

SUPREME COURT OF QUEENSLAND

CITATION: *Greg Beer t/a G & L Beer Covercreting v J M Kelly (Project Builders) P/L* [2008] QCA 35

PARTIES: **GREG BEER t/a G & L BEER COVERCRETING**
(applicant/appellant)
v
J M KELLY (PROJECT BUILDERS) PTY LTD
ACN 010 280 412
(respondent)

FILE NO/S: Appeal No 10415 of 2007
DC No 2515 of 2007

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 29 February 2008

DELIVERED AT: Brisbane

HEARING DATE: 14 February 2008

JUDGES: Holmes and Muir JJA and Mackenzie AJA
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDER: **1. Allow the appeal, and set aside the orders of 22 October 2007**
2. Order the respondent to pay the appellant's costs at first instance and on appeal

Orders made ex tempore by McMurdo P on 29 February 2008:

- 1. Vacate orders of published judgment**
- 2. Parties are to make further written submissions within 7 days regarding all outstanding issues**
- 3. Parties are directed to follow the directions of the Deputy Registrar (Appeals)**
- 4. Transcript of today's hearing to be prepared**

CATCHWORDS: STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – RULES OF CONSTRUCTION – WORDS TO BE GIVEN LITERAL AND GRAMMATICAL MEANING – where the appellant carried out works for the respondent under a licence class “Painting and Decorating” – where a condition restricted the licence to “residential spray on painting” – construction of s 42(1) *Queensland Building Services Authority Act 1991* (Qld) – whether “licence of the

appropriate class” can be read subject to any work-restrictive condition on a licence – limitations of the power of the court when construing a statute, to interfere with the language chosen by the legislature

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – RULES OF CONSTRUCTION – GENERALLY – whether s 30(3) *Queensland Building Services Authority Act* 1991 (Qld) authorised the creation of a class of licence of “painting and decorating restricted to residential spray on painting” – whether, alternatively s 29 of Sch 1 of *Mutual Recognition (Queensland) Act* 1992 allowed the creation of the specific class of “painting and decorating restricted to residential spray on painting”

Mutual Recognition (Queensland) Act 1992 (Qld), s 29 of Sch 1

Queensland Building Services Authority Act 1991 (Qld), s 30, s 31, s 34, s 42

Queensland Building Services Authority Regulation 2003 (Qld), s 14, Pt 41 of Sch 2

Inco Europe Ltd v First Choice Distribution (A Firm) [2000] 1 WLR 586, considered

Jones v Wrotham Park Settled Estates [1980] AC 74, considered

Nominal Defendant v Ravenscroft [2007] QCA 435, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, considered

COUNSEL: M H Hindman for the appellant
B E Codd for the respondent

SOLICITORS: Clayton Utz for the appellant
Dibbs Abbott Stillman for the respondent

- [1] **HOLMES JA:** I agree with the reasons of Muir JA and the orders he proposes.
- [2] **MUIR JA:** This appeal concerns the construction of s 42(1) of the *Queensland Building Services Authority Act* 1991 (Qld) (“the Act”) which provides:
“A person must not carry out, or undertake to carry out, building work unless that person holds a contractor’s licence of the appropriate class under this Act.”
- [3] The appellant contractor held a licence under the Act which was described in a search of the licensing authority’s records, under the heading “Licence Class”, as “Painting and Decorating”. The Licence contained a condition restricting it to “residential spray-on painting only.”
- [4] The appellant did building works, pursuant to a contract with the respondent, which, it is conceded, were within the scope of work permitted by the licence class “Painting and Decorating” but which were outside the restriction,

“residential spray-on painting only”. For those works the appellant claimed payment of \$87,231.20. Payment was not made and by originating application, the appellant commenced proceedings in the District Court and sought judgment against the respondent pursuant to s 19 of the *Building and Construction Industry Payments Act 2004* (Qld).

- [5] The application was resisted on grounds which included the ground that recovery was prohibited by s 42(3) of the Act because the appellant was alleged to have carried out the work without holding a contractor’s licence of the appropriate class.
- [6] The primary judge upheld the respondent’s submission on the construction of s 42(1) finding that a “licence of the appropriate class” within the meaning of s 42(1) is to be read subject to any work-restrictive condition on a licence. The central questions for determination on this appeal are whether that conclusion and the respondent’s alternative argument that the Licence was for a class other than “Painting and Decorating”, namely “Painting and Decorating restricted to residential spray on painting”, are correct.

Relevant provisions of the Act

- [7] The provisions of the Act relevant for present purposes in the form in which they existed on 28 April 2005 are set out below. Passages of particular relevance are in italics.

“30 Classes of contractors’ licences

(1) A licence (a contractor’s licence) may be issued authorising the licensee—

- (a) to carry out all classes of building work; or
- (b) to carry out building work of 1 or more classes specified in the licence.

(2) *Contractors’ licences are to be divided into classes by regulation-*

- (a) *according to whether the licence relates to all classes of building work or is limited to a specified class or specified classes of building work; and*
- (b) *if the licence is limited to a specified class, or specified classes, of building work--according to the class or classes of building work to which it relates.*

(3) *A contractor’s licence may be issued for any class of licence.*

(4) However, a regulation may specify a class of licence to be a class that may be held and renewed by a person who held that class immediately before the commencement of the regulation specifying the class but may not, after the

commencement of that regulation, be applied for by, or issued to, another person.

31 Entitlement to contractor's licence

(1) A person (not being a company) is entitled to a contractor's licence if the authority is, on application by that person, satisfied that—

- (a) the applicant is a fit and proper person to hold the licence; and*
- (b) the applicant has the qualifications and experience required by regulation in relation to a licence of the relevant class; and*
- (c) the applicant satisfies the relevant financial requirements stated in the board's policies; and
- (d) the applicant can lawfully work in Queensland; and
- (e) the applicant is not an excluded individual for a relevant event or a permanently excluded individual; and
- (f) the applicant is not a disqualified individual; and
- (g) the applicant is not a banned individual; and
- (h) the applicant does not have an unpaid judgement debt for an amount the authority may recover under section 71.

(2) A company is entitled to a contractor's licence if the authority is satisfied, on application by that company for a licence, that—

- (a) the directors, secretary and influential persons for the company are fit and proper persons to exercise control or influence over a company that holds a contractor's licence; and
- (b) the company's nominee holds a licence specifically identifying, as a class of building work that the nominee may supervise, the same class of building work for which the licence is sought by the company; and

- (c) the applicant satisfies the relevant financial requirements stated in the board's policies; and
- (d) the company is not an excluded company; and
- (e) the company is not a company for which a banned or disqualified individual is a director, secretary, influential person or nominee; and
- (f) neither the company, nor a director, secretary, influential person or nominee of the company has an unpaid judgement debt for an amount the authority may recover under section 71.

34 Grant of licence

(1) If the authority is satisfied, on an application under this division, that the applicant is entitled to a licence, the authority must issue a licence of the appropriate class.

(2) A licence is to be in the form of a card and must—

- (a) state the licensee's name and licence number; and*
- (b) state the type of licence; and*
- (c) state the class of building work the licensee is licensed to carry out; and*
- (d) if the licensee is an individual, contain a recent photograph of the licensee; and*
- (e) state when the licence is due for renewal.*

35 Imposition of conditions etc. on grant of licence

(1) A licence may be granted subject to such conditions as the authority considers appropriate.

(2) Without limiting subsection (1), a licence for which an occupational licence is required is taken to be subject to the condition that the licensee hold, and continue to hold, for the term of the licence, the occupational licence.

(3) Without limiting subsection (1), a contractor's licence is subject to the condition that—

- (a) the licensee's financial circumstances must at all times satisfy the relevant financial requirements stated in the board's policies; and*

- (b) variations of the contractor's turnover and assets must be notified, or notified and approved, in accordance with the relevant financial requirements stated in the board's policies.”

36 Subsequent imposition of conditions etc.

(1) If the authority has reason to believe—

- (a) that a licensee may have insufficient financial resources to meet possible liabilities in relation to building work; or
- (b) that there is some other proper ground for imposing a condition on the licence;

the authority may notify the licensee of the proposed condition and invite the licensee, within a period specified in the notice, to make written representations on the proposal.

(2) After considering the written representations (if any) made by the licensee, the authority, if satisfied that the condition is appropriate, may, by notice to the licensee, impose the condition.

(3) A condition may be imposed preventing the licensee from continuing to carry on business until the licensee has lodged with the authority appropriate security against possible liabilities in relation to building work.

(3A) A condition may be imposed requiring the licensee to complete a course module included in technical or managerial national competency standards relevant to the building industry.”

42 Unlawful carrying out of building work

(1) A person must not carry out, or undertake to carry out, building work unless that person holds a contractor's licence of the appropriate class under this Act.

...

(3) Subject to subsection (4), a person who carries out building work in contravention of this section is not entitled to any monetary or other consideration for doing so.

(4) A person is not stopped under subsection (3) from claiming reasonable remuneration for carrying out building work, but only if the amount claimed—

- (a) is not more than the amount paid by the person in supplying materials and labour for carrying out the building work; and
- (b) does not include allowance for any of the following—
 - (i) the supply of the person's own labour;
 - (ii) the making of a profit by the person for carrying out the building work;
 - (iii) costs incurred by the person in supplying materials and labour if, in the circumstances, the costs were not reasonably incurred; and
- (c) is not more than any amount agreed to, or agreed to, as the price for carrying out the building work; and
- (d) does not include any amount paid by the person that may fairly be characterised as being, in substance, an amount paid for the person's own direct or indirect benefit.

(5) An unlicensed person who carries out, in the course of employment, building work for which that person's employer holds a licence of the appropriate class under this Act does not contravene this section.

(5A) An unlicensed person who, as a subcontractor, carries out, or undertakes to carry out, building work for a licensed trade contractor, does not contravene this section if the work is within the scope of the building work allowed by the class of licence held by the contractor. . . .

(7) An unlicensed person who carries out, or undertakes to carry out, building work in partnership with a person who is licensed to carry out building work of the relevant class does not contravene this section.

. . .

(9) A person who contravenes this section commits an offence.

Maximum penalty—250 penalty units.”¹

48 Cancellation or suspension of licence

The authority may suspend or cancel a licence if—

- (h) the licensee contravened a condition to which the licence is subject under section 35 or that is imposed under section

¹ *The Act*, s 42(1) - (4)

36 on the licensee's licence; or”²

89 Proper grounds for disciplinary action against a licensee

For section 88, proper grounds exist for taking disciplinary action against a licensee if—

(k) the licensee contravenes a condition of the licence;

“**contractor’s licence**” means a licence authorising the licensee to carry out, and to supervise, building work.³

“**condition**” includes a limitation or restriction.”⁴

Relevant provisions of the Queensland Building and Services Authority Regulation 2003

[8] Section 14 of the *Queensland Building and Services Authority Regulation 2003* (Qld)⁵ divides licences into classes in accordance with Schedule 2 and provides that a contractor’s licence may be issued for any class of licence. Schedule 2 contains 56 parts, each of which provides for a particular class of licence and identifies, in respect of that class, the scope of the works relevant to it and the technical qualifications, managerial qualifications and experience required by the licensee. A financial requirement is specified also.

[9] Part 41 concerns “Painting and Decorating”. The specified scope of the work for that class is:

“2 Scope of work

(1) Apply paint or other substance for protective, decorative or technical purposes, including colour matching.

(2) Apply texture coatings.

(3) Apply wall paper.

(4) Prepare surfaces for application of paint or other protective, decorative or technical materials.

(5) Incidental work of another class.”

The appellant’s licence

[10] Neither the Licence, nor a copy of it, is in evidence. Nor is a certificate of the Authority under s 41 of the Act. The evidence as to the class of the Licence is provided by a “licence search – individual” issued by the Authority pursuant to s 39 of the Act. Section 39 provides for a right of inspection of the Register maintained by the Authority, purportedly on payment of a fee, but appears to contain no provision for the issue of written material in relation to searches.

² *The Act*, s 48 (h)

³ *The Act*, Sch 2, definition “contractor’s licence”

⁴ *The Act*, Sch 2, definition “condition”

⁵ In the form it was in at the date of commencement of the licence on 28 April 2005

That role falls to s 41, which empowers the Authority to issue a certificate to applicants on payment of a fee. The certificate is admissible in legal proceedings as evidence of any matter stated in it. Argument at first instance and on appeal proceeded on the assumption that the search information accurately represented the contents of the licence. There is no reason to believe that the assumption was ill-founded.

- [11] The relevant part of the front page of the search form is as follows:

LICENCE CLASS STATUS			
LICENCE CLASS	LICENCE GRADE	CONDITION	STATUS
PAINTING AND DECORATING	TRADE CONTRACTOR LICENCE	YES	ACTIVE

NOTE: Where BSA has imposed a condition, full particulars within the Licence History Section

- [12] The second page contains the following:

HISTORY

LICENCE CLASSES				
PAINTING AND DECORATING				
Date From	Date To	Type	Status	Reason
28 APRIL 2005	CURRENT	TRADE CONTRACTOR LICENCE	ACTIVE	NEW APPLICATION
CONDITIONS / ENDORSEMENTS				
Start Date	End Date	Type		
28 Apr 2005	Current	Condition		
Details				
RESTRICTED TO RESIDENTIAL SPRAY ON PAINTING ONLY				

The scheme of the Act and Regulations

- [13] Under s 30 of the Act, a licence may be issued authorising the licensee to carry out building work of the class or classes specified in the licence. That section requires also that contractors' licences be divided into classes by regulation "according to whether the licence relates to all classes of building work or is limited to a specified class or specified classes . . .". Where the licence is not a general one it is to be "limited to a specified class, or specified classes, of

building work – according to the class or classes of building work to which it relates.”⁶

- [14] Section 30(3) provides that a contractor’s licence may be issued for any class of licence. Under s 35 a licence may be granted subject to such conditions as the Authority considers appropriate. “Conditions” is defined to include “a limitation or restriction”.
- [15] A natural person applicant for a contractor’s licence has an entitlement to a licence if the Authority is satisfied that the applicant has met the requirements in s 31(1) including the requirement that:
 “(b) the applicant has the qualifications and experience required by regulation in relation to a licence of the relevant class;”
- [16] In the case of a company, there is a requirement that:
 “The company’s nominee holds a licence specifically identifying as a class of building work that the nominee may supervise, *the same class of building work* for which the licence is sought by the company.”(emphasis added)
- [17] Section 34(1) provides expressly that if the Authority is satisfied that an applicant is entitled to a licence it “must issue a licence of the appropriate class.” Conversely, the Authority has no power to issue a licence of a particular class if the requirements of the Act and Regulations in relation to a licence of that class have not been met.

Construction of s 42(1)

- [18] The following passage from the reasons of the majority in *Project Blue Sky Inc v Australian Broadcasting Authority*⁷ explains that statutory interpretation is not merely a linguistic exercise and that the context of the words used and the purpose of the statutory provisions must be borne in mind:

“The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. See *Taylor v Public Service Board (NSW)* (1976) 137 CLR 208 at 213, per Barwick CJ. The meaning of the provision must be determined ‘by reference to the language of the instrument viewed as a whole’. *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320, per Mason and Wilson JJ. See also *South West Water Authority v Rumbles’s* [1985] AC 609 at 617, per Lord Scarman, ‘in the context of the legislation read as a whole’. In *Commissioner for Railways (NSW) v Agalianos*, (1955) 92 CLR 390 at 397. Dixon CJ pointed out that ‘the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed’. Thus, the process of construction must always begin by examining the context of the provision that is being construed. *Toronto Suburban Railway Co v Toronto Corporation* [1915] AC 590 at 597;

⁶ The Act, s 30(2)

⁷ (1998) 194 CLR 355

Minister for Lands (NSW) v Jeremias (1917) 23 CLR 322 at 332; *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 312, per Gibbs CJ; at 315, per Mason J; at 321, per Deane J.”⁸

- [19] Under the literal approach favoured by the appellant “a contractor’s licence of the appropriate class” in s 42(1) means a licence having the class described in the licence; in this case “Painting and Decorating”. That conclusion draws support from the Act’s structure. It provides for the issuing of licences to carry out either all classes of building work or the building work of the class or classes specified in the licence.⁹ It is assumed in sections 30 and 34 that where an applicant is not seeking a licence for all classes of building work, if the Act’s requirements are met, a licence will be issued for a particular class of building work. Section 30(2) implicitly, if not expressly, provides for the building work to be divided into classes by regulation. The Regulations, following the scheme of the Act, make provision for the division of licences into the classes specified in the Second Schedule. No provision is made for restricted classes, limited classes or sub-classes. It is thus not surprising that the licence class of the Licence is described in terms of one of the classes in the Second Schedule to the Regulations.
- [20] The words “a licence of the appropriate class” also appear in s 34. In that section it is apparent that the words mean a licence for the class of building work specified in the licence application and in respect of which the requirements of the Act have been satisfied. It would be a little surprising if the same collocation of words in s 42 meant something quite different, namely:
 “A contractor’s licence under which the work may be carried out...
 [or] a contractor’s licence of the appropriate class without a condition, restriction or limitation by virtue of which such work may not be carried out.”
- [21] Having regard to the Act’s scheme, under which a contractor’s licence may only be issued in respect of a specific class or specific classes of work after the Authority is satisfied that the applicant for a licence is a fit and proper person and has appropriate qualifications and experience, the prohibition in s 42(1), literally construed, is perfectly sensible. The Act does not contemplate that a licence for a class of work will be issued to a person who is not competent to do that work or who has otherwise failed to meet the Act’s requirements for licence applications. There was thus no drafting imperative to frame the prohibition in s 42(1) by reference to the holding of a licence which permitted the subject work to be undertaken. Subsections (5), (5A) and (7) of s 42, by referring respectively to “a licence of an appropriate class”, “work allowed by the class of licence” and “work of the relevant class”, further illustrate the assumptions underlying s 42(1) that a licence will not be issued in respect of a class of work unless the licensee is duly qualified and that the class of work for which a licence is issued defines the scope of the work authorised by the licence.

⁸ (1998) 194 CLR 355 at 381

⁹ *The Act*, s 30

- [22] The literal approach to the construction of s 42 is supported also by the principle, admittedly rather diminished in force in recent times, that “statutes creating offences are to be strictly construed.”¹⁰

The respondent’s contentions

- [23] The respondent contends that a “licence of the appropriate class” means an unconditional licence of the relevant class. Further, it is said that a restricted licence does not answer the description of a licence of a class appropriate to undertake the relevant work, where the restriction has the effect that the licence holder is not authorised to do the work.

- [24] Any conclusion to the contrary, it is argued, would deny consumers the protection which the legislature intended to confer by s 42 and result in a failure to punish conduct which is manifestly unlawful. It is further argued that when regard is had to the purpose and character of the legislation:

“It is as much a breach of s 42 to conduct work without a licence as to conduct work beyond the scope of a licence held. Similarly, to conduct work beyond the scope of conditions on a licence held must likewise be unlicensed contracting because the appropriate licence in the relevant case could only be one without the conditions otherwise contravened.”¹¹

- [25] I readily accept that a primary object of s 42 is the protection of consumers and that the general legislative intention of subsection (1) is to prevent contractors doing work which they are not licensed to do so as to protect consumers from the hazards arising from building work undertaken by unqualified or unsuitable contractors.

- [26] But it is not the role of the court, under the guise of an exercise of statutory construction, to supplement the words of a statute so as to remedy a perceived omission by the legislature, particularly where such a course would be inconsistent with the statute’s structure.

- [27] The limitations on the power of court, when construing a statute, to interfere with the language chosen by the legislature is explained by Lord Nicholls of Birkenhead in the following passage from his reasons, with which the other members of the court agreed, in *Inco Europe Ltd v First Choice Distribution*¹²:

“This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise

¹⁰ *Beckwith v R* (1976) 35 CLR 569 at 576

¹¹ *The Act*, s 42

¹² [2000] 1 WLR 586

words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation: see Lord Diplock in *Jones v. Wrotham Park Settled Estates* [1980] A.C. 74, 105. In the present case these three conditions are fulfilled.”¹³

- [28] The above formulation is generally similar to that propounded by Lord Diplock in *Jones v Wrotham Park Settled Estates*¹⁴ except that, in relation to condition (3), Diplock LJ considered that the court must be able to state with certainty the additional words that would have been inserted by the draftsman and approved by Parliament. The Wrotham Park test has been referred to with approval in a number of Australian appellate decisions.¹⁵
- [29] It is unnecessary, however, to explore the limitations on the court’s power to correct omissions or mistakes any further. If it can be said that there is a deficiency in the scope of s 42(1), it does not arise from an obvious omission or erroneous or inadequate drafting. Rather, it results from the failure of the Regulations to provide for a restricted licence class or classes. Also, there may have been sound policy reasons, other than those discussed already, for confining the prohibition in s 42(1) to persons not holding “a contractor’s licence of the appropriate class”. If the prohibition were to be extended to work done in breach of conditions or exceeding limitations imposed by licences, penal sanctions could be visited on contractors for trivial transgressions unlikely to have any detrimental impact on consumers. It is of particular significance that the Act makes specific provision, in sections 48 and 89, for action which may be taken in the event of a breach of a condition of a licence. Under s 48 the Authority may suspend or cancel the licence. The penalties for breach of conditions are flexible and permit the imposition of penalties which reflect the gravity of the breach. That, one would think, is likely to accord with the legislative intention.
- [30] Another argument advanced by the respondent is that the restriction imposed on the licence resulted in the creation of a “Residential Spray-on Painting Only” class of licence. This, it is said, is authorised by s 30(3) which permits “a contractor’s licence [to] be issued for any class of licence”. The argument ignores the role of subsection (3). Subsection (2) provides for contractor’s licences to be divided into classes by regulation. Subsection (3), by way of supplementation of subsection (2) provides, in effect, that a contractor’s licence may be issued for any class provided for by the regulation. The other difficulty with the argument is that the Regulations make no provision for restricted classes or subclasses. The relevant class of work in the Regulations is “Painting and Decorating”. That is why the licence class is stated in the Licence as “Painting and Decorating” and not “Painting and Decorating Restricted to Residential Spray-on Painting”.
- [31] The respondent sought to overcome this difficulty by arguing that although the Regulations may not have made provision for a limited class of painting and

¹³ [2000] 1 WLR 586 at 592

¹⁴ [1980] AC 74 at 104-107

¹⁵ The Authorities are collected in *Nominal Defendant v Ravenscroft* [2007] QCA 435 at [36]

decorating licence, the creation of such a class was authorised by the *Mutual Recognition (Queensland) Act 1992*. The argument was to the following effect. Where a person is licensed in New South Wales, the Authority is obliged by that Act to license the person for the equivalent occupation. No direct equivalent of the class of licence held by the appellant in New South Wales existed in Queensland, but s 29 of Schedule 1 of the *Mutual Recognition (Queensland) Act 1992* sets up a scheme which allows for the creation of a specific class of licence through the imposition of conditions. It is unnecessary to address this argument as the Authority issued the Licence for the “Painting and Decorating” class of work and not for some other class. Additionally, there is no evidence that the appellant applied for the Licence under or in reliance on the *Mutual Recognition (Queensland) Act 1992* or that the Authority had recourse to that Act.

Conclusion

- [32] The respondent filed a notice of contention which contained a number of other grounds on which it wished to rely to defeat the application for summary judgment. Those grounds raised factual matters which are more appropriately dealt with at first instance. They, or some of them at least, were raised at first instance but were not decided by the primary judge because of the view he took of the construction of s 42(1).
- [33] For the above reasons, I would order that the appeal be allowed, that the orders at first instance be set aside and that the respondent pay the appellant’s costs at first instance and on appeal.
- [34] **MACKENZIE AJA:** I have had the advantage of reading Muir JA’s reasons and agree with his analysis and conclusions. I agree with the orders he proposes.