SUPREME COURT OF QUEENSLAND

CITATION:	*Bloomer Constructions (Qld) Pty Ltd v O'Sullivan & Anor* [2009] QSC 220
PARTIES:	**BLOOMER CONSTRUCTIONS (QLD) PTY LTD ACN 071 344 100** (applicant) **v** **SEAN O'SULLIVAN** (first respondent) **MICHAEL CHRISTOPHER VADASZ TRADING AS AUSTRALASIAN PILING COMPANY** (second respondent)
FILE NO/S:	BS 6449 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	7 August 2009
DELIVERED AT:	Brisbane
HEARING DATE:	10 July 2009
JUDGE:	White J
ORDER:	**The application be dismissed**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – DECISIONS TO WHICH JUDICIAL REVIEW LEGISLATION APPLIES – EXCLUDED DECISIONS – OTHER DECISIONS – where the applicant entered into a contract with the second respondent for building and construction services – where the second respondent issued a payment claim under the *Building and Construction Industry Payments Act* 2004 (Qld) – where the first respondent adjudicator was appointed under the *Building and Construction Industry Payments Act* and adjudicated in favour of the second respondent – where the applicant applies for a prerogative order under Part 5 *Judicial Review Act* 1991 (Qld) to quash the adjudication decision – where under an amendment by the *Justice and Other Legislation Amendment Act* 2007, Part 3 Division 2 *Building and Construction Industry Payments Act* is an enactment to which the *Judicial Review Act* does not apply – whether Part 5 *Judicial Review Act* is excluded from applying to Part 3 Division 2 *Building*

and Construction Industry Payments Act 2004 – whether the adjudication decision can be subject to review under Part 5 *Judicial Review Act*

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – OTHER MATTERS – where the applicant entered into a contract with the second respondent for building and construction services – where the second respondent issued a payment claim under the *Building and Construction Industry Payments Act* 2004 (Qld) – where the first respondent adjudicator was appointed under the *Building and Construction Industry Payments Act* and adjudicated in favour of the second respondent – where the second respondent held a conditional contractor's licence – whether the second respondent was precluded from entering into a building contract, issuing a payment claim and applying for adjudication under the *Building and Construction Industry Payments Act*

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – JURISDICTIONAL MATTERS – where the applicant entered into a contract with the second respondent for building and construction services – where the second respondent issued a payment claim under the *Building and Construction Industry Payments Act* 2004 (Qld) – where the first respondent adjudicator was appointed under the *Building and Construction Industry Payments Act* and adjudicated in favour of the second respondent – where the second respondent held a conditional contractor's licence – whether the adjudicator has no jurisdiction to make the adjudication decision

Building and Construction Industry Payments Act 2004 (Qld), s 10(2), Part 3 Division 2
Justice and Other Legislation Amendment Act 2007 (Qld)
Judicial Review Act 1991 (Qld), s 18, s 41, s 43, s 48, Schedule 1 Part 2
Queensland Building Services Authority Act 1991 (Qld), s 31, s 34, s 35, s 36, s 38, 42. s 48, s 88, s 89, s 97
Supreme Court Act 1995 (Qld) , s 128
Uniform Civil Procedure Rules 1999 (Qld), rr 564–569

Bezzina Developers Pty Ltd v Deemah Stone (Qld) Pty Ltd [2008] 2 Qd R 495, considered
Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor (2004) 61 NSWLR 421, cited
Cant Contracting Pty Ltd v Casella & Anor [2006] QCA 538, considered
Greg Beer t/as G & L Beer Covercreting v J M Kelly (Project Builders) Pty Ltd [2008] QCA 35, applied
Intero Hospitality Projects Pty Ltd v Empire Interior

(Australia) Pty Ltd & Anor [2008] QCA 83, considered
J Hutchinson Pty Ltd v Galform Pty Ltd & Ors [2008] QSC 205, considered
Musico & Ors v Davenport & Ors [2003] NSWSC 977, cited
Uniting Church in Australia Property Trust (Qld) v Davenport & Anor [2009] QSC 134, applied
Walton Construction (Qld) Pty Ltd v Salce & Ors [2008] QSC 235, considered

COUNSEL: Mr T M Matthews for the applicant
Mr R Holt SC and Ms E J Longbottom for the second respondent

SOLICITORS: Romans & Romans for the applicant
McCullough Robertson for the second respondent

[1] Bloomer Constructions (Qld) Pty Ltd ("Bloomer") has brought an "application for review" and applied for an order in the nature of a prerogative order pursuant to Part 5 of the *Judicial Review Act* 1991 (Qld) ("the *JR Act*") quashing the entire Adjudication Decision of the first respondent dated 5 June 2009. Mr O'Sullivan was the adjudicator appointed under the *Building and Construction Industry Payments Act* 2004 (Qld) ("the *BCIP Act*") to adjudicate the dispute between Bloomer and the second respondent, Michael Christopher Vadasz trading as Australasian Piling Company ("Australasian").

[2] Two broad issues arise for consideration.

1. Whether by reason of the conditional status of the licence held by Australasian:

   (a) Australasian was precluded from entering into a building contract with Bloomer, issuing a payment claim and lodging an adjudication application; and

   (b) the adjudicator had no jurisdiction to make his Adjudication Decision.

2. Whether the Adjudication Decision is open to review pursuant to Part 5 of the *JR Act*.

Background

[3] The parties entered into a written contract in November 2008 under which Australasian was to undertake the design, installation and certification of perimeter and internal piling on a site at Commercial Road, Newstead for the lump sum price of $1,261,872 plus GST. According to the Adjudication Decision there is significant debate between the parties regarding the terms of the contract.

[4] On 14 April 2009 Australasian served a payment claim on Bloomer in the amount of $1,249,642.88 (incl GST) pursuant to the *BCIP Act*.

[5] On 27 April 2009 Bloomer served a payment schedule on Australasian scheduling an amount of $nil on the basis that Australasian was indebted to it "in the order of $1,320,310 to date".

[6] On 11 May 2009 Australasian lodged an adjudication application and on 19 May Bloomer lodged an adjudication response to the effect that an adjudicator did not have jurisdiction because:

> "at the time of entering into the contract, [Australasian] did not meet the licensing requirements of the *Queensland Building Services Authority Act* 1991 in that the licence held by [Australasian] was with a qualification."[1]

[7] On 5 June 2009 the adjudicator made his decision in the sum of $415,079.50 (including GST) in favour of Australasian. The adjudicator held that:

> "…[Bloomer] has not satisfied me that the apparent qualification on [Australasian's] licence would preclude [Australasian] from undertaking relevant work and more importantly, there is nothing in the authorities…that establish that [Australasian], in such circumstances, is not entitled to make a statutory payment claim under the Act."[2]

[8] The parties filed a consent order before the Chief Justice on 23 June 2009 whereby Australasian was not to take any steps to enforce the adjudication certificate to recover the monies the subject of the Adjudication Decision and Bloomer paid the adjudication sum plus interest plus the adjudicator's fees into court pending the hearing and determination of the application for review.

Judicial review of adjudication

[9] By amendment in 2007,[3] Part 3 Division 2 of the *BCIP Act* was added to Schedule 1 Part 2 of the *JR Act* as an enactment to which the *JR Act* did not apply. Part 3 Division 2 in ss 21–32 concerns the "adjudication of disputes".

[10] Mr Matthews for Bloomer submitted that the exclusion of the *BCIP Act* from the purview of the *JR Act* does not and was not intended by the legislature to exclude the operation of Part 5 of that Act for injunctive relief by way of prerogative orders. He relied upon observations of Daubney J in *Uniting Church in Australia Property Trust (Qld) v Davenport*[4] preferring the approach of Chesterman J (as his Honour then was) in *Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd*[5] to that of Fraser JA in *Bezzina Developers Pty Ltd v Deemah Stone (Qld) Pty Ltd*.[6] Mr Holt SC who appeared with Ms Longbottom for Australasian submitted that the words in the *JR Act* should be given their plain meaning and Fraser JA's view in *Bezzina* followed. The opinion of Chesterman J in *Intero*, although obiter, was that the 2007 amendments to the *JR Act* applied only to Part 3 applications for a statutory order of review, while Fraser JA disagreed in *Bezzina*, also obiter, and stated that the amendments applied to Part 5 as well as Part 3 applications.

[11] Section 18 of the *JR Act* provides for the Act to have effect "despite any law in force at its commencement", but by s 18(2):

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1 Adjudication Decision p 5, being Exhibit "H" to the affidavit of Daniel Romans filed 17 June 2009.
2 Adjudication Decision p 5.
3 *Justice and Other Legislation Amendment Act* 2007 (Qld).
4 [2009] QSC 134.
5 [2008] QCA 83.
6 [2008] 2 Qd R 495 at footnote 25.

"… this Act does not –

(a) …

(b) apply to decisions made, proposed to be made, or required to be made, under an enactment mentioned in schedule 1, part 2."

[12] When the *JR Act* was enacted its purpose was twofold: to provide a process for reviewing administrative decisions and to simplify the procedure for seeking prerogative relief. The writ processes for such relief were abolished but not the underlying power of the court to review. Section 41, which is in Part 5, provides that:

"(1) The prerogative writs of mandamus, prohibition or certiorari are no longer to be issued by the Court.

(2) If, before the commencement of this Act, the court had jurisdiction to grant any relief or remedy by way of a writ of mandamus, prohibition or certiorari, the court continues to have the jurisdiction to grant the relief or remedy, but must grant the relief or remedy by making an order, the relief or remedy under which is in the nature of, and to the same effect as, the relief or remedy that could, but for subsection (1), have been granted by way of such a writ."

[13] Section 43(1) provides that the procedure for a prerogative order or injunction "must be made by way of an application for review." This is instead of the previous cumbersome order nisi to review procedure returnable before the Full Court. An application for a declaration or injunction (other than a prerogative injunction) may also be made by way of application for review if appropriate.[7] If the court concludes that an application for a declaration or injunction (other than a prerogative injunction) made under s 43(2) ought to have been commenced by claim[8] or originating application, it may order the proceeding to continue as if commenced in that way. The *Uniform Civil Procedure Rules* ("*UCPR*") contemplate in rr 564–569 a close correspondence between an application brought for a statutory order of review and an application for review, that is, Part 3 applications and Part 5 applications.

[14] A number of recent decisions have considered the effect of the 2007 amendments to the *JR Act*. The first in time is *Intero*. The observations by Chesterman J about the effect of the amendments on Part 5 of the *JR Act* were obiter since the court was concerned with an application under Part 3 and the relation between s 13 of the *JR Act* (provision for review in another Act) and s 100 of *BCIP Act* (preserving civil proceedings). His Honour said:[9]

"[60] …With the enactment of the *Justice and Other legislation Amendment Act* 2007 judicial review of adjudications made pursuant to the *Building and Construction Industry Payments Act* 2004 ('the Act') will no longer be reviewable pursuant to Part 3 of the *JR Act*.

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7 *Judicial Review Act*, s 43(2).

8 See *Supreme Court of Queensland Act* 1991 (Qld), s 130, for reading writ of summons or originating summons as claim or application.

9 [2008] QCA 83 at [60]–[62].

> [61] Adjudications will, however, continue to be reviewable pursuant to Part 5 of the *JR Act* which regulates the jurisdiction the Court formerly had to control proceedings of inferior courts and domestic tribunals. The grounds on which review might be sought are those established by the well known principles of administrative law. They are of course more circumscribed than the grounds for review given by s 20, s 23 and s 24 of the *JR Act.*
>
> [62] Mr Bond SC who appeared with Mr [sic] Hindman for the applicant held out the prospect that builders dissatisfied with adjudications will continue to seek judicial review of them, utilising the provisions of Part 5 and seeking guidance, no doubt, from the New South Wales jurisprudence in which there have been numerous attempts to review adjudications pursuant to the general principles of an administrative law *dehors a Judicial Review Act*."

[15] His Honour opined that since s 48, which permits the court to stay or dismiss an application it considers inappropriate or without reasonable basis, applies to both Part 5 as well as Part 3 applications, it could be used to curtail such threatened applications for review of the *BCIP Act* adjudications.

[16] In *Bezzina* the 2007 amendments were not applicable to the dispute between the parties. However, Fraser JA, with whom the President and Keane JA agreed, said of the effect of those amendments:[10]

> "From the commencement of that Act [the 2007 amending Act], adjudication decisions are not reviewable under the *Judicial Review Act* 1991 (Qld)."

His Honour added in a footnote:[11]

> "In my respectful opinion, adjudications are no longer reviewable under any part of the *Judicial Review Act* 1991 (Qld): cf *Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd* [2008] QCA 83 at [61]."

[17] The parties in *J Hutchinson Pty Ltd v Galform Pty Ltd & Ors*,[12] perhaps mindful of the observations in *Bezzina,* brought an originating application seeking a declaration that a certain adjudication under the *BCIP Act* was void and should be set aside and for other interlocutory and injunctive relief, not pursuant to the *JR Act*, but s 128 of the *Supreme Court Act* 1995 or the inherent jurisdiction of the court. Section 128 empowers the court to make a "merely declaratory decree" and grant no other relief. Chesterman J was the judge hearing that application. His Honour said, after referring to the mode of the application:[13]

> "…but as I pointed out in *Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd and Hanlon* [2008] QCA 83, the effect of the amendment is only to remove adjudications made

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10 [2008] 2 Qd R 495 at [75].
11 [2008] 2 Qd R 495 at footnote 25.
12 [2008] QSC 205.
13 [2008] QSC 205at [27].

> pursuant to the Act from the purview of judicial review under Part 3 of the *JR Act*. Adjudications remain reviewable under Part 5 of the *JR Act* which preserves the jurisdiction the Court formerly had to control proceedings of inferior courts and domestic tribunals. Section 41(1) of the *JR Act* forbids the Court from issuing writs of prohibition of [sic] certiorari but confirms the power to grant relief to the same effect as the forbidden writs. A writ of certiorari when made absolute quashed the decision with respect to which the writ was sought."

[18] Justice Philip McMurdo concluded in *Walton Construction (Qld) Pty Ltd v Salce & Ors*[14] that it was unnecessary to consider these views expressed in *Intero* and *J Hutchinson* that an adjudication decision is still susceptible to an application for review under Part 5 of the *JR Act* notwithstanding the 2007 amendments because:

> "…as appeared to be ultimately conceded, this Court has jurisdiction to declare void an adjudicator's decision which was given without jurisdiction, quite apart from the operation of the *Judicial Review Act*."[15]

His Honour's analysis followed that of the New South Wales Court of Appeal in *Brodyn Pty Ltd v Davenport*[16] that the operation of the adjudication process in the *BCIP Act* depends for its foundation upon the existence of a construction contract to which that Act applies.[17]

[19] In the final case to which I was referred, *Uniting Church*, the court was asked to restrain an adjudicator appointed under the *BCIP Act* from making a correction to his award that he advised the parties he proposed doing. Since the proposed correction fell outside the ambit of s 28(1) of the *BCIP Act*,[18] Daubney J concluded it constituted an act of jurisdictional error and the court could prevent such error "by granting appropriate relief, whether declaratory or, if necessary, injunctive." After referring to the 2007 amendments his Honour observed:[19]

> "It is far from clear that the inclusion of the *[BCIP Act]* in Part 2 of Schedule 1 of the [*JR Act*] has the consequence of excluding an entitlement on the part of a contracting party to make application for injunctive relief under Part 5 of the *Judicial Review Act* 1991."

His Honour noted the observations of Fraser JA in *Bezzina* and those of Chesterman J in *Intero* and preferred to adopt the approach of the latter noting at [41]:

> "One can well understand on policy grounds, particularly the imperative for the [*BCIP Act]* to provide an expeditious means of decision-making for the purposes of progressing an ongoing building project, that the legislature intended that adjudicators' decisions should not be subject to statutory orders of review under the [*JR*

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14 [2008] QSC 235.
15 [2008] QSC 235at [6].
16 (2004) 61 NSWLR 421, especially per Hodgson JA at 441 para 53.
17 See also his Honour's earlier decision in *Cant Contracting Pty Ltd v Casella* [2006] QCA 538; [2007] 2 Qd R 13 at [59]–[61] to the same effect.
18 Adjudicators may correct clerical mistakes.
19 [2009] QSC 134 at [40].

> *Act]*. The underlying objective for this scheme was neatly explained, in the context of the cognate New South Wales legislation, by Barrett J in *Greenaways Australia Pty Ltd v CBC Management Pty Ltd*:[20]
>
> > '15 The aim of the *Building and Construction Industry Security of Payment Act* is to ensure that progress payments are made, whether or not provided for in the contract, so that the party carrying out building work receives, on account, a summarily assessed sum as compensation for work done. That the adjudicator does or does not take into account a particular item or treats it in a particular way is irrelevant to ultimate questions of the contractual liabilities of the parties to one another. In *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140, Palmer J summarised the system embodied in the legislation as "pay now, argue later". In *Brodyn Pty Ltd v Davenport* [2004] NSWSC 394, Hodgson JA said that the Act reflects a legislative intention "to ensure that disputes concerning the amount of such payments are resolved with the minimum of delay", the payments themselves being "only payments on account of a liability that will be finally determined otherwise."'
>
> That policy is, however, a far cry from suggesting that citizens should be precluded from having recourse to the courts to seeks [sic] orders in the nature of prerogative remedies or which otherwise lie generally within the inherent discretion of the Court without an express legislative exclusion."

Mr Matthews relied upon those observations.

[20] As set out above, s 18(2)(b) of the *JR Act* expressly states that the Act does not:

> "apply to decisions made, proposed to be made or required to be made, under an enactment mentioned in schedule 1, part 2."

Schedule 1 Part 2 is headed "Enactments to which this Act does not apply" and includes the *BCIP Act* Part 3 Division 2 which concerns the adjudication of disputes. Both the plain meaning of the words used and the Explanatory Note support the conclusion that the legislature intended to exclude the whole of the *JR Act.*[21] It should also be noted that s 97 of the *Queensland Building Services Authority Act* 1991 (Qld) ("the *QBSA Act*") excludes the *JR Act* in relation to "a proceeding for a

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[20] [2004] NSWSC 1186 at [15].

[21] "…will fully exempt the decisions of adjudicators made under the *Building and Construction Industry Payments Act* 2004 from review under the *Judicial Review Act* 1991. This amendment is consistent with the objective of the *Building and Construction Industry Payments Act* 2004 to create a dispute resolution process whereby adjudicators can quickly resolve payment disputes between parties to a construction contract on an interim basis." *Justice and Other Legislation Amendment Bill* 2007 Explanatory Note p 978. It should be noted that while the NSW cognate legislation is in relevant material respects the same as the *BCIP Act*, s 69 of the *Supreme Court Act* 1970 (NSW) is similar in its effect to s 41 of the Queensland *JR Act*, so that, notwithstanding the privitive terms of, for example, the NSW equivalent of s 31(4) of the *BCIP Act*, parties could call in aid that provision to seek review on the grounds of jurisdictional error, *Musico v Davenport* [2003] NSWSC 977 of 31 October 2003 at [47]–[52]; *Brodyn* per Hodgson JA at [49]–[51].

minor domestic building dispute" decided by the Commercial and Consumer Tribunal except where:

> "(a) the tribunal had or has no jurisdiction under the Act to hear and decide the proceedings; or
>
> (b) a breach of the rules of natural justice happened in relation to a party to the proceeding."[22]

This demonstrates, if it were necessary to do so, that the legislature, in a complementary Act to the *BCIP Act* had expressly turned its mind to the question of 'saving' what might broadly be termed Part 5 reviews. If there were intention to do so when Part 3 Division 2 of the *BCIP Act* was excluded from the *JR Act* there was a legislative model available.

[21] I conclude that the 2007 amendments to the *JR Act* apply to exclude the whole of that Act from the provisions of the *BCIP Act* relating to adjudicator's decisions.

[22] However, the jurisdiction of an adjudicator to enter upon his adjudication is dependent upon the existence of a construction contract of the kind contemplated by the Act. It includes, by virtue of s 10(2) of the *BCIP Act*, building work within the meaning of the *QBSA Act* for which a person must be licensed. Section 42 of that Act prohibits a person from carrying out building work unless that person holds an appropriate licence. If an unlicensed person carries out building work, that person is not entitled to any monetary or other consideration for doing so.[23] As McMurdo J reasoned in *Cant*[24] it cannot be the case that the *BCIP Act*, in its avowed purposed of making available to a contractor progress payments under a construction contract, intended to give de facto enforceability to a contract unenforceable by virtue of s 42 of the *QBSA Act*. His Honour concluded:[25]

> "In my view, the [*BCIP Act*] operates only when there is a construction contract of which the terms as to payment are enforceable by the builder."

[23] If an adjudicator enters into an adjudication in respect of which he had no jurisdiction or, conversely, declines to carry out an adjudication which comes within the purview of the Act, he has fallen into jurisdictional error and the court has power under s 128 of the *Supreme Court Act* to declare the adjudication void for want of jurisdiction or, as the case might be. It is unnecessary, on this application, to go further and consider whether this court's inherent power to control error in subordinate or inferior courts and tribunals extends to the decision of an adjudicator under the *BCIP Act*,[26] or whether that power extends to other examples of error such as failure to accord natural justice beyond what the *BCIP Act* requires. The legislature clearly does not want the process of speedy cash flow for contractors frustrated by access to the courts "obtained from the rear".[27]

[24] The conclusion is that the application for review is not apt to challenge the alleged want of jurisdiction in the adjudicator. If the argument otherwise is sound the court could proceed as if the application was by originating application.

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22 *Queensland Building Services Authority Act*, s 97(2).
23 *Queensland Building Services Authority Act*, s 42(3) except for the limited bases in s 42(4).
24 [2006] QCA 538 at [61].
25 [2006] QCA 538 at [61].
26 *Musico v Davenport* [2003] NSWSC 977 at [55].
27 *Musico v Davenport* [2003] NSWSC 977 at [28]–[41].

The conditional licence

[25] The licence held by Mr Vadasz as at 13 October 2008 issued by the Queensland Building Services Authority described Mr Vadasz's licence class as "Foundation Work (Piling and Anchors)". The condition was in the following terms:

> "1. The holder of this licence may not carry out any building work of a kind as defined by the QBSA Act 1991 until the financial requirements for licensing are satisfied.
>
> 2. Appropriate financial information must be provided within fourteen (14) days of the date of the imposition of this condition."

The start date of the licence is 1 February 2008. There is no information as to whether the information required was provided in the time limited by the condition when the parties entered into their contract in November 2008. A search made by Bloomer's solicitors on 15 June 2009 shows that Mr Vadasz's licence was then without conditions. This application has been argued on the assumption that the licence was conditional when the contract was entered into between the parties and throughout the period of the contract.

[26] Bloomer contends that the condition on the licence disentitled Australasian to any monetary or other consideration for performing the building work. Section 42 of the *QBSA Act* provides, relevantly:

> "**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.
>
> …
>
> (9) A person who contravenes this section commits an offence."

[27] It is common ground that the work carried out by Australasian was building work within the meaning of the *QBSA Act*. The question is whether the imposition of an unsatisfied condition meant that Australasian could not enter into and perform a contract, issue a payment claim pursuant to that contract and lodge an adjudication application under the *BCIP Act*.

[28] In *Greg Beer t/a G & L Beer Covercreting v J M Kelly (Project Builders) Pty Ltd*[28] the Court of Appeal considered the effect of the prohibition in s 42 on a contractor holding a licence subject to a condition. The condition restricted the scope of work the contractor could perform within the licence class. The contractor performed the work and made a claim pursuant to the *BCIP Act* for work within the scope of work permitted by the licence class but outside the scope of the condition. The issue for decision on appeal was whether the words "licence of an appropriate class" in s 42(1) of the *QBSA Act* was to be read subject to any condition imposed on the

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[28] [2008] QCA 35.

licence. The court concluded that the prohibition in s 42 did not extend to work done in breach of conditions imposed on the licensee. Mr Holt SC and Ms Longbottom for Australasian seek to apply that reasoning to the present case while Mr Matthews for Bloomer argues that *Beer* is distinguishable.

[29] Before discussing the decision further it is necessary to set out some of the relevant provisions of the *QBSA Act*.

> "**31 Entitlement to contractors 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
>
> …"

> "**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
>
> …"

> "**35 Imposition of conditions etc. on grant of licence**
>
> (1) A licence may be granted subject to such conditions as the authority considers appropriate.
>
> …
>
> (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."

[30] The authority may impose conditions after the issue of a licence. Section 36 provides:

"**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.

…

(4) The authority may, by subsequent notice to the licensee, vary or revoke a condition imposed under this section.

(5) A notice imposing or varying a condition must inform the licensee of the licensee's right to apply for a review of the authority's decision to impose or vary the condition."

[31] The authority has power to suspend the licence if a licensee fails to pay the appropriate licence fee within the time allowed under the regulation and:

> "(3) If a licence has remained in suspension under this section for more than 3 months, the authority may, by notice to the licensee, cancel the licence."[29]

[32] By s 48 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 36 on the licensee's licence…"

[33] The tribunal established under the *Commercial and Consumer Tribunal Act* 2003 (Qld) has jurisdiction to hear an application by the Queensland Building Services Authority as to whether proper grounds exist for taking disciplinary action against a person subject to the Act.[30] By s 89 proper grounds exist for taking a disciplinary action against a licensee if:

> "(k) the licensee contravenes a condition of the licence…"

There is no evidence that any disciplinary action was taken against Mr Vadasz and nothing is noted on the "History" of his licence.

[34] The following extracts from the reasons of judgment of Muir JA (with whom Holmes JA and Mackenzie AJA agreed) in *Beer* identifies the process of reasoning of the court in reaching its conclusion that s 42 cannot be construed to mean a licence without conditions.

> "[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…
>
> [20] The words 'a licence of the appropriate class' also apper 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

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29 *Queensland Building Services Authority Act*, s 38.

30 *Queensland Building Services Authority Act*, s 88.

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.

[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.'[31]

…

[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 the 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*[32]:

> '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

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31 *Beckwith v R* (1976) 135 CLR 569 at 576.

32 [2000] 1 WLR 586.

> 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 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 per Lord Diplock in *Jones v Wrotham Park Settled Estates* [1980] AC 74, 105. In the present case these three conditions are fulfilled.'[33]

…

> [29] …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 sanction 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."

[35] Mr Matthews seeks to distinguish *Beer* on the ground that the condition imposed was in relation to the extent to which the work of the appropriate class could be performed within that class and not a blanket prohibition imposed by reason of the non-satisfaction of "one of the fundamental entitlements"[34] to a contractor's licence. In support of that distinction Mr Matthews referred to the passage at [21] that:

> "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."

The difficulty with that argument is that the authority did issue Mr Vadasz with a licence and, on this application at least, that is not reviewable. If he did not provide

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33 [2000] 1 WLR 586 at 592.

34 Applicant's submissions, p 4.

the necessary financial information within the time limited then the authority had power to cancel or suspend that licence. It clearly did not do so. It may then be a discipline matter. There is no arguable distinction in this case from the process of reasoning in *Beer*.

[36] The conclusion must be that whilst there may be jurisdiction to correct jurisdictional error on the face of the record, no such error can be discerned.

Orders

[37] The application is dismissed.