QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Goldfield Projects Pty Ltd v Queensland Building and Construction Commission* [2020] QCATA 21
PARTIES:	**GOLDFIELD PROJECTS PTY LTD** (applicant\appellant) **v** **QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION** (respondent)
APPLICATION NO/S:	APL072-19
ORIGINATING APPLICATION NO/S:	GAR213-15
MATTER TYPE:	Appeals
DELIVERED ON:	11 February 2020
HEARING DATE:	15 November 2019
HEARD AT:	Brisbane
DECISION OF:	Senior Member Brown Member Howe
ORDERS:	**Application for leave to appeal refused.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – where the applicant filed an interlocutory application – where the relief sought was refused in large part – where the applicant sought leave to appeal – where the tribunal decided the application without reference to the respondent's submissions – where the applicant claimed lack of procedural fairness in not being given an opportunity to respond to the respondent's submissions – where the applicant suffered no practical unfairness in the circumstances – where the interlocutory application sought to re-agitate a previously decided matter – where re-agitation constituted a de facto appeal – where no error found in the decision below – where leave to appeal not merited *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 28(1), s 142(3)(a)(ii) *ACI Operations P/L v Bawden* [2002] QCA 286 *Goldfield Projects Pty Ltd v Queensland Building and Construction Commission* [2017] QCAT 260

Kioa v West (1985) 159 CLR 550
McDonald v Queensland Police Service [2017] QCA 255
Parker v Comptroller-General of Customs (2009) 252 ALR 619
Pickering v McArthur [2005] QCA 294
Spaulding v Law Institute of Victoria [2013] VSC 632
Stead v State Government Insurance Commission (1986) 161 CLR 141

REPRESENTATION:

Applicant:	Self-represented by H Chan
Respondent:	Self-represented by in-house legal representative N Thirumoorthi

REASONS FOR DECISION

[1] By proceedings commenced 9 September 2015 (GAR213-15), the applicant seeks to review two decisions made by the Queensland Building and Construction Commission ('QBCC'), concerning the scope of work undertaken under the statutory insurance scheme to rectify or complete defective building work performed by the applicant.

[2] The issue as to whether or not the work was defective has been finally determined in other review proceedings before the tribunal (GAR460-13), with the tribunal confirming the decision by QBCC to issue the applicant with a direction to rectify defective work.

[3] The only issue to be resolved in the present matter, GAR213-15, is therefore limited to the reasonableness of the scope of rectification work.

[4] On 17 January 2019, the applicant filed an interlocutory application for miscellaneous matters in the tribunal applying for extensions of time to file material and directions concerning expert evidence, and also seeking a declaration overturning the decision made in GAR460-13.

[5] The tribunal issued directions concerning the application for miscellaneous matters on 22 January 2019 directing that the applicant provide a copy of the interlocutory application to QBCC by 31 January 2019, that QBCC file any submissions in response by 14 February 2019 and the application for miscellaneous matters be determined on the papers not before 14 February 2019.

[6] On 24 January 2019, the applicant sent an email to the registry, amongst other things asking that it be allowed to provide a submission 'in response to QBCC submission'.

[7] By further email dated 1 February 2019, again addressed to the registry, the applicant enquired whether the applicant needed to file another application in support of its request to be able to make submissions in response to QBCC's submissions.

[8] There was no response from the registry to either email.

[9] The interlocutory application was decided on the papers by a tribunal member on 21 February 2019 with the member granting extensions of time to file and serve material as requested, but otherwise dismissing the application.

[10] The applicant now seeks to appeal that decision.

[11] Given the decision sought to be appealed is a decision which is not the tribunal's final decision in the proceeding (an interlocutory decision), leave to appeal must first be sought.[1]

[12] Leave to appeal will usually only be granted where an appeal is necessary to correct a substantial injustice to the appellant and where there is a reasonable argument that there is an error to be corrected.[2] The mere fact that there has been an error, or that an error can be detected in the judgment below, is not ordinarily by itself sufficient to justify the granting of leave to appeal.[3] If a question of law is identified that is of general or public importance that may weigh in favour of granting leave.[4]

Proposed grounds of appeal

[13] The applicant's complaints are somewhat repetitive and lack precision. Reducing them to their base assertions they are:

(a) The applicant was not afforded procedural fairness because he was not given an opportunity to file a reply to QBCC's response to his application;

(b) The applicant's proposal about expert evidence was appropriate and wrongly rejected because the tribunal is bound to adopt appropriate rules;

(c) The rejection of the applicant's request for a site visit by the experts was unreasonable because a site visit was required to enable the experts to properly investigate the relevant facts; and

(d) Finally, that the learned member erred in refusing to review the decision made in the earlier proceeding matter GAR460-13 which widened the scope of rectification work to include the replacement of the waterproofing membrane in the bathroom and declare it void.

Review GAR460-13

[14] It is appropriate to consider the final complaint first.

[15] On 3 December 2013, the applicant was issued with a direction to rectify defective building work alleged by the owner to have been performed in two bathrooms of a house. On 24 December 2014, the applicant filed an application (GAR460-13) to review the decision to issue the direction. A tiling expert was engaged by the QBCC to inspect the bathrooms and provide a report. He carried out an inspection on 14 January 2014 and provided a report on 28 January 2014. In July and August 2015, a licensed builder engaged by the QBCC carried out rectification work in the

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1 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act') s 142(3)(a)(ii).
2 *Pickering v McArthur* [2005] QCA 294, [3]; *McDonald v Queensland Police Service* [2017] QCA 255, [25].
3 *ACI Operations Pty Ltd v Bawden* [2002] QCA 286.
4 *Spaulding v Law Institute of Victoria* [2013] VSC 632, [28].

bathrooms. The builder rectified the defects referred to in the direction to rectify, but also rectified further defects in the work which, in the view of QBCC, became reasonably necessary after commencing the rectification work.

[16] Matter GAR460-13 was determined on 4 October 2016, with the decision by QBCC to issue the direction to rectify confirmed. The learned member also directed that the direction be widened to include the additional rectification work done by the builder.

[17] With the interlocutory application brought in GAR213-15, the applicant sought to declare the decision in GAR460-13 widening the scope of work void.

[18] In that application, the learned member correctly stated that he had no power to do that. Indeed what the applicant sought with the declaration was effectively to mount a de facto appeal of the decision in GAR460-13. The applicant could have appealed that decision at the time but did not do so. It was not able to be done using the invention of an interlocutory application in entirely separate proceedings.

[19] A constant theme throughout the material filed by the applicant in GAR213-15 is the re-agitation of its claim that the building work it performed was not defective. It is far too late to pursue that course now.

[20] The learned member's refusal to make the declaration sought was correct.

Procedural fairness

[21] The applicant says it was not afforded procedural fairness because it was not given an opportunity to provide details for the application, not permitted to make submissions responding to submissions by QBCC and not given the opportunity to consult a legal representative.

[22] The directions made by the tribunal on 22 January 2009 were standard and commonly made in the tribunal. There was nothing unusual about them.

[23] Procedural fairness is not a fixed, immutable concept and panacea regardless of circumstance. In *Kioa v West*, Mason J (as he then was) said:

> Where the decision in question is one for which provision is made by statute, the application and content of the doctrine of natural justice or the duty to act fairly depends to a large extent on the construction of the statute.…What is appropriate in terms of natural justice depends on the circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject matter, and the rules under which the decision-maker is acting …[5]
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> In this respect the expression "procedural fairness" more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case.[6]

[24] It was the applicant's interlocutory application. The application was in standard form number 40 and on the front of the form it clearly states 'Refer to attached instructions prior to filling out this form.' On the instructions attached to the form it states 'C2 – The tribunal may give a direction at any time in a proceeding including

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5 (1985) 159 CLR 550, 584 [32].
6 Ibid [33].

on the basis of documents alone so please include all relevant information in your application.'

[25] The applicant was therefore enjoined by the directions attached to the application to ensure it provided all necessary material with the application.

[26] The applicant completed its name and the respondent's name in the application and filed it with two pages attached. The applicant did not complete any other part of the form including C2 which relates to applications for directions. The attachments however are titled 'C2 – Application for directions'.

[27] The attached two pages set out the directions sought on the first page and set out the reasons that the applicant sought the directions on the second.

[28] By s 28(1) of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act'), the procedure for a proceeding is at the discretion of the tribunal, subject to the QCAT Act, any enabling Act and the rules of the tribunal.

[29] The tribunal issued directions giving the respondent, QBCC, an opportunity to also file information and submissions. The matter was then determined on the papers as stated in the directions.

[30] In *Parker v Comptroller-General of Customs,*[7] the Comptroller-General of Customs commenced proceedings in the Supreme Court of New South Wales against Parker and his companies, for offences involving unauthorised movement of goods from a bond warehouse and evasion of duty payable. There was an issue about the seizure of documents by the Comptroller-General. The trial judge held that the range of documents seized went well beyond what would have been authorised by s 214 of the *Customs Act* 1901 (Cth) based upon a decision of *O'Neill*,[8] a judgment of the District Court of New South Wales. Although the seizure was therefore accepted as unlawful, the judge admitted the evidence. Parker was convicted and substantial penalties were imposed.

[31] He appealed to the New South Wales Court of Appeal. The appeal was dismissed. In the course of judgment the Court of Appeal held that *O'Neill* had been wrongly decided. Parker was granted special leave to appeal to the High Court limited to the ground that the Court of Appeal had denied him procedural fairness by finding against him without notice of its intention to depart from *O'Neill*.

[32] The High Court dismissed the appeal, French CJ explaining:

> The Court of Appeal was correct in its construction of s 214. It should, however, have given notice to Mr Parker of its intention to consider that question. In the event, Mr Parker was not deprived of the possibility of a successful outcome. There was no practical unfairness:

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7 (2009) 252 ALR 619.

8 *In the matter of the appeal of Lawrence Charles O'Neill* (Unreported, District Court of New South Wales, Dunford DCJ, 18 August 1988).

> "Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice."[9]
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> …
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> No other alternative argument that could have been put is apparent. In the circumstances there was no relevant unfairness. The course taken by the Court of Appeal did not deny the appellant an opportunity to put argument that could have made a difference to the outcome.[10]

[33] In *Stead*[11] the High Court noted that an appellate court will not order a new trial if it would inevitably result in the making of the same order as that made by the primary judge at the first trial. An order for a new trial in such a case would be a futility.

[34] It is not clear why, but it appears the learned member was not apprised of the QBCC's response to the interlocutory application and made his decision without considering the response. In his reasons, the learned member notes that QBCC had not filed a response. That of course was incorrect. The QBCC had filed a response within time. In its response QBCC said it had no intention to file expert evidence at that stage, not unless the applicant did. The applicant has still not filed expert evidence as at the date of this application for leave to appeal.

[35] Given the submissions by QBCC were not considered by the learned member in deciding the interlocutory application, we fail to see how the loss of opportunity to respond to something not considered may have resulted in a change to the learned member's decision. The decision was based entirely on the applicant's material and the material filed by the parties to that date, other than the submissions by QBCC.

[36] As to the applicant's claim that it was denied the opportunity to consult a legal representative, the parties have been granted leave for legal representation in GAR213-15, however there has been no appearance by any legal representative at directions hearings nor other evidence of legal representatives being engaged by the applicant at any time since 2015 (when QBCC brought an unsuccessful application to have the applicant's claim struck out). The applicant has not seen fit to engage legal representations to conduct this application for leave to appeal.

[37] The applicant has suffered no practical unfairness in the circumstances.

Expert evidence and a site visit

[38] The applicant's issues about expert evidence and a site visit are similarly interwoven with the matters finalised in GAR460-13 and similarly misconceived.

[39] Given that the decision being reviewed in GAR213-15 is limited to the reasonableness of the scope of rectification work, and the rectification work has

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9 *Parker v Comptroller-General of Customs* (2009) 252 ALR 619, 623 [12] (French CJ), quoting *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 195 ALR 502, 511 [37] (Gleeson CJ).

10 *Parker v Comptroller-General of Customs* (2009) 252 ALR 619, [91] (French CJ), citing *Stead v State Government Insurance Commission* (1986) 161 CLR 141, 145.

11 *Stead v State Government Insurance Commission* (1986) 161 CLR 141.

already been completed, it is difficult to conceive what utility would be served with a site visit.

[40] The applicant also made a previous application for a site visit in GAR213-15 which was refused.[12] There is no indication that any relevant circumstance has changed since that refusal. It is appropriate to set out at some length what the learned member said there when refusing to make a direction for a site visit:

> [14] Goldfield says that it must be given site access to allow its expert to be able to independently assess the scope of work the subject of the review.
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> [15] It says it has new legal advisors and a new 'technical consultant' who should be able to examine the works to provide appropriate advice to the company. Mr Chan on behalf of Goldfield says that any denial of site access is a denial of natural justice.
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> [16] In response, the QBCC says firstly the question of whether the works are defective should not be an issue in these proceedings. That issue was determined in the Tribunal's previous review of the decision to issue the direction to rectify.
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> [17] I accept that submission.
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> [18] The Tribunal determined that the works were defective and confirmed the decision to issue the direction to rectify. I do not consider that that issue should be re-litigated in these proceedings. The defective work, namely the tiling installation, was as described in the direction to rectify and was expanded by the Tribunal in its decision to include the method of fixing the shower screens to the floor, such as to widen the scope of the rectification works required to include replacement of the waterproofing membrane.
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> [19] The QBCC submits, and I accept, that the issue for determination in this review of the scope of works is whether the scope of works is reasonable and necessary to rectify the defects identified.
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> [20] The rectification works have been completed for nearly two years. I was not convinced that an inspection of the completed works would assist an expert witness in giving evidence about the reasonable necessity for those works to rectify defects which are no longer visible.
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> [21] I was not satisfied that there was any denial of procedural fairness if site access was not given. Goldfield did not articulate, at the directions hearing or in submissions in support of the application, what the procedural unfairness to it would be.
>
> [22] The owner is not a party to these proceedings and had declined to give access. Before any order for access was made, I would have required to hear from the owner on the issue. This would have caused further unwarranted delay to a matter which has already been in the Tribunal since September 2015. I considered, having regard to the objects of the QCAT Act to deal with matters in a way which is, inter alia, fair and quick, that such further delay would not be desirable.

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12 *Goldfield Projects Pty Ltd v Queensland Building and Construction Commission* [2017] QCAT 260.

> [23] In all of the circumstances, I considered it was not desirable to make the order sought.[13]

[41] Finally there is also the applicant's complaint that its proposal to set an agenda for expert evidence was wrongly rejected. In the interlocutory application the applicant had sought the appointment of experts 'in accordance with Practice Direction 4 of 2009'. In declining to make further orders about the appointment of experts the learned member determining this application said:

> [6] Senior Member Aughterson directed Goldfield to file any expert evidence by a particular date. There is nothing inconsistent with this direction and Practice Direction No 4 of 2009. …
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> [7] The QBCC have yet to lodge any evidence in reply, which may potentially include expert evidence. In the circumstances of this case, I consider it appropriate to wait until all of the expert evidence is before the Tribunal before considering making directions regarding a conclave. It is inappropriate for me to make directions limiting the QBCC's choice of expert should it choose to engage one. [14]

[42] The position taken by the learned member was appropriate in the circumstances.

[43] When the applicant filed submissions in support of its application for leave to appeal it referred to a purported exchange between Mr Chan appearing for the applicant and the learned member concerning Practice Direction 4 of 2009. The exchange was said to have taken place at a subsequent directions hearing on 12 March 2019. Referring to that discussion the applicant now seeks to introduce, into its application for leave to appeal, a dispute concerning which party should file its expert's report first.

[44] This issue does not appear to have been a matter raised in the interlocutory application. Nor, accordingly, is it addressed in the reasons for decision given by the learned member. It cannot be introduced now in this application for leave to appeal.

Conclusion

[45] We are not satisfied that there has been any error shown on the part of the learned member against whose order the applicant seeks leave to appeal. We find no practical unfairness occurred in the matter. Even if it could be claimed that there was error, or procedural unfairness, we are not satisfied that the applicant has shown it is appropriate to grant leave to appeal in any case. We are not satisfied that it is necessary to correct any substantial injustice done to the applicant.

[46] Application for leave to appeal refused.

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13 *Goldfield Projects Pty Ltd v Queensland Building and Construction Commission* [2017] QCAT 260, [14]–[23].

14 *Goldfield Projects Pty Ltd v Queensland Building and Construction Commission* [2019] QCAT 65.