

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *McCrystal v Office of the Information Commissioner & Anor* [2019] QCATA 90

PARTIES: **SHAUN MCCRYSTAL**
(applicant/appellant)
v
**OFFICE OF THE INFORMATION
COMMISSIONER**
(first respondent)
**QUEENSLAND BUILDING AND CONSTRUCTION
COMMISSION**
(second respondent)

APPLICATION NO/S: APL364-17; APL052-18; APL082-18; APL131-18

ORIGINATING APPLICATION NO/S: 312996; 313173; 313091; 313174

MATTER TYPE: Appeals

DELIVERED ON: 8 July 2019

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Justice Daubney, President

ORDERS: **The applications for miscellaneous matters filed 16 August 2018 in each of APL364-17, APL052-18, APL082-18 and APL131-18 are dismissed.**

CATCHWORDS: ADMINISTRATIVE LAW – FREEDOM OF INFORMATION – RIGHT OF ACCESS – where the applicant made complaints to the Queensland Building and Construction Commission – where the events leading to those complaints occurred at either or both of two adjoining premises – where the applicant subsequently made four access applications under the *Right to Information Act 2009* ('RTI Act') concerning the investigations into and decisions on those complaints – where the applicant applied for internal review – where the applicant then applied for external review by the Information Commissioner – where the applicant appeals each of the four decisions of the Information Commissioner to the Appeal Tribunal under s 119 of the RTI Act – where the applicant has brought applications for the four appeals to remain as separate proceedings but be heard and decided together under s 55 of the *Queensland Civil and Administrative Tribunal Act 2009*

– whether to make a direction under s 55 of the QCAT Act

ADMINISTRATIVE LAW – FREEDOM OF INFORMATION – RIGHT OF ACCESS – where the applicant has made an application in each of the four appeal proceedings for a person to make themselves available for cross-examination before the Appeal Tribunal – where the applicant submits that the attendance of the Queensland Building and Construction Commissioner for cross-examination would assist the Appeal Tribunal in determining each of the four appeals – whether to make a direction under ss 97 and 98 of the QCAT Act

Queensland Civil and Administrative Tribunal Act 2009, s 55, s 97, s 98,
Right to Information Act 2009, s 119

McDonald v Queensland Building Services Authority [2012] QCAT 224
Pacific Century Productions P/L v Taylors Contracting Services P/L; Pacific Century Production P/L v Koppers Timber Preservation P/L [2003] QSC 289
Papale & Ors v Sucrogen Ltd [2015] QSC 192
QBCC v Geoffrey Mitchell, GMA Certification Pty Ltd [2017] QCAT 23
Sibelco v Right to Information Commissioner [2017] QCATA 59

REPRESENTATION:

Applicant: L B Watt of Becker Watt Lawyers
First Respondent: L Lynch, Right to Information Commissioner
Second Respondent: Holding Redlich Lawyers

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

[1] The applicant made four separate access applications to the Queensland Building and Construction Commission ('QBCC') under the *Right to Information Act 2009* ('RTI Act'). He subsequently sought both internal review by the QBCC and external review by the Information Commissioner of the decisions made in respect of those applications. The applicant filed separate appeals against the four decisions of the Information Commissioner as below:

(a) APL364-17 on 7 November 2017;

- (b) APL052-18 on 1 March 2018;
 - (c) APL082-18 on 10 April 2018; and
 - (d) APL131-18 on 14 June 2019.
- [2] The information sought by the applicant broadly relates to complaints he made to the QBCC about construction work undertaken at two adjacent properties located at 19 and 21-23 Manson Parade, Yeerongpilly ('the Properties'). The applicant contends that this information reveals misconduct by various QBCC-licensed (or unlicensed) entities and also by the QBCC and its officers.
- [3] On 16 August 2019, the applicant filed identical Applications for Miscellaneous Matters in each of the four appeal proceedings. Those applications sought that the Tribunal make the following directions under the *Queensland Civil and Administrative Tribunal Act 2009* ('QCAT Act'):
- (a) under s 55 that the four appeals remain as separate proceedings but be heard and decided together; and
 - (b) under ss 97 and 98 for Commissioner Bassett to make himself available for cross-examination by the applicant and Appeal Tribunal.
- [4] It is convenient to deal with each of the directions sought in turn.

Application to hear and decide proceedings together

- [5] Section 55 of the QCAT Act provides:

55 Sequence

- (1) The tribunal may direct that 2 or more proceedings concerning the same or related facts and circumstances—
 - (a) remain as separate proceedings but be heard and decided together; or
 - (b) be heard in a particular sequence.
 - (2) The tribunal's power to give a direction under subsection (1) is exercisable only by a legally qualified member or an adjudicator.
- [6] The applicant submits that the Appeal Tribunal should use the above power to direct that the four appeals be heard together, but remain as separate proceedings. He argues that the appeals contain overlapping or related facts and errors of law by the QBCC and OIC in performing their functions under the RTI Act, but that they should remain as separate proceedings because of the 'distinct factual differences and errors of law and a need for differing evidence and consideration of the law to be drawn in each proceeding'.¹
- [7] In support of this submission, the applicant relies solely on an earlier decision of the Tribunal in *QBCC v Geoffrey Mitchell, GMA Certification Pty Ltd*.² In that matter,

¹ Submission attached to application filed 16 August 2019 at [17].

² [2017] QCAT 23.

Member Cullen determined that the two proceedings in question should remain separate but be heard and decided together where the legislation and building codes governing each application were the same, but the proceedings nonetheless concerned different facts and conduct occurring at different properties.

- [8] The applicant places particular reliance on the following statement of Member Cullen that joining the proceedings under s 55 was:³

... sensible, in that it highlights the need for evidence to be drawn in relation to each separate proceeding, but achieves economies of scale in hearing the matters together.

...

There is, in my view, obvious benefit to sequencing these proceedings. There will likely be reduced costs to both parties occasioned by hearing the matters together. Further, there will also be reduced costs to the Tribunal, which is a relevant factor that the Tribunal should always consider in managing proceedings before it.

- [9] The applicant submits the economies of scale referred to by Member Cullen would be achieved by hearing and deciding the proceedings together and would be consistent with the Tribunal's objective to deal with matters in a way which is economical, informal and quick.⁴
- [10] The application is opposed by both respondents. The Information Commissioner has taken a more nuanced approach by proposing that s 55 should be used but instead to sequence the proceedings such that APL364-17 is heard and determined first, followed by APL052-18, and APL082-18 and APL131-18 then be heard and determined together.
- [11] Both respondents question the applicant's reliance on *Mitchell*, saying that case was very different from the present. *Mitchell* concerned two occupational regulation proceedings in which the orders sought required the Tribunal to determine in fact whether particular conduct by a private building certifier amounted to unsatisfactory professional conduct or professional misconduct. That is far removed from the Appeal Tribunal's task in the present case which is to consider only questions of law.
- [12] The QBCC also submits that *Mitchell* can be distinguished as it related to one individual person and the subsequent investigation of that individual's conduct on substantially similar grounds albeit at different locations. On the other hand, each of the current appeals refers to numerous different persons, numerous distinct investigations and internal conduct of the QBCC and Information Commissioner, a large number of documents, multiple considerations for refusal, and numerous grounds relied upon by the Information Commissioner in its four separate and distinct decisions.
- [13] I am not convinced that *Mitchell* provides persuasive support for the current application. As submitted by the respondents, that case involved determinations of

³ At [23]-[25].

⁴ QCAT Act, s 3.

fact regarding the conduct of the building certifier and then consideration as to whether that amounted to misconduct. By virtue of s 119 of the RTI Act, these appeals may only be made on questions of law. While the legislation and the basic issue in each matter – whether the Information Commissioner’s decision is attended by an error of law – are the same, the alleged errors of law are not. This is made clear by reference to the applicant’s own submissions, which demonstrate the different grounds of appeal in each matter.⁵

- [14] The errors of law alleged against the Information Commissioner in each appeal are set out in paragraph 14 of the submissions filed with the application. It is sufficient to note that, looking at the various matters listed under each appeal, there is very little similarity in the errors alleged.
- [15] In addition, the grounds on which the external review applications were made differ and accordingly so do the decisions of the Information Commissioner. Even where the decisions touch on similar issues, such as the application of the public interest test and consideration of whether documents are non-existent or unlocateable, the approach of the Information Commissioner and its reasoning are not identical in each decision.
- [16] It seems, therefore, that the similarity asserted by the applicant appears to relate mostly to the allegations of fact which underlay his original complaints. This is again clear in the applicant’s own submissions where the alleged misconduct at each of the Properties is outlined.⁶ As I have already noted, the Appeal Tribunal’s task in cases such as this is to determine questions of law. It does not involve any examination of the allegations made by the applicant or the substance of his complaints, nor is the Appeal Tribunal concerned with a merits review of the decision reached by the QBCC in respect of those complaints. Review by the Appeal Tribunal under s 119 of the RTI Act is in the nature of judicial review.⁷
- [17] In any event, in the present case, I am not satisfied that any similarities in the factual circumstances would achieve the economies of scale claimed by the applicant. This is particularly so in circumstances where it is submitted, and I accept, that there is a real risk that hearing the matters together could well cause inefficiency and confusion.
- [18] The QBCC submits that in determining an application under s 55, the Tribunal must consider whether there are sufficient similarities or related facts to justify the proceedings being heard together. It also submits that this is broadly analogous to what the Tribunal must consider in an application for the consolidation of proceedings under s 54. In its submissions, the QBCC has made reference to authorities dealing with the question of consolidation under s 54 of the QCAT Act, including a decision of the Tribunal in *McDonald v Queensland Building Services Authority*,⁸ in which two proceedings were consolidated under s 54 on the grounds that the applications were inextricably linked and that their determination was likely to involve the same or similar evidence from the same witnesses.⁹ The QBCC contends that the same cannot be said of the present appeals.

⁵ Submission attached to application filed 16 August 2019 at [14].

⁶ At [13].

⁷ See *Sibelco v Right to Information Commissioner* [2017] QCATA 59 at [27].

⁸ *McDonald v QBSA* [2012] QCAT 224.

⁹ At [15].

- [19] The QBCC referred to *Pacific Century Productions Pty Ltd v Taylors Contracting Services Pty Ltd*.¹⁰ The applications in that case were for orders under rr 79 and 80 of the *Uniform Civil Procedure Rules 1999* ('UCPR') that two proceedings be heard and determined one after the other by the same judge, but Ambrose J instead made an order for their consolidation under r 65. Speaking on consolidation, his Honour said that:¹¹

As a general principle, actions will be consolidated if the claims properly made in different actions could have been made in the one action and the parties to the separate actions will not suffer.

The QBCC is correct in its submission that the appeals here could not have been brought as one appeal under the RTI Act, relating as they do to separate decisions of the Information Commissioner.¹²

- [20] The QBCC also cited the decision of the Supreme Court in *Papale & Ors v Sucrogen Ltd*.¹³ There, Bond J refused an application for separate proceedings to be heard and decided together under UCPR r 79 on the grounds that the potential overlap between evidence which might have been adduced in both proceedings was not such as would justify an exercise of discretion in favour of giving leave to order that both proceedings be heard together.¹⁴
- [21] I am of the view that this is also the case with the present appeals. I also accept the respondents' submissions that these appeals are quite different from *McDonald v QBSA* where the applications were inextricably linked and their determination was likely to involve the same or similar evidence from the same witnesses. As I have already said, the present appeals concern distinct alleged errors of law and involve different personnel within the QBCC on initial decision and internal review and within the Office of the Information Commissioner on external review.
- [22] I also accept that, rather than resulting in efficiencies and streamlining the proceedings, hearing the appeals together is liable to result in confusion, which would not be remedied by having them remain as separate proceedings under s 55. As the QBCC submits, 'the intermingling of the extensive (and differing) factual and legal backgrounds of the Appeal Applications, if they are to be heard and decided together, would be unavoidable despite the supposed distinction from consolidation.'¹⁵ To the limited extent that the same witnesses are required in relation to two or more of the appeals, it seems likely that they may have difficulty in distinguishing between events related to the same or similar properties which occurred some years past.
- [23] For completeness, I should also note that I find the Information Commissioner's proposed alternative equally unconvincing. The assertion that the conclusions reached on questions of law in one appeal can somehow influence the questions to

¹⁰ *Pacific Century Productions P/L v Taylors Contracting Services P/L; Pacific Century Production P/L v Koppers Timber Preservation P/L* [2003] QSC 289.

¹¹ At [25].

¹² See RTI Act, s 119.

¹³ [2015] QSC 192.

¹⁴ At [18]. I note that his Honour also rejected an application to join a third party to the proceedings under r 194(2) of the UCPR for the same reasons, but that is not relevant for present purposes.

¹⁵ Submissions of the second respondent filed 22 March 2019 at [8].

be decided in the other appeals is difficult to reconcile with the Information Commissioner's earlier submission that each appeal contains discrete issues.

- [24] If the Appeal Tribunal were to be satisfied that no error of law had been committed in APL364-17, which the Information Commission submits should be heard first, it does not follow that the Appeal Tribunal would necessarily be satisfied that such errors had been committed in the subsequent matters. That question would need to be considered in the specific context of the documents requested and against the reasoning and process taken by the Information Commissioner in each particular matter.
- [25] For those reasons, the Application to hear and decide the proceedings together under s 55 of the QCAT Act is dismissed.

Application for attendance of Commissioner Bassett

- [26] The applicant has also applied for a direction under ss 97 and 98 of the QCAT Act for Commissioner Bassett to make himself available for cross-examination before the Appeal Tribunal.
- [27] Section 97 of the QCAT Act relevantly provides:

97 Requiring witness to attend or produce document or thing

- (1) The tribunal may, by written notice, require a person to—
- (a) attend at a stated hearing of a proceeding to give evidence; or
 - (b) produce a stated document or other thing to the tribunal.
- (2) The tribunal may give a notice under subsection (1) on the application of a party to a proceeding or on its own initiative.

- [28] Section 98 in turn provides:

98 Powers relating to witnesses

- (1) In a hearing of a proceeding, the tribunal may—
- (a) on its own initiative call any person to give evidence; or
 - (b) examine a witness on oath or require a witness to give evidence by affidavit; or
 - (c) examine or cross-examine a witness to the extent the tribunal considers appropriate to obtain information relevant to performing its functions in the proceeding; or
 - (d) compel a witness to answer questions the tribunal considers relevant to the proceeding.

- [29] The applicant submits that the Appeal Tribunal should use these powers to order that Commissioner Bassett make himself available for cross-examination at the hearing of these proceedings as he is in a position to confirm the applicant's submissions, refute the respondents' contentions and to assist the Tribunal to make its decision on these appeals.

- [30] The assistance Commissioner Bassett is apparently able to provide stems from a meeting between the applicant and the Commissioner following an investigation by the Queensland Ombudsman into the applicant's complaints. Commissioner Bassett acknowledged in writing certain deficiencies in the QBCC's handling of the applicant's complaints and the applicant submits that he retains knowledge of misconduct by various entities, including the QBCC and its officers.
- [31] The application is opposed by both respondents. Each argues that it is beyond the jurisdiction of this Appeal Tribunal to take evidence from Commissioner Bassett and that any evidence he could provide would be irrelevant in appeals based, as these appeals must be, solely on questions of law.
- [32] As set out above, the Appeal Tribunal's role in appeals such as these is confined to questions of law, as is explicit in the terms of the legislation and confirmed by the authorities.¹⁶
- [33] On the applicant's own case, Commissioner Bassett's evidence would concern the knowledge he retains of misconduct by various entities, the QBCC and its officers. I can see no basis upon which such evidence would assist the Appeal Tribunal in determining whether the decisions under appeal were infected by errors of law. I accept the QBCC's submission that the conduct of its officers in investigating complaints made by the applicant has no bearing on the legality of the decisions of the Information Commissioner.
- [34] In its submissions, the Information Commissioner refers to the applicant having identified other individuals in addition to Commissioner Bassett as being in a position to assist the Appeal Tribunal in making its decision.¹⁷ Commissioner Bassett is the only potential witness the subject of the current application, so it is unnecessary for me to make further comment on this.
- [35] It follows that the application for a direction that Commissioner Bassett make himself available for cross-examination should be refused.

Conclusion

- [36] Accordingly, for the above reasons, the Appeal Tribunal makes the following orders:
1. The applications for miscellaneous matters filed 16 August 2019 in each of APL364-17, APL052-18, APL082-18 and APL131-18 are dismissed.

¹⁶ In this Tribunal, see, for example, the discussion by Thomas J in *Sibelco Right to Information Commissioner* [2017] QCATA 59 at [11]-[27].

¹⁷ Submissions of the First Respondent filed 22 March 2019 at [34].