QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Boyle & Anor v Axis Contracting Pty Ltd* [2023] QCATA 139
PARTIES:	**LAUREN BOYLE and JOSHUA BRAIDEN** (applicants) **v** **AXIS CONTRACTING PTY LTD** (respondent)
APPLICATIONS NOS:	APL378-22 and APL 381-22
ORIGINATING APPLICATIONS NOS:	MCDO 60887-21 and MCDO 371-22
MATTER TYPE:	Appeals
DELIVERED ON:	2 November 2023
HEARING DATE:	13 October 2023
HEARD AT:	Brisbane
DECISION OF:	Dr J R Forbes
ORDERS:	(i) Leave to appeal is granted; (ii) The appeal is allowed; (iii) The decision made herein on 1 November 2022 is set aside; (iv) The proceedings are remitted to the Registrar for retrial on a date to be fixed; (v) The question of costs is reserved to the primary tribunal.
CATCHWORDS:	APPEAL – APPLICATION FOR LEAVE TO APPEAL – MINOR CIVIL DISPUTE – whether reasons for primary decision adequate – where terms of contract left uncertain – decision where insufficiently explained – appeal allowed and proceedings remitted for retrial *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 121, s 122, s 142 *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 *Branson v Repatriation Commission* (1991) 23 ALD 600

Devries v Australian National Railways Commission (1993) 177 CLR 472
Drew v Bundaberg Regional Council [2011] QCA 359
Felton & Anor v Raine and Horne Real Estate [2011] QCATA 330
Fox v Percy (2003) 214 CLR 118
Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd [1983] 3 NSWLR 378
JM v QFG and KG [2000] 1 Qd R 373
Osmond v Public Service Board of New South Wales [1984] 3 NSWLR 447
QUYD Pty Ltd v Marvass Pty Ltd [2009] 1 Qd R 41; [2008] QCA 257
Seablest Pty Ltd (t/a Salamanca Executive Suites) v Smith (1996) 91 LGERA 1
Telstra Corporation v Arden (1994) 20 AAR 285 at 296; [1994] FCA 1239
Wingfoot Australia Partners Pty Ltd v Kocak (2013) 252 CLR 480; [2013] HCA 43

APPEARANCES & REPRESENTATION: Mr J Richards for Axis Contracting Pty Ltd
Ms Lauren Boyle for the applicants

REASONS FOR DECISION

Introduction

[2] At first instance these actions were consolidated and the same procedure is adopted here. The two applications for leave to appeal involve the same applicants, namely Lauren Boyle and Joshua Braiden. For ease and brevity of reference I shall refer to them collectively as "Boyle".

[3] Boyle's applications for leave feature identical grounds of appeal as set out below.[1]

[4] Boyle occupies a semi-rural property at Old Gympie Road, Glass House Mountains, about 80 kms north of Brisbane. On this property there is a dam. Boyle proposed to repair it and line it with plastic waterproofing. To that end she obtained a quotation from the respondent ('Axis'), which advertises itself as providing 'a broad range of services in the electrical, civil, project management and wider technical fields', including 'major resource projects'.

Axis engaged

[5] On 2 September 2021 Axis offered to perform for $17,073.55:

> Earthworks - preliminary clear-out of existing dam, raking/stacking of rocks found to outside of proposed liner area, removal of tree stumps and roots to depth of 3m in proposed liner area, profile dam contours to suit liner dimensions, excavate liner

1 Paragraph [16] below.

> retention trench, doze/backfill dam catchment zone to minimum of 5m from liner boundary, top-dress and seed appropriate native grass/vegetation (floren bluegrass or similar, TBC.

[6] However, that was not a complete, self-contained description of the proposed agreement. There were important provisos:

> Quote is … subject to policies shown at www.axis-contracting.com/policies ... Full terms and conditions is [*sic*] available on request or at www.axis-contracting.com/policies.

And:

> In the event an unforeseen complication is found which will impact time and cost you will be informed of the problem and its estimated impact prior to further work taking place.

[7] Boyle duly accepted that quotation.[2] It does not appear that there was any discussion or comment upon the "policies" addendum or the "unforeseen complications" clause[3] at that stage.

An unforeseen complication

[8] However, Richards (for Axis) says that soon after work began he reported to Boyle that its machinery had encountered 'a sedimentary layer of solid rocks'[4]. Richards advised that removal of the rock would involve 'a dramatic cost increase, as rock excavation was not included in our quote and is clearly a latent condition'.[5] Whether or not an optional method of dealing with this problem was discussed with Boyce is an unresolved issue.[6]

[9] Thereafter, as the Adjudicator found:

> I accept … the fact that he hit solid rock [and] that is a latent issue, it wasn't part of the quote, and therefore, in the absence of any instructions for him to do something else, he was entitled to proceed with the work.[7]

[10] So work continued without any attempt at rock excavation and was (as Axis claims, and the Adjudicator found[8]) satisfactorily completed.

[11] But by no means did Boyle and Braiden share the tribunal's or Axis's satisfaction. On 11 November 2021 Braiden sent an email to the company alleging numerous defects in its performance. Boyle refused to pay the bill.

Ajax sues for debt & Boyle responds

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2 Transcript of hearing 1 November 2022 ('T') page 12 line 36, page 23 lines 36-44, page 28 lines 22-23 (Boyle) page 30 lines 9-10 (Boyle), page 40 lines 4-5 (Adjudicator).

3 See paragraph [5] above.

4 T page 7 lines 11-12, 45 (Richards). Page 8 lines 42-43 (Adjudicator), page 9 line 20 (Richards, referring to photograph), page 10 lines 31, 36 (Adjudicator), page 11 line 6 (Adjudicator), lines 10-11 (Braiden), page 37 line 45 (Adjudicator quoting Richards).

5 T page 37 line 49, page 38 lines 1-2 (Adjudicator quoting Richards).

6 T page 7 line 17 (Richards, affirmative) page 11 lines 3-4 (Braiden *contra*.)

7 T page 40 lines 47-49.

8 T page 41 lines 27-29.

[12] On 13 April 2022 Axis commenced an action in debt seeking payment of $14,004.70 including interest and costs.

[13] Boyle responded with a claim for compensation.

Primary hearing

[14] On 1 November 2022 the tribunal heard and determined claim and counterclaim as a consolidated proceeding. Boyle was ordered to pay Axis $12,602.28 within 21 days and the Boyce counterclaim was dismissed.

[15] In two separate applications Boyle seeks leave to appeal each decision.[9]

[16] In each application for leave the grounds of appeal are identical. Accordingly the two applications will be dealt with as one.

Boyce seeks leave to appeal - grounds

[17] The proposed grounds of appeal are as follows:

(a) The Adjudicator erred by failing to give to give any consideration to the terms and conditions of the contract that applied to the services performed by Axis;

(b) The Adjudicator erred by failing to give adequate reasons in relation to the terms of the contract;

(c) The Adjudicator erred by failing to take into account relevant considerations and evidence of Mr Braiden;

(d) The Adjudicator erred in fact by finding that the dam had not been made smaller by Axis; and

(e) The Adjudicator erred in accepting Axis's evidence over the evidence given by Ms Boyle and Mr Braiden.

[18] With respect to grounds (d) and (e) the difficulties that face appeals against findings of fact and credit are set out in the interlocutory decision of Member Lember in these proceedings, delivered on 28 March 2023.[10] Findings of fact that have some evidence to support them are seldom disturbed on appeal,[11] and assessments of credit that are not 'glaringly improbable' are similarly difficult to displace.[12] An application for leave to appeal is not an opportunity to re-try the case presented at trial, or to `second guess' the primary decision-maker. Rather, it is limited to a search for errors of law, if any, that may have resulted in serious injustice.[13] It is not nearly enough for an applicant for leave to entertain a subjective feeling of dissatisfaction. It is not an error of law to

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9 Leave is required by the QCAT Act s 142(3)(a)(i).

10 Paragraphs [21] to [25].

11 *Fox v Percy* (2003) 214 CLR 118 at 125-126.

12 *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479.

13 *QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41; [2008] QCA 257 at [6]; *Drew v Bundaberg Regional Council* [2011] QCA 359 at [18]; *Felton & Anor v Raine and Horne Real Estate* [2011] QCATA 330 at [19].

prefer one party's version to the other's, or to give less weight to evidence than a party thinks it should receive:

> If there is evidence ... no error of law occurs simply because the judge prefers one version of evidence to another, or one set of inferences to another. That is his function ... Even if the evidence is strongly one way the appeal court may not interfere simply because it reaches a different conclusion … even if it regards the conclusion of the trial judge as against the weight of the evidence.[14]

[19] As a distinguished Queensland judge observed:

> That this Court merely disagrees with a factual view of a tribunal does not show that a decision based on it is legally erroneous.[15]

Question of law – adequacy of reasons

[20] However, if we focus on grounds (a), (b) and (c)[16] a question of law does arise. At the hearing I suggested to the parties, and they agreed, that those grounds may be crystallised as the central issue, namely whether the reasons given for the subject decisions are adequate.

[21] QCAT has a statutory as well as a common law duty to give adequate reasons for its decisions at first instance.[17] Inadequacy of reasons is an error of law[18] and a denial of natural justice,[19] which renders the decision liable to be set aside.

[22] But 'adequacy' may be a vexed question; 'the extent to which a [tribunal] must go in giving reasons is not capable of precise definition'.[20] No mechanical formula can be given in determining what reasons are required.[21] It is a matter of judgment and degree, considering, *inter alia,* the gravity of the case, the issues in order of importance, the qualifications of the tribunal, the urgency of the decision, and so on.

[23] The same standards are not demanded of all decision makers. Tolerance is extended to tribunals with no legal qualifications or experience, particularly those not required to adjudicate often. The following comment related to a planning committee with no legal training:

> A specialist tribunal consisting of persons inexperienced in the … use of legal language ought not to be expected to craft reasons for judgment in the style of the High Court … It is inappropriate to undertake an over-zealous exercise in reviewing the language used.[22]

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14 *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 151 per Kirby P.

15 *JM v QFG and KG* [2000] 1 Qd R 373 at 391 per Pincus JA.

16 See paragraph [16] above.

17 QCAT Act s 121, s 122.

18 *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480; [2013] HCA 43 at [28].

19 *Osmond v Public Service Board of New South Wales* [1984] 3 NSWLR 447 at 468, 476, 478, 480.

20 *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378 at 381; *Telstra Corporation v Arden* (1994) 20 AAR 285 at 296; [1994] FCA 1239 at [30] per Burchett J.

21 *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 at 443 per Meagher JA.

22 *Seablest Pty Ltd (t/a Salamanca Executive Suites v Smith* (1996) 91 LGERA 1 per Slicer J; see also *Branson v Repatriation Commission* (1991) 23 ALD 600 per O'Loughlin J.

[24] Lay tribunals occupy the lower end of the scale when adequacy of reasons is in question[23]:

> The standard expected should be adjusted to the circumstances,[24] including the nature of the question to be decided, the functions, attributes and talents of the member or members.[25]

[25] The expected standard rises when the tribunal is legally qualified, has curial experience and regularly engages in adjudication. However, moderation in critical appraisal should still be exercised. Differences between courts and tribunals must not be overlooked.[26] A critic must not 'impose such onerous burdens on [tribunals] as to cause them to be afraid to make decisions lest they be challenged on trivial grounds.'[27] Inferior courts seldom enjoy the jurisprudential leisure of superior courts. Sympathy has been shown for "overloaded" tribunals.[28] "The realities of pressure of work and limited time in the magistrates' court must be acknowledged".[29] Trial judges and tribunals 'must always endeavour to balance their duty to explain with their duty to be brief.

[26] Even so, 'a judge or magistrate at first instance … has an obligation to provide reasons for the judgment given. That obligation arises as a matter of judicial duty.'[30] 'A failure to provide sufficient reasons can and often does lead to a real sense of grievance that a party does not know or understand why the decision was made'.[31]

Primary decision - analysis

[27] Omitting two paragraphs of procedural history the subject decision ('the decision') occupies less than three pages of a 41-page transcript.

[28] The decision bluntly declares that: 'According to the quote that was accepted I consider that the work was done. There's nothing to suggest that it wasn't'.[32]

[29] It is sometimes difficult to discern whether version "A" of the respective parties' evidence facts is clearly preferred as a firm finding to version "B", and if so, why?

Terms of contract unresolved

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23 *Sydney United Football Club v Soccer New South Wales* [2005] NSWSC 474 at [54] per McDougall J.

24 *Drew v Makita (Australia) Pty Ltd* [2009] 2 Qd R 219; [2009] QCA 66 at [60].

25 *Cypressvale Pty Ltd v Retail Shop Leases Tribunal* [1996] 2 Qd R 462 at 485; *Boynes v Brown Group Personnel Pty Ltd* [2015] VSC 702 at [30] (medical tribunal's reasons not to be "scrutinised over-zealously").

26 *Queensland v Mahommed* (2007) EOC ¶93-452; [2007] QSC 18 at [34].

27 *Toy Centre Agencies Pty Ltd v Spencer* (1983) 46 ALR 351 at 359; 67 FLR 458 at 466 per Lockhart J.

28 *Absolon v NSW Technical and Further Education Commission* (1997) 75 IR 47 (arguments accepted, and those rejected, not clearly shown); affirmed [1999] NSWCA 311; *Manonai v Burns* [2011] WASCA 165 at [56].

29 *Manonai v Burns* [2011] WASCA 165 at [56] per Hall J; *Commissioner of Taxation v Baffsky* (2001) 122 A Crim R 568 at 578 per Spigelman CJ (*extempore* judgments).

30 *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 at 441 per Meagher JA.

31 *Beale* at 442.

32 T page 41 lines 27-29.

[30] But precisely what had the terms of the fundamental contract become by the time the work was done? Performance of what contract was being approved? At no stage did the quotation and its acceptance necessarily amount to a contract one and entire. The quotation incorporates by reference the company's standard 'terms and conditions', to be viewed elsewhere.[33] Did any of those 'terms and conditions' modify the terms of the quotation, and if so, to what effect?

Further, the terms of the original agreement were altered when Axis claimed an 'unforeseeable complication', and Boyce consented to, or acquiesced in a corresponding alteration to the depth of the 'proposed liner area'.[34] Did that affect the original terms of the contract, and if so, how? The quality and depth of excavation was a particular issue.[35]

An arbitrary ruling?

[31] In the circumstances the summary ruling: 'According to the quote that was accepted I consider that the work was done' is, with respect, unduly vague and sweeping

> 'The statement of bare conclusions without the statement of reasons will always expose the tribunal to the suggestion that it has not given close enough attention'.[36]
>
> "Where nothing exists but an assertion of satisfaction on undifferentiated evidence judicial obligation has not been discharged".[37]
>
> "Vague general statements or unexplained conclusions are not sufficient".[38]

[32] As appears above, I bear in mind the pressures under which the tribunal at first instance, is required to work But it is not a lay tribunal sitting just once in a while. Reluctantly I am drawn to the conclusion that the reasons given for the decision are insufficient. It follows that the decision cannot stand, and that the matter must be remitted for rehearing on the merits. The present application for leave to appeal is not the occasion for a retrial.

Extempore decision adequate?

[33] The issues are not uncomplicated, and there is a considerable body of conflicting evidence. I suggest, with respect, that the tribunal could appropriately have reserved its decision for more extensive consideration. Although primary decisions are often given extempore, decisions reserved, sometimes for considerable periods, are by no means unprecedented.

[34] It is unnecessary to discuss the applicants' other grounds of appeal, or their application to lead new evidence. Suffice it to say that such an application will inevitably fail unless it is shown that the new material was not reasonably available at the time of the trial.

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33 At website www.axis-contracting.com/.policies/.

34 T page 40 lines 40-43.

35 T page 3 lines 5-6, page 11 lines 10-12 (Braiden).

36 *Commonwealth v Pharmacy Guild of Australia* (1989) 91 ALR 65 at 88 per Sheppard J.

37 *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 249 per Kirby P.

38 *Cypressvale Pty Ltd v Retail Shop Leases Tribunal* [1996] 2 Qd R 462 at 477 per Fitzgerald P. In this case the reasons of the tribunal were deemed adequate.

ORDERS

(i) Leave to appeal is granted;

(ii) The appeal is allowed;

(iii) The decision made herein on 1 November 2022 is set aside;

(iv) The proceedings are remitted to the Registrar for retrial on a date to be fixed;

(v) The question of costs is reserved to the primary tribunal.