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Issue 5

Is the QBCC Merits Review a Sham?



Commercial Litigation Team

We reported that proposed amendments to the *Queensland Building and Construction Commission Act 1991* (QBCC Act) represented a dramatic shift in the powers of the Queensland Building and Construction Commission (QBCC) against building licence holders.

In one of the first cases of its kind in Queensland, Quinn & Scattini Lawyers assisted a retired tradesman who lodged an application in the Queensland Civil and Administrative Tribunal (QCAT) for the review of the QBCC's decision to issue him with a direction to rectify for work that they claimed was defective.

Merits Review

Some decisions of the QBCC (such as the decision to issue a direction to rectify) are reviewable by QCAT – a process known as 'merits review'. Merits review essentially involves QCAT replacing the QBCC as decision maker and independently making a fresh decision based on the facts and evidence. The merits review process has been a relatively cheap and accessible method for building licence holders to ensure that the QBCC has acted fairly and lawfully when issuing a direction to rectify.

Importantly, the review is conducted independently by QCAT and not by QBCC staff.

Removal of the Ability to Stay a Decision

The issue of a direction to rectify is the first in a series of steps which may result in the building licence holder being forced to pay the QBCC any amount the QBCC has paid under the statutory insurance scheme to rectify or complete defective or incomplete work. Until recently, a licensee could apply for a 'stay' of the QBCC decision until their application for merits review could be decided.

A 'stay' effectively paused the QBCC action until the review decision was made. This ability to pause the QBCC action until it was reviewed independently by QCAT was critical to the fairness of the process. However, an amendment to the QBCC Act was rushed through just before Christmas 2014 prohibiting QCAT from granting stays of QBCC decisions.

Statutory Liability is not dependent upon a Valid Direction to Rectify

So why was the ability to stay a QBCC decision during a QCAT merits review proceeding so critical to the fairness of the process?

Under the QBCC Act, if the QBCC makes any payment on a rectification claim under the statutory insurance scheme, then it may recover that amount as a statutory debt from the building licence holder to whom it issued the direction to rectify. But what if the QBCC had no reasonable basis upon which to issue the direction to rectify to start with? The Queensland Court of Appeal's position on this issue is that: "*It is sufficient for recovery under the section*

that the authority has made a payment on a claim under the insurance scheme.

The statutory right to recover (i.e., from the building licence holder) is not conditioned upon the legal quality of a determination by the authority to make the indemnity payment or of any anterior step taken by the authority that had led to the decision to pay." (Emphasis added)

This means that, if the QBCC makes a payment on a claim under the insurance scheme, then it has a right to recover that amount from the building licence holder even if the QCAT review decision concludes that there was no basis to issue the Direction to Rectify against them.

A Recent Case of Ours

Our client, a 74 year old carpenter (now retired) was issued a direction to rectify in respect of works he allegedly carried out for an owner-builder six years earlier. He applied to QCAT for a merits review of the QBCC decision, primarily on the grounds that he was not the person responsible. In response to his QCAT application, the QBCC served him with a statement of reasons for the decision which was 223 pages long. Critically, during this process, the QBCC Act had been amended to remove QCAT's ability to stay the QBCC's decision while it was being reviewed by QCAT.

Quinn & Scattini Lawyers are Engaged

Overwhelmed by the QBCC's response, our client contacted Quinn & Scattini Lawyers and requested assistance with the proceeding.

We prepared submissions and represented our client at the initial compulsory conference. Our submissions presented a very strong case that the QBCC's decision was misconceived and had no reasonable basis. However, the QBCC continued to progress the claim against our client even though his application to QCAT to review its decision was well advanced.

The issue of a direction to rectify is the first in a series of steps which may result in the building licence holder being forced to pay the QBCC any amount the QBCC has paid under the statutory insurance scheme to rectify or complete defective or incomplete work.

When we challenged this, the QBCC responded that the QBCC had a new policy to progress insurance claims without waiting for QCAT review applications to be decided, and that the QBCC had, in fact, commenced and almost completed the rectification works. We immediately advised our client that the

QBCC had 'leapfrogged' the QCAT proceeding and that this would render any QCAT merits review decision irrelevant, because once the QBCC paid for the rectification works under the statutory insurance scheme, our client would become liable for a statutory debt in that amount, even if his QCAT merits review proceeding was successful and the QBCC decision to issue a direction to rectify against him was set aside.

So What Happened?

We recommended to our client that the only way to beat the QBCC was to immediately bring an application against the QBCC in the Queensland Supreme Court under the *Judicial Review Act 1991*. This would gazump the QBCC's exploitation of the new amendment to the QBCC Act, enabling him to seek a stay of the QBCC's decision to allow time for the

Supreme Court to consider the legality of the QBCC's decisions against him.

So instructed, we quickly prepared our client's application and filed it in the Supreme Court. The QBCC (who previously had been uncooperative and non-responsive in respect of the QCAT proceedings) immediately requested that the parties attempt to settle the proceeding. The whole matter was settled shortly after. The outcome was a win for our client.

Issues such as these are an example of why we strongly recommend that, when faced with a dispute with the QBCC, you should obtain competent legal advice as soon as possible.

If you are faced with a dispute, then please call Quinn & Scattini Lawyers to book a consultation to discuss how we may be able to assist you.

Lost Wills



Wills & Estates Team

You may think that if a will is lost, that it no longer exists and cannot be used to distribute the estate of a loved one who has died. This is not correct.

Provided certain conditions are met, the court will admit to probate a will that has been reconstructed from the verbal evidence of someone to whom the will-maker has told the terms of the will.

The most interesting and high profile case of a lost will is that of Brett Whitely^[1], the

famous artist. He hand-wrote his will, had it signed by two independent witnesses then, taped it to the underside of a drawer in his kitchen.

After his death, Mr Whitely's will could not be found anywhere, but Mr Whitely had shown his close friend his will and where he had hidden it. Mr Whitely had also spoken to a number of other people about the gifts that he had made in the will. Those people included his daughter who lived in London. Mr Whitely's daughter could remember key parts of the will. Other witnesses were also able to tell the court about key parts of the will.

In the end, there was sufficient evidence for the court to reconstruct Mr Whitely's will.

The Supreme Court of Queensland in *Carey v Carey*^[2] found a will that had been lost to be valid.

Elizabeth Carey had made the will in 1976. The will had been kept with her lawyers. Elizabeth died in 1989 leaving two children surviving. Her son telephoned his mother's lawyers not long after his mother's death and asked what Elizabeth's will said. A secretary of the firm told him. The children did nothing about administering the estate and after ten years the lawyers destroyed the will together with their file.

The court accepted the evidence that the son was able to give about the contents of the will. This meant that, despite the will having been lost and no copy of it being available, the deceased's estate was able to be distributed in accordance with the will.

So, if a loved one has passed away and you know that he or she left a will, but neither it nor a copy of it can be found, it

is important to explore whether the will can be recreated.

There are a number of hoops you must jump through, but where there is sufficient evidence the court will reconstruct the will. Of course, an application to the court to recreate a will is expensive.

There are a few simple steps you can take to avoid confusion and unnecessary expense after you die.

You can:

- see a lawyer at Quinn & Scattini Lawyers to have your will properly prepared;
- ensure that your will is kept in a safe place, for example in a bank safe deposit or in Quinn & Scattini's safe custody; and
- tell your executors where the will is, and encourage them to see a lawyer at Quinn & Scattini for guidance about administering the estate.

[1] *Whitely v Clune (No. 2) The Estate of Brett Whitely* [1993] NSWSC 102594 (unreported)

[2] [2015] QSC 197

Spike in Drug Usage Calls for Tougher Penalties



In the past few months our Criminal Law Team has noticed a significant increase in drug related matters and enquiries.

This coincides with research recently conducted by the Australian Crime Commission which identified an increase

in drug seizures, arrests and charges throughout the country and The Alcohol and Drug Foundation (previously known as The Australian Drug Foundation) which showed illicit drug use is also on the rise.

As a result, there has been a dramatic spike in the number of people appearing before the court for all types of drug offences including possession, supply and trafficking.

In addition to this the courts are constantly dealing with people who commit dishonesty offences as way of funding and supporting their addiction.

This seems to be causing magistrates and judges to hand down tougher sentences for these types of offences which often means periods of imprisonment form part of the penalty. Often, these facilities are unable to provide the rehabilitative service that many drug addicts truly require.

As such, upon their release offenders often return to bad habits and re-offend. As criminal defence lawyers, we not only assist you through the court system but also can assist those persons in need to connect with the appropriate rehabilitative agencies. This then reduces the risk of recidivism and assists our clients with taking control of their lives.

By utilising the services provided by psychologists, counsellors, Drug Arm and the Alcohol, Tobacco and Other Drugs Services (**ATODS**) we are finding that many of our clients receive better outcomes in court, and further turns our client's in a positive direction to ensure that they can make a worthwhile contribution to the community.

If you know anyone that has been charged with a drug related offence and is in need of legal advice and assistance, call one of our Criminal Law Team lawyers.

We are more than happy to assist in the recovery process during this sensitive time.

Unlike some other firms - who focus on only one area of law - Q&S can offer expert solutions for all legal areas.

Access our expert lawyers for your next legal issue.

Family Law | Wills & Estates | Property & Conveyancing | Commercial Litigation/Disputes | Business Law | Criminal or Traffic | Migration

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