

# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Forrest & Forrest v Abbott Builders QLD Pty Ltd* [2021]  
QCATA 148

PARTIES: **PHILLIP FORREST**  
**JAN FORREST**  
(applicants/appellants)

v

**ABBOTT BUILDERS QLD PTY LTD**  
(respondent)

APPLICATION NO/S: APL044-21

ORIGINATING APPLICATION NO/S: BDL280-19

MATTER TYPE: Appeals

DELIVERED ON: 10 December 2021

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Senior Member Howard

ORDERS: **1. The application for leave to appeal is dismissed.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – NATURE OF RIGHT – APPEALS IN THE STRICT SENSE AND APPEALS BY WAY OF REHEARING – WHEN APPEAL LIES – FROM INTERLOCUTORY DECISIONS – LEAVE TO APPEAL – where leave to appeal required before an appeal in relation to order granting leave to be legally represented – where grounds of appeal seek error of law and errors of mixed law and fact and errors of fact – where copy of application not received – procedural fairness – whether tribunal’s exercise of discretion miscarried

*Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 3, s 4, s 28, s 29, s 31, s 43, s 142(3)(ii), s 146, s 147

*Queensland Civil and Administrative Tribunal Rules 2009* (Qld) s 35(3)

*Pickering v McArthur* [2010] QCA 341

*Flegg v Crime and Misconduct Commission & Anor* [2014] QCA 42

APPEARANCES &  
REPRESENTATION:

Applicant: Self-represented  
 Respondent: Becker Watt Lawyers

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] Abbott Builders Qld Pty Ltd (the builder) sought leave of the Tribunal to be legally represented in proceedings. The Tribunal made an order pursuant to s 43 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (' QCAT Act') granting leave for the parties to be legally represented in a proceeding concerning a building dispute. Mr and Ms Forrest (the homeowners) seek to challenge the Tribunal's decision on appeal.
- [2] The grounds of appeal sought to be agitated concern alleged breaches of procedural fairness; and alleged inaccuracies in the reasons for decision. Leave to appeal is required before an appeal in relation to a decision of the Tribunal, which is not a final decision in a proceeding may advance.<sup>1</sup>

### The Tribunal's decision

- [3] In deciding to grant leave for legal representation, the learned Senior Member considered the history of two proceedings for a building dispute that were filed by the Forrest's, and which had been consolidated by the Tribunal. The first application seeks restitution and costs in respect of defective and incomplete works based on some 20 issues raised by the Forrest's. The second application involves their claim for liquidated damages for late completion of building works.
- [4] The parties subsequently filed statements of evidence which more comprehensively identified the issues. The Tribunal summarises the issues for consideration as including the meaning of the properly construed contract; the date for practical completion; any agreed extension of the date for practical completion; whether the Forrest's specified use of particular building products, and whether delays in their availability led to delays in progress and completion of the works; which party was responsible to obtain the necessary building certifications; and whether building work was defective or incomplete in respect of the 20 identified items.
- [5] Abbott Builders application was expressed in general terms, and to the effect that the proceedings were likely to involve complex questions of fact or law and that legal representation will assist the Tribunal. The Forrest's submitted they were not informed why Abbott Builders sought representation; the matter is not complex; they are not and do not intend to be represented; they oppose legal representation for the builder; they cannot afford representation and will be disadvantaged if Abbott Builders are represented; and the costs of obtaining legal representation would place an unfair burden on them. Abbott Builders says in reply that Mr Forrest is uniquely placed to conduct the litigation on the homeowners behalf, placing the builder at a

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<sup>1</sup> QCAT Act s 142(3)(ii).

disadvantage if leave is not granted. Mr Forrest disputes he is more qualified than any other lay person.

- [6] The Forrest's also submitted that they had not received a copy of the submissions of the builders in support of the application for leave. The Tribunal found that this argument lacked substance, because there were no separate submissions in support.
- [7] The Tribunal observed the frequently complex nature of building disputes and that parties often have limited understanding of the legal basis for their claims and the relevant legal principles that are applicable. Here, the learned Senior Member noted the Forrest's claim sought restitution rather than damages for breach of contract. It concluded here that collectively the issues arising for consideration in this matter are sufficiently complex to justify granting leave for legal representation.
- [8] In rejecting the argument of the Forrest's of any potential or perceived disadvantage, the Tribunal considered this was mitigated against having regard to the overriding duty of legal practitioners as officers of the court to assist the Tribunal in the administration of justice, together with the obligations of the Tribunal itself as provided for in ss 28 and 29 of the QCAT Act. These obligations require the Tribunal to observe natural justice and ensure understanding of certain things, including the nature of the assertions made in the proceeding and the legal implications of the assertions. The learned Senior Member also refers to there being no obligation on the Forrests to obtain legal representation.
- [9] The Tribunal published its reasons for decision.<sup>2</sup>

### **The appeal process**

- [10] As referred to earlier, because the decision sought to be appealed is not the Tribunal's final decision in the proceeding, leave to appeal is required before the appeal can proceed.<sup>3</sup> Whether leave to appeal should be granted is considered against well established principles, namely whether there is a reasonable argument of error in the decision and whether an appeal is necessary to correct a substantial injustice.<sup>4</sup>
- [11] An appeal on an error of law alone is an appeal in the strict sense and must be decided in accordance with s 146 of the QCAT Act. Appeals on the basis of mixed law and fact or fact, are to be decided pursuant to s 147 of the QCAT Act, by way of rehearing.
- [12] In essence, the grounds of appeal allege an error of law, errors of mixed law and fact and errors of fact, in the exercise of the Tribunal's discretion, such that the exercise of discretion miscarried.<sup>5</sup>
- [13] The Forrest's contend that they were denied procedural fairness. In particular, they submit that the Form 56 application for leave for legal representation does not name them, rather, it names Abbott Builders and Queensland Building and Construction Commission (QBCC). This is so, although it is endorsed with the file numbers for

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<sup>2</sup> *Forrest v Anor v Abbott Builders (Qld) Pty Ltd* [2021] QCAT 60.

<sup>3</sup> QCAT Act s 142(3)(a)(ii).

<sup>4</sup> *Pickering v McArthur* [2010] QCA 341

<sup>5</sup> Appeals against the exercise of discretion are to be decided in accordance with the principles discussed by Gotterson JA in *Flegg v Crime and Misconduct Commission & Anor* [2014] QCA 42, [14]–[16] ('Flegg').

various review ('GAR') proceedings against the QBCC as well as the relevant building dispute ('BDL') file number for the matter involving the Forrests and Abbott Builders.

- [14] They further contend that they were not given a copy of the completed Form 56, and that Abbott Builders did not file later submissions as directed by the Tribunal. The Forrest's say that they did not initially, in complying with the Tribunal's directions to respond to the application, provide submissions in response to Abbott Builders submissions, but rather having regard to the matters set out in a blank Form 56. That said, Abbott Builders filed submissions in reply and the Forrest's then filed further submissions responding to the matters set out in those submissions which the Tribunal considered.
- [15] The Forrest's also submit that the Form 56 which was provided by the registry after the decision was made by the Tribunal, was not endorsed with the QCAT stamp, and therefore a decision should not have been made on it. The argument seems to be that the application was not filed in accordance with s 31 of the QCAT Act, and not served as provided for in *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) s 35(3).
- [16] The Forrest's also say Abbott Builders did not provide evidence to substantiate their claims that '*Many aspects of the matters and issues in question are of a legal nature and require significant statutory interpretation unable to be completed by the Respondent themselves.*'<sup>6</sup> Further, Abbott Builders submissions refer to the complex questions of fact requiring expert evidence to be delivered, and co-ordinated and that the Tribunal would be assisted by legal representation. In their submissions in reply, Abbott Builders claimed that Mr Forrest had personal experience in contract drafting and administration placed them at a disadvantage in the absence of legal representation.

### **Should leave to appeal be granted?**

- [17] Natural justice is a flexible concept. That said, a party is generally entitled to know the case they are required to meet, and to have the opportunity to respond to it.
- [18] The Forrest's were entitled to receive a copy of the application for leave for legal representation and attached submissions. Further, the completed application, while referring to the BDL proceeding in making the application, did not name the parties to that proceeding. The GAR proceedings named and also listed as the 'Case number', referred to multiple review proceedings in which Abbott Builders had sought review of QBCC decisions relating to the Forrests' building works.
- [19] That said, the Tribunal's directions gave the Forrest's notice that an application for legal representation had been made in BDL280-19. The submissions filed by Abbott Builders in support of the application referred in general terms to the matters specified in s 43 of the QCAT Act. The Forrest's responded that they did not have a copy of the application filed, but rather by reference to s 43 considerations. Then, Abbott Builders filed a further submission, which the Forrest's again responded to with further submissions.
- [20] There is no doubt that Abbott Builders application for leave for legal representation did not proceed as it should have. Abbott Builders ought properly to have named the

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<sup>6</sup> Application for leave to be represented, filed 22 April 2020 by Abbott Builders, Part F.

Forrest's specifically in the application and served the Forrest's with their application. That said, as is apparent from the history set out above, the Forrest's were given notice of the application by the Tribunal. They then had the opportunity to fully respond to the application, despite not having seen a copy of the filed Form 56, by providing submissions in respect of the matters set out in s 43 of the QCAT Act and replying to the later submissions filed by Abbott Builders. The fact that an unsealed copy of the application was later provided to the Forrests by the registry does not suggest the application was not properly filed in the registry, nor bear on whether the Forrest's had adequate notice of the application for leave for legal representation and a proper opportunity to respond to it.

- [21] I observe that, unlike the decisions sought to be relied upon by the Forrests in support of their application for leave to appeal, the application here is an interlocutory and procedural one which does not affect the substantive rights of the parties.
- [22] Having regard to the nature of the application, while acknowledging the unfortunate irregularities in the way the application proceeded, and despite of those irregularities, I would conclude that the Forrest's had adequate notice of the application from the Tribunal, and an adequate opportunity to respond to it in addressing the matters set out in s 43 and Abbott Builders submissions in reply.
- [23] The Forrests further contend that the Tribunal made errors, in effect, in exercising its discretion to grant the application. In particular, the Tribunal concluded that Forrest's had received a copy of the application and the submissions filed with it, stating '*Clearly they received and considered the application for leave to be represented with the attached annexure.*'<sup>7</sup> Therefore, the Tribunal found the Forrests' submission, that they had not been served, 'lacks substance.'<sup>8</sup>
- [24] I would accept that the Tribunal was mistaken in finding as a fact that the Forrest's had received and considered the application for leave for legal representation. I would accept that they read a blank Form 56. However, for the reasons set out herein, that error of fact is ultimately not material as to whether the Tribunal's exercise of discretion miscarried in granting leave for legal representation.
- [25] In relation to the Forrests' broader submissions that the Tribunal erred in granting leave without '*substantive justification against the objects and functions of the Tribunal,*'<sup>9</sup> they argue that there is no indication of the complexities of law and fact Abbott Builders rely upon and they do not identify the matters upon which the Tribunal which may require the assistance of Abbott Builders lawyers. They also argue in effect that the GAR proceedings involving Abbott Builders and QBCC may add complexity, but that they (the Forrest's) are not a party to those proceedings.
- [26] Further, they Forrest's submit that the QCAT Act's objects require the Tribunal to deal with matters in a way which is accessible, fair, just economical, informal and quick,<sup>10</sup> and provides that to achieve the objects, the Tribunal to conduct proceedings informal way so as to minimise costs as is consistent with achieving justice; and maintain and use members with appropriate knowledge and

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<sup>7</sup> *Forrest v Anor v Abbott Builders (Qld) Pty Ltd* [2021] QCAT 60, [15].

<sup>8</sup> *Ibid*, [15].

<sup>9</sup> Applicant's submissions filed 14 June 2021.

<sup>10</sup> QCAT Act s 3

experience.<sup>11</sup> As I understand the submission, the Forrest's argue that having regard to these matters it is not apparent what matters might require the assistance of lawyers.

- [27] As discussed earlier, the Tribunal made its own assessment of the complexity of the proceedings having regard to the applications for a building dispute and aspects of those applications. It was entitled to do so in determining the application. It was also entitled to consider, as it did, that s 28 and 29 of the QCAT Act, as well as the obligations of legal practitioners as officers of the court, overcame the objection of the Forrest's as to any perceived disadvantage if Abbott Builders was represented in circumstances that the Forrest's were not intending to seek representation.

### **Conclusion and orders**

- [28] Having regard to the reasons set out, I do not accept that the Forrests were denied procedural fairness. Further, although the Tribunal made an error of fact, it was not a material error and did not affect the decision such that the exercise of the Tribunal's discretion to grant leave for legal representation miscarried.
- [29] Further, in the circumstances, there is no substantial injustice to be corrected in respect of which a grant of leave to appeal should be given.
- [30] Having regard to the matters set out, the application for leave to appeal is dismissed. I make orders accordingly.

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<sup>11</sup> QCAT Act s 4