SUPREME COURT OF QUEENSLAND

CITATION:	*Medical Board of Australia v Judge Horneman-Wren & Leggett* [2013] QSC 339
PARTIES:	**MEDICAL BOARD OF AUSTRALIA** (applicant) **v** **ALEXANDER HORNEMAN-WREN SC, DCJ ACTING IN HIS CAPACITY AS A JUDICIAL MEMBER OF THE QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL** (first respondent) and **DR ANDREW ALFRED GEORGE LEGGETT** (second respondent)
FILE NO/S:	BS 8973 of 2013
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	13 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	19 and 26 November 2013
JUDGE:	Dalton J
ORDER:	**Application dismissed**
COUNSEL:	D Williams for the applicant G Diehm QC for the second respondent
SOLICITORS:	McInnes Wilson for the applicant Crown Solicitor for the first respondent Quinlan Miller Treston for the second respondent

[1] This is an application made pursuant to s 26(1)(b) of the *Judicial Review Act* 1991 to extend time in which to bring a proceeding for a statutory order for review. The Medical Board seeks to impugn a decision of the Deputy President of QCAT refusing it leave to add a new ground to a complaint it is prosecuting against Dr Leggett in QCAT. The complaint brought by the Medical Board in QCAT originally had two grounds: (i) that during the course of treating a female patient over eight years, Dr Leggett allowed the relationship with the patient to become personal and sexual, and (ii) that after ceasing treatment of this patient, Dr Leggett,

after "an inappropriate interval" (one assumes inappropriately short), began a sexual relationship with the patient.

[2] Dr Leggett asked for particulars of various allegations made, received an inadequate response from the Board, and applied for parts of the complaint to be struck out. This application was heard by the Deputy President who gave a decision on 19 February 2013. Relevantly to the matter in issue before me, the Deputy President struck out part of the second ground pleaded against Dr Leggett. The pleading of that second ground was that, after termination of the doctor/patient relationship, Dr Leggett "made no appropriate arrangement for referring [the patient] to an alternative medical practitioner for continuation of any psychiatric treatment". The Deputy President struck out this allegation on the grounds that, despite request, the Medical Board had not provided any particulars supporting the existence of a duty to refer the patient. In response to such a request the Board had simply said:

> "The the [sic] particulars of each and every fact, matter or circumstance by or from which it is to be inferred that the Registrant was under a duty to [the patient], after termination of the treating relationship, to refer her to a medical practitioner for psychiatric treatment, is a duty residing in the Registrant to make appropriate referral arrangements of [the patient] to another medical practitioner for psychiatric treatment and in the circumstances, the Registrant by omission did not do so."

[3] The Deputy President criticised these particulars and pointed out that they did not provide any facts, matters or circumstances – see [40] of the decision of 19 February 2013.

[4] Following the decision to strike out, the Medical Board made an application in writing to QCAT, expressed to be pursuant to s 64 or s 58 of the *Queensland Civil and Administrative Tribunal Act* 2009, for leave to file and serve "amended particulars of disciplinary action". Relevantly the proposed new pleading against Dr Leggett was to add what was described as a third ground of professional misconduct:

> "… the Registrant made no appropriate arrangement at the cessation of the treating relationship for referring [the patient] to an alternative medical practitioner for continuation of any psychiatric or counselling treatment in breach of his obligations as a medical practitioner, such duty or obligation arising from conduct in which he:
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> 3.1.1 Engaged in conduct of a sexualized nature during the treating relationship as particularized in 1.2.3 to 1.2.8 above;
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> 3.1.2 Had knowledge that the relationship had become sexualized;
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> 3.1.3 Stated to [the patient], shortly prior to the termination of the treating relationship, that '*I wish I could have you both*' referring to her and his wife Ann;
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> 3.1.4 Had been advised at some point after 2000 by his supervisor to terminate the treating relationship on the basis of the physical relationship between himself and [the patient];

> 3.1.5 Had knowledge, or should reasonably have known of the transference issues arising from an extended period of psychotherapy involving 3 sessions per week from 1994 onwards;
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> 3.1.6 He received from [the patient] a letter from Paris in 2001 that said she was missing him;
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> 3.1.7 He sent correspondence to [the patient] in 2001 suggesting a recommencement of the treating relationship;
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> 3.1.8 He initiated sexualized conduct involving lap-sitting and prolonged hugging upon restarting the treating relationship in 2002;
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> 3.1.9 He stipulated in the final session of treatment in August 2002 a 1 year no contact period between them;
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> 3.1.10 He had knowledge of [the patient's] low mood and visible distress in the final few sessions of treatment in 2002 which ought have suggested to him that the treatment termination process had not been satisfactorily concluded."

[5] This application was heard on the papers in accordance with s 32 of the *QCAT Act*. When making the application the applicant had the opportunity to make submissions or provide affidavit material. The applicant did not do so. The Board made written submissions as to why QCAT ought not allow the amendment sought, and the applicant made written submissions in reply to those. The Deputy President refused the application to amend the pleading to add the third ground. That decision was made on 14 May 2013 and it is that decision which is sought to be impugned in this Court.

[6] The similarity between that part of the second ground struck out by the Deputy President on 19 February 2013, and the third ground sought to be added to the complaint after that decision, will have been noted. The Deputy President gave reasons for his decision of 14 May 2013. He recorded Dr Leggett's opposition to the amendment and his argument that, at least in respect of subparagraphs 3.1.1-3.1.9, the proposed third ground suffered from the same, or similar, deficiencies as that part of ground 2 which the Deputy President had previously struck out. He found that paragraphs 3.1.1-3.1.9 did not identify facts, matters and circumstances to support the plea of a duty at the cessation of the treating relationship to refer the patient to another psychiatrist. He considered that the fact alleged at paragraph 3.1.10 was ambiguous and not sufficient to save the otherwise deficient pleading.

[7] The Deputy President noted the submissions made on behalf of Dr Leggett to the effect that logically, the only sensible basis for referral to a psychiatrist was clinical need (which was not distinctly alleged). He noted that the Board contradicted that proposition in its submissions in reply. Further, he noted neither the Board nor Dr Leggett relied upon any expert or other evidence in making their respective submissions but, as it were, put their points of view on the basis of logic or commonsense.

[8] The Deputy President noted the Medical Board's submission that to determine that clinical need was the only criteria for referral would be to determine a matter it

sought to raise as an issue in the proceedings without a hearing. He went on to say of that submission, "The Board's submission does not grapple with the fundamental flaw in the pleading of ground three that the duty or obligation is said to have existed, at the end of the treating relationship, because of matters … concerning Dr Leggett's conduct at various times during the treating relationship, rather than any clinical need for treatment …". The Deputy President took the view that Dr Leggett's objections were not met by saying it ought to be left to a trial to see if there was any evidence to support the obligation alleged; the question before him was whether Dr Leggett ought to be put to answering the ground. The Deputy President found that he ought not. He described the submissions made on the part of the Board as erroneous and failing to come to grips with the point at issue before him – "whether a sufficiently particularised allegation of the existence of an obligation has been made". That is, the Deputy President looked to see whether there were facts alleged capable of supporting the duty pleaded. His approach was entirely orthodox. He was determining a pleading matter, not a substantive matter.

[9] After the decision of 14 May 2013 the Medical Board filed an appeal to the Court of Appeal against this decision. It then withdrew its appeal, acknowledging it had no right to appeal – see s 398ZI of the *Health Practitioners (Disciplinary Proceedings) Act* 1999. Then, outside the 28 days limited by s 26(2) of the *Judicial Review Act*, the Medical Board decided to seek a statutory order for review in relation to the Deputy President's decision not to allow it to add the third ground. In these circumstances the application came before me for leave to extend time pursuant to s 26(1)(b) of that Act.

[10] A factor which is fundamental to exercising a discretion to extend time to allow this proceeding for a statutory order for review to proceed is the utility of any such proceeding. In my view there is no utility, as the proposed proceeding is without merit, so much so that I am content to determine that point on a summary hearing – cf *General Steel Industries Inc v Commissioner for Railways (NSW).*[1] The Medical Board faces two insuperable obstacles. One is that a statutory order for review is available under the *Judicial Review Act* to "a person who is aggrieved by a decision to which this Act applies …" – s 20(1). Section 4 of the *Judicial Review Act* defines "a decision to which this Act applies" as being (whatever else) a decision of an administrative character. It is clear that the decision of the Deputy President which it is sought to challenge is of a judicial character. The second obstacle faced by the Medical Board is that s 156 of the *QCAT Act* provides that the *Judicial Review Act*, Parts 3-5, do not apply to a decision of QCAT other than "to the extent the decision … is affected by jurisdictional error". Equally clearly, the decision complained of here is not one which could sensibly be argued to be affected by jurisdictional error.

[11] As to the first point, the distinction between administrative and judicial power is authoritatively stated in *Brandy v Human Rights & Equal Opportunity Commission*.[2] Judicial power is characterised by the making of a binding and authoritative decision, whether that decision is subject to appeal or not. The decision is reached by application of a judicial method: "… by applying the relevant principles of law to the facts as found" – p 258. The point of a judicial decision is that it ascertains, and adjudicates upon, the rights of the parties. If a decision has

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1 (1964) 112 CLR 125.

2 (1994-1995) 183 CLR 245, 256-259.

these characteristics, it does not matter that it is made by a Tribunal and not a Court, the exercise of power, and the decision, is judicial.

[12] In the proceeding brought by the Medical Board against Dr Leggett, QCAT is exercising its original jurisdiction – s 9(2)(a) *QCAT Act*, granted to it under the *HP(DP) Act*, an enabling Act within the meaning of s 6 of the *QCAT Act.* That jurisdiction is a jurisdiction to hear and determine a matter referred to it by a National Board pursuant to s 193 of the *Health Practitioner Regulation National Law Act* 2009 – see s 398ZA(1) of the *HP(DP) Act.* When one turns to s 193 of the *HPRNL Act* one sees that a National Board must refer to the Tribunal matters where it alleges that a medical practitioner has behaved in a way which constitutes professional misconduct. Division 12 of Part 8 of the *HPRNL Act* makes provision for appropriate notice to be given so that natural justice can be done between any relevant parties. There is provision at s 196 for QCAT to decide whether or not there has been professional misconduct, and if so whether the practitioner's rights to practice should be conditioned, suspended or cancelled (*inter alia*). Division 13 of Part 8 of the *HPRNL Act* provides that persons whose rights are affected by the decision of QCAT have rights to appeal. Division 5 of Part 12A of the *HP(DP) Act* provides for the giving of notice of the hearing of a disciplinary proceeding so as to ensure natural justice is accorded to the parties and they have the right to be heard. Division 6 of Part 12A of the *HP(DP) Act* provides for notice of QCAT's "final decision" in disciplinary proceedings to be given to the relevant people and provides that the QCAT decision must include reasons and information about appeal rights. It is clear, beyond argument, that QCAT's role in this process is to make final (subject to appeal) determinations of fact based on evidence and law after giving all relevant parties an opportunity to be heard. The decisions will determine what are the legal rights and obligations of the parties before the Tribunal and will affect them in a binding way. The process is a judicial one. See generally s 164 of the *QCAT Act* which provides that QCAT is a Court of record, and *Owen v Menzies & Ors*[3] as to QCAT being a Chapter III Court.

[13] In this matter, as part of the judicial process being carried out in QCAT, an interlocutory application was made, expressly pursuant to s 64 or alternatively s 58 of the *QCAT Act.* It was made on the papers pursuant to s 32 of the *QCAT Act.* That is part of Chapter 2 Part 2 of the *QCAT Act* which deals with practice and procedure. Section 28(3) obliges QCAT to observe the rules of natural justice. The Medical Board had every opportunity to place before the Deputy President anything it wished to in support of its application. It also had the opportunity to reply to Dr Leggett's submissions. The decision of the Deputy President was an interlocutory one, but nonetheless authoritative as to the Board's right to amend its pleading. It was made by applying the relevant law to the facts. It binds the parties to it. It is a judicial decision.

[14] Equally clear in my opinion is the fact that the decision made by the Deputy President could not arguably be impugned on the basis of jurisdictional error. The High Court in *Craig v South Australia*[4] discussed what will constitute jurisdictional error on the part of an inferior Court. This dicta was affirmed in *Kirk v Industrial Relations Commission (NSW).*[5] In *Kirk* the High Court adopted what *Craig* had

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3 [2013] 2 Qd R 327.
4 (1994-1995) 184 CLR 163, 176 ff.
5 (2010) 239 CLR 531, 573, 574.

said, that an inferior Court will fall into jurisdictional error, "if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist." Next, again by reference to *Craig's* case, jurisdictional error will be "at its most obvious where the inferior Court purports to act wholly or partly outside the general area of its jurisdiction in the sense of entertaining a matter or making a decision or order of a kind which wholly or partly lies outside the theoretical limits of its functions and powers". Lastly, an inferior Court will make a jurisdictional error if it acts in the absence of a jurisdictional fact; disregard of a matter which a statute requires be taken into account as a condition of jurisdiction, or misconstruing a statute which gives it its power, so that it misconceives "the nature of the function" which it is performing. In *Kirk* the High Court recognised that *Craig* should not "be seen as providing a rigid taxonomy of jurisdictional error" – p 574.

[15] In *Craig's* case the High Court expressly rejected the statements of Lord Reid in *Anisminic* as to jurisdictional error, at least where that concept is to be applied to an inferior Court which has the authority to decide questions of law as well as questions of fact for itself – p 178-197. The applicant's written submissions completely missed this point and extracted passage after passage dealing with what will constitute jurisdictional error in an administrator.

[16] The grounds sought to be agitated in the proceeding for a statutory order of review are enumerated in the amended application which I granted leave to read and file on 26 November 2013. They rest in part on an untenable view of s 64 of the *QCAT Act* which was said to compel the Deputy President simply to accept an amended pleading or complaint from the Medical Board on the basis that it was proffered *simpliciter*. (One wonders why an application was made.) The other failures to take into account statutory requirements particularised in the amended application are in my view equally untenable. Further, these grounds make the mistaken assertion that the Deputy President made a factual finding, in advance of the hearing, that no relevant duty could be owed in the circumstances sought to be agitated by the Medical Board. This mistakes the whole point of the Deputy President's reasons and decisions. He did not make that factual finding. The finding he made was that the pleading did not particularise any factual basis sufficient to support the plea contended for.

[17] Last, it was contended that the decision of the Deputy President was so unreasonable that it could be vitiated on *Wednesbury* grounds. It was contended on the basis of *Minister for Immigration and Citizenship v Li*[6] that *Wednesbury* unreasonableness amounted to jurisdictional error in an inferior Court. I do not think the High Court in that case was concerned with notions of jurisdictional error, although the judgments provide an extensive analysis of the origin and content of the duty to act reasonably in exercising a discretion. In my view there could be no tenable argument in this case that the decision of the Deputy President to refuse leave to amend to add the third ground against Dr Leggett was unreasonable in the *Wednesbury* sense. The decision was a discretionary one on a matter of practice and procedure: it would be difficult to challenge even if the Medical Board had a right to appeal on the merits.[7] The Deputy President exercised a discretion in a perfectly

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6 [2013] HCA 18.

7 *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170.

orthodox manner within the four corners of the field entrusted to him by statute. If there was any error (and I am not suggesting there was) it was his to make.

[18] There is no utility in giving leave to enlarge the time, for the proceeding is bound to fail for the reasons just outlined. This overwhelms any other factors which might normally weigh in my discretion, such as delay on the part of the applicant, prejudice to the respondent and any notions about the public interest, so I deal with those matters very shortly. In my view there has been delay on the part of the applicant which is explained only by its own error. This factor weighs against granting leave to extend time. So does the fact that the proceedings against Dr Leggett are becoming more and more delayed in their determination and that delay is due to the failure of the Medical Board first to plead properly, second to provide proper particulars when asked, and now in persisting with the March 2013 application to amend. In the meantime Dr Leggett's practice of his profession is disturbed. Further, the proceeding in QCAT itself is a proceeding dealing with conduct alleged to have taken place between 1994 and 2002. The Medical Board asserted there is a matter of public interest which might favour its having an extension of time within which to bring this proceeding. There are no matters of public interest involved in the QCAT proceedings. It is a disciplinary proceeding concerned with the facts peculiar to the treating relationship in issue.

[19] I dismiss the application. I will hear the parties as to costs.