurisdiction – whether claim was minor civil dispute or building dispute – where enabling Act conferred jurisdiction as building dispute

ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – where enabling Act prescribed early dispute resolution process – where appellant did not comply with process – where leave not needed to correct substantial injustice

Queensland Building and Construction Commission Act 1991 (Qld), s 75, s 77, Schedule 2

Queensland Building and Construction Commission Regulation 2003 (Qld), s 5, Schedule 1AA

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 3, s 12, s 47, Schedule 3

Big4 Brisbane Northside Caravan Village v Schliebs [2012] QCAT 277

Cachia v Grech [2009] NSWCA 232

Clarke v Japan Machines (Australia) Pty Ltd [1984] 1 Qd

R 404

Creek v Raine & Horne Mossman [2011] QCATA 226
Glenwood Properties Pty Ltd v Delmoss Pty Ltd [1986] 2
 Qd R 388

Leyden v NJ Tierney Constructions Pty Ltd

McIver Bulk Liquid Haulage Pty Ltd v Fruehauf

Australia Pty Ltd [1989] 2 Qd R 577

QUYD Pty Ltd v Marvass Pty Ltd [2009] 1 Qd R 41

Rothenberger Australia Pty Ltd v Poulsen (2003) 58
 NSWLR 288

Walsh v Australian Building and Construction Group
 [2016] QCAT 187

REPRESENTATION:

Applicant: Self-represented

Respondent: Self-represented

APPEARANCES:

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

REASONS FOR DECISION

What is this appeal about?

- [1] An Adjudicator dismissed LKB Holdings Pty Ltd’s claim of \$6,606.49 against Cesar Gacayn for electrical work because LKB did not comply with the early dispute resolution process before filing its application. LKB submitted this was an error of law because the process does not apply to ‘electrical work’.
- [2] Because this is an appeal from a minor civil dispute, leave is required.¹
- [3] In determining whether to grant leave, the Tribunal will consider established principles including:
- (a) whether there is a reasonably arguable case of error in the primary decision;²
 - (b) whether there is a reasonable prospect that the appellant will obtain substantive relief;³
 - (c) whether leave is needed to correct a substantial injustice caused by some error;⁴ and
 - (d) whether there is a question of general importance upon which further argument, and a decision of the Appeal Tribunal, would be to the public advantage.⁵

¹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (‘QCAT Act’), s 143(3).

² *QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41.

³ *Cachia v Grech* [2009] NSWCA 232, 2.

⁴ *QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41.

[4] I will address the ground of appeal below.

Did the Tribunal have jurisdiction to decide the claim?

[5] The Tribunal's decision to dismiss the application for want of jurisdiction is correct.

[6] Section 12 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) confers the Tribunal's jurisdiction over minor civil disputes. A 'minor civil dispute' relevantly includes a claim to recover a debt or liquidated demand.⁶ The claim is for a specific amount and therefore liquidated.⁷

[7] However, the definition of 'minor civil dispute' also provides:⁸

2 However, if an enabling Act confers jurisdiction on the tribunal to deal with a claim (however called) within the meaning of paragraph 1(a), the claim is not a minor civil dispute unless the enabling Act expressly states it is a minor civil dispute.

[8] The effect of sub-paragraph 2 is to remove a claim that can be characterised as both a 'building dispute' and a 'minor civil dispute' from the Tribunal's minor civil disputes jurisdiction. This means that the claim will not be a 'minor civil dispute' if an enabling Act also confers jurisdiction on the Tribunal to deal with it.

[9] Here, the enabling Act is the *Queensland Building and Construction Commission Act 1991* (Qld). Section 77 of that Act gives the Tribunal jurisdiction over a 'building dispute'. LKB's submission that 'electrical works' are not within the Tribunal's jurisdiction over a 'building dispute' is not correct. The process by which the Act confers jurisdiction is:

- (a) 'Building dispute' relevantly includes a minor commercial building dispute;
- (b) 'Minor commercial building dispute' means a commercial building dispute not exceeding \$10,000;
- (c) 'Commercial building dispute' relates to a contract to perform reviewable commercial work;
- (d) 'Reviewable commercial work' means tribunal work other than reviewable domestic work;
- (e) 'Tribunal work' specifically includes the provision of electrical work.⁹

[10] LKB's submission that 'electrical work' are exempted by the *Queensland Building and Construction Commission Regulation 2003* (Qld), Schedule 1AA, section 20 is not correct. Schedule 1AA is solely an aid to interpreting section 5 of the Regulation. This is clear from the words 'section 5' at the start of Schedule 1AA and section 5(1) of the Regulation itself that provides:

⁵ *Glenwood Properties Pty Ltd v Delmoss Pty Ltd* [1986] 2 Qd R 388, 389; *McIver Bulk Liquid Haulage Pty Ltd v Fruehauf Australia Pty Ltd* [1989] 2 Qd R 577, 577, 580.

⁶ QCAT Act, s 12(4)(b), Schedule 3.

⁷ *Rothenberger Australia Pty Ltd v Poulsen* (2003) 58 NSWLR 288, 297.

⁸ QCAT Act, Schedule 3.

⁹ *Queensland Building and Construction Commission Act 1991* (Qld), s 75(1)(c), s 77(1), Schedule 2.

1 For the Act, schedule 2, definition building work, work stated in schedule 1AA is not building work.

- [11] Section 5 of the Regulation therefore merely qualifies the definition of ‘building work’. ‘Building work’ is not an element of the process by which the Act confers jurisdiction on the Tribunal.
- [12] Because the claim is a ‘building dispute’, the enabling Act prescribes the procedures to be followed and, to the extent of any inconsistency between that procedure and the provisions of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), the enabling Act prevails.¹⁰
- [13] LKB was required to file evidence of participating in early dispute resolution under section 77(2) of the *Queensland Building and Construction Commission Act 1991* (Qld) - as the learned Adjudicator correctly held.
- [14] LKB did not file this evidence. Instead, on 28 September 2018, and three months after the hearing, LKB filed an Affidavit from its commercial agent¹¹ to the effect that the agent telephoned the Commission on 2 July 2018 – one week after the learned Adjudicator’s decision – who advised that it cannot assist because the works were not electrical works and not ‘building works’.
- [15] The Affidavit is fresh evidence. The Appeal Tribunal will only accept fresh evidence if it was not reasonably available at the time the proceeding was heard and determined. Ordinarily, an applicant for leave to adduce fresh evidence must satisfy three tests:¹²
- (a) Could the parties have obtained the evidence with reasonable diligence for use at the trial?
 - (b) If allowed, would the evidence probably have an important impact on the result of the case?
 - (c) Is the evidence credible?
- [16] The Affidavit was only obtained after the hearing and has little evidential value. LKB did not provide evidence of attempting to contact the Commission before filing its application. Indeed, the file indicates that LKB acknowledged at the hearing that it had not attempted to resolve the dispute using the Commission. LKB did not explain why it did not attempt to contact the Commission and obtain this evidence earlier.
- [17] Moreover, the Affidavit is - at most - evidence of an attempt to retrospectively comply with section 77(2) of the Act. The Affidavit does not show any attempt at compliance *before* by LKB filing its application. Rather, the Affidavit shows that LKB did not attempt to comply with section 77(2) until one week after the hearing and some five months after filing its application.

¹⁰ *Big4 Brisbane Northside Caravan Village v Schliebs* [2012] QCAT 163, [31] (Wilson J).

¹¹ Affidavit of Lyndall Smith sworn 2 July 2018.

¹² *Clarke v Japan Machines (Australia) Pty Ltd* [1984] 1 Qd R 404, 408.

- [18] Compliance cannot be retrospective. Because compliance with section 77(2) of the Act is the gateway through which an applicant must pass *before* filing an application for a building dispute,¹³ the Affidavit cannot be evidence of compliance. The early dispute resolution process is meant to provide a quick and cheap way of resolving building disputes. That is consistent with the objects of the QCAT Act to have the Tribunal deal with matters in a way that is accessible, fair, just, economical, informal and quick.¹⁴
- [19] LKB's non-compliance with section 77(2) of the Act is fatal to its application and its appeal:
- Section 77(2) QBCC Act is expressed in clear and unequivocal terms. A person may not apply to the tribunal to decide a building dispute unless the person has complied with a process established by the QBCC to attempt to resolve the dispute. Compliance with the section is a precondition to the jurisdiction of the Tribunal being enlivened. The provision is not merely procedural, it is mandatory and has substantive effect. The Tribunal cannot exercise the powers conferred by s 61 QCAT Act to waive compliance with s 77(2) QBCC Act.¹⁵
- [20] The Affidavit should not be admitted as evidence and the appeal must be dismissed. The consequence of LKB not complying with section 77(2) of the *Queensland Building and Construction Commission Act* 1991 (Qld) is that the Tribunal does not have jurisdiction in its application. It does not matter that LKB filed its application as a minor civil dispute.¹⁶
- [21] The original application was misconceived and must therefore be dismissed as lacking in jurisdiction.¹⁷
- [22] Whether LKB should file in the Tribunal a further application for a minor commercial building dispute upon compliance with section 77(2) of the *Queensland Building and Construction Commission Act* 1991 (Qld) is a matter upon which he might wish to obtain independent legal advice.

Should the Appeal Tribunal grant leave to appeal?

- [23] I find nothing to indicate that the learned Adjudicator acted on a wrong principle, or made any mistakes of fact or law affecting his decision. There is no question of general importance for the Appeal Tribunal to determine. There is no reasonably arguable case that the Tribunal was in error. There is no reasonable prospect of substantive relief on appeal. There is no evidence that a substantial injustice will result if leave is not granted. Leave to appeal should be refused.

¹³ *Walsh v Australian Building and Construction Group* [2016] QCAT 187, [8], citing with approval *Leyden v NJ Tierney Constructions Pty Ltd* [2015] QCAT 483.

¹⁴ QCAT Act, s 3(b).

¹⁵ *Walsh v Australian Building and Construction Group* [2016] QCAT 187, [12].

¹⁶ *Walsh v Australian Building and Construction Group* [2016] QCAT 187, [13].

¹⁷ QCAT Act, s 47; *Walsh v Australian Building and Construction Group* [2016] QCAT 187, [13].

What is the appropriate Order?

[24] The appropriate Order is:

1. Leave to appeal refused.