

**CITATION:** *McClintock v Queensland Building Services Authority* [2011] QCATA 310

**PARTIES:** Mr Peter Cyril McClintock  
(Applicant/Appellant)  
v  
Queensland Building Services Authority  
(Respondent)

**APPLICATION NUMBER:** APL094-11

**MATTER TYPE:** Appeals

**HEARING DATE:** 26 August 2011

**HEARD AT:** Brisbane

**DECISION OF:** **Richard Oliver, Senior Member**  
**Michelle Howard, A/Senior Member**

**DELIVERED ON:** 18 October 2011

**DELIVERED AT:** Brisbane

**ORDERS MADE:** **The decision of the tribunal dated 21 February 2011 is confirmed.**

**CATCHWORDS:** Excluded individual – where applicant significant shareholder in the company – whether the applicant an influential person – procedural fairness – where documents produced after the conclusion of the hearing – where Tribunal relied on the produced document to find the applicant an excluded individual – where failure to allow the applicant to lead further evidence about the produced documents – whether failure resulted in denial of natural justice

*Corporations Act 2001 (Cth), s 198A*  
*Income Tax Assessment Act 1936, s 252*  
*Queensland Building Services Authority Act 1991, ss 56AC(2)(c), 56AC(4), 56AD(8), 56AF(3), Schedule 2*  
*Queensland Civil and Administrative Tribunal Act 2009, ss 4(c), 33(3), 142, 142(3)(b), 146*

*Clements v Independent Indigenous Advisory*

*Committee* (2003) 131 FCR 28  
*Goldie v Minister for Immigration and Multicultural Affairs* [1999] FCA 1277  
*Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82  
*Kioa v West* (1985) 159 CLR 550  
*Applicant Veal of 2002 v Minister for Immigration & Multicultural Affairs* (2005) 225 CLR 88  
*Maher v Adult Guardian & Anor* [2011] QCA 225  
*Foss v Harbottle* (1883) 67 ER 189  
*Nation v QBSA* (2006) QCCTB 114

### **APPEARANCES and REPRESENTATION (if any):**

**APPLICANT:** Mr Peter Cyril McClintock was represented by Mr Taylor of Counsel instructed by Hallett Legal

**RESPONDENT:** Queensland Building Services Authority was represented by Mr Thomson of counsel instructed by Malcolm Robertson, Solicitor

### **REASONS FOR DECISION**

- [1] Mr McClintock is a registered builder and was a former director and nominee builder of Crescent Couriers Pty Ltd. He resigned his directorship on 15 April 2007. Mr McClintock was at all times a substantial shareholder of the company. The company carried on the business of the manufacture of lattice, fencing and residential construction.
- [2] On 1 July 2008 an Administrator was appointed to the company. As a consequence of the Administrator being appointed, the Queensland Building Services Authority categorised Mr McClintock as an 'excluded individual'<sup>1</sup> resulting in the cancellation of his builder's license for a period of five years. To retain his builders license<sup>2</sup> Mr McClintock applied to the Authority to be categorised as a 'permitted individual'.
- [3] On 27 April 2009 the Authority refused to categorise Mr McClintock as a permitted individual because it was not satisfied that he, as an influential person of the company, took all reasonable steps to avoid the circumstances that lead to the appointment of the administrator<sup>3</sup> to the company. On 17 May 2009 Mr McClintock filed an application to review that decision.

<sup>1</sup> Queensland Building Services Authority Act 1991, s 56AC(4).

<sup>2</sup> QBSA Act, s 56AF(3).

<sup>3</sup> QBSA Act, s 56AD(8).

- [4] On 4 January 2010, well outside the time limit for reviewing a decision<sup>4</sup>, Mr McClintock filed a second application to review the decision to categorise him as an excluded individual. In essence, he contended that he was not an influential person in the company at the time the administrator was appointed. An influential person, for a company, is a person other than a director or secretary of the company, who is in a position to control or substantially influence the conduct of the company's affairs.<sup>5</sup> Examples of persons who may be an influential person include a shareholder with a significant shareholding, a financier or a senior employee.<sup>6</sup>
- [5] Both applications came on for hearing in the Tribunal on 12 November 2010. On 21 February 2011 the Tribunal confirmed the decision of the Authority to categorise Mr McClintock as an excluded individual. The application to review the decision to refuse to categorise Mr McClintock as a permitted individual is yet to be heard.
- [6] The Tribunal found that Mr McClintock was an excluded individual on the basis that he was an influential person for the company at the relevant time, that is, within one year<sup>7</sup> immediately before the appointment of the administrator. That finding was based on voluntary disclosure statements signed by Mr McClintock, as a public officer of the company.
- [7] Mr McClintock filed an application for leave to appeal or appeal the Tribunal's decision of 21 February 2011. Leave to appeal is required to appeal on a question of fact.<sup>8</sup> However, because this decision appealed from is a final decision, leave is not required on a question of law.<sup>9</sup>
- [8] When it decides an appeal on a question of law, the Appeal Tribunal may, among other things, confirm or amend the decision; or set aside the decision and substitute its own decision.<sup>10</sup>
- [9] At the hearing of the appeal, Mr McClintock relied essentially on two grounds involving error of law. The first ground is that he was denied procedural fairness. The second ground involves an error of law on the basis that on any view of the facts found by the learned Tribunal Member, Mr McClintock did not satisfy the definition of 'influential person' within the *Queensland Building Services Authority Act 1991* (the QBSA Act).

### **Was Mr McClintock denied natural justice?**

- [10] At the conclusion of the hearing the learned Member made it clear that he was not satisfied with the extent of the evidence concerning Mr McClintock's relationship with the Australian Taxation Office (ATO). In particular what he

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<sup>4</sup> QCAT Act, s 33(3).

<sup>5</sup> QBSA Act, schedule 2.

<sup>6</sup> QBSA Act, schedule 2.

<sup>7</sup> See QBSA Act, s 56AC, esp s 56AC(2)(c).

<sup>8</sup> *Queensland Civil and Administrative Tribunal Act 2009*, s 142, esp s 142(3)(b).

<sup>9</sup> *Queensland Civil and Administrative Tribunal Act 2009*, s 142.

<sup>10</sup> *Queensland Civil and Administrative Tribunal Act 2009*, s 146.

was looking for was 'correspondence, assessment notices – correspondence to and from the ATO, assessment notices and amended assessments for the 2005 and 2006 year'.<sup>11</sup> The learned Member went on to say that he wanted to clarify the tax debt.<sup>12</sup> There was no discussion or expectation that the voluntary disclosure statements would be included in the documents produced. The learned Member then issued a notice to produce to Ahrens Accounting requiring production of correspondence and documents passing between Ahrens and the ATO. The notice to produce was made over an objection by counsel for Mr McClintock. The learned Member then allowed a period of time for both parties to make/file written submissions in relation to the material produced in compliance with the Notice.

[11] As indicated the bundle of documents produced included two 'Voluntary disclosure and Amendment details' documents which were signed by Peter C McClintock on 18 April 2008. They each included 'a submission for application and further remission of penalties', and a taxpayer declaration.

[12] The documents included a request to the ATO to 'amend and remove the income tax deductions claimed in the relevant tax year ....' and a declaration in the terms of 'I declare that the information I have provided is true and complete and that I am authorised to disclose this information'. The documents are each stated to have been completed by Mr McClintock as 'Public Officer'.

[13] The existence of these documents had not been raised during the hearing and nor had there been any suggestion by the Authority that signing the documents Mr McClintock was acting as an influential person in the affairs of the company. As it transpired, it was the signing of the voluntary disclosure documents that led the learned Member to conclude that Mr McClintock was an influential person.

[14] Following the production of those documents, the Authority provided written submissions to the Tribunal. The Authority submitted that the voluntary disclosure documentation was an 'important document' in the affairs of the company signed by Mr McClintock in the capacity of an officer of the company, after he ceased being a director. It was contended by the Authority that this was clear evidence, that within 12 months of the relevant date, Mr McClintock was in fact exercising influence over the affairs of the company.

[15] In response, Mr McClintock referred to section 252 of the *Income Tax Assessment Act 1936* and the requirement for a company to nominate a public officer. He argued that the provision does not suggest that public officers have powers or rights or that they are otherwise people of influence. He contends that the ongoing role as a public officer after his resignation as a director is not a role in the management of the company. He did not

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<sup>11</sup> Transcript page 131.  
<sup>12</sup> Ibid.

specifically address the Authority's submission that by doing so he was exercising influence over the affairs of the company.

- [16] On appeal, the submissions made by Mr McClintock about the alleged denial of procedural fairness relate to the production of the documents subsequent to the conclusion of the hearing. He contends that he was denied procedural fairness because the learned Member relied on the voluntary disclosure documentation signed by Mr McClintock as the company's public officer to make other findings and to conclude that he was an influential person. The other findings made were that by Mr McClintock signing that document, the company obtained an advantage by the substantial reduction in penalties of 80%; he bound the company into amended assessments; and that there were other options.<sup>13</sup>
- [17] The complaint is that once the Tribunal received the documents from Ahrens Accounting, Mr McClintock was not given an opportunity to comment on why he signed the document, whether he knew that the company would get a reduction in penalties, and if so how much, and whether he expected the company would get the full 80% reduction as found by the learned Member.
- [18] Mr McClintock argued that once the learned Member decided to rely on this evidence alone to conclude Mr McClintock exercised influence to obtain an advantage for the company, he should have appraised Mr McClintock of how the documents could be relevant to his consideration. This would have then given Mr McClintock an opportunity to respond to it and provide some explanation or motive for his conduct.
- [19] This is particularly so in circumstances where it was not anticipated that the disclosure documentation would be included in the bundle. The transcript suggests, despite counsel's objection, that the intention to file further submissions was predicated on clarification of the tax debt.<sup>14</sup>
- [20] The Authority argues on appeal that Mr McClintock was on notice of the issue as it was raised in its written submissions, which the learned Tribunal Member subsequently accepted. It argues that although its submission did not expressly articulate the matters now complained of by Mr McClintock, it fairly raised the issue that by signing the documentation as a public officer he was an influential person for the purposes of the Act.
- [21] The Authority says therefore that there has been no denial of natural justice. Pointing out that there was a procedure for responding, the Authority submits that the *Queensland Civil and Administrative Tribunal Act 2009* (the QCAT Act) entitles Tribunal Members to adopt diverse approaches to achieving natural justice. It contended that in keeping with the functions of the Tribunal under QCAT Act, the Tribunal may adopt a procedure for

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<sup>13</sup> Reasons for decision, [38].

<sup>14</sup> Transcript page 131.

ensuring proceedings are conducted in an informal way which minimised costs to parties, and is as quick as is consistent with achieving justice.<sup>15</sup>

[22] The Authority contends that it was open to Mr McClintock to ask to reopen the evidence when he saw the documents and the Authority's submissions, but he did not. His submissions addressed the issue of the disclosure documentation, although in a limited fashion. However, the import of it was obvious and that by signing it the company had the potential to have significant penalties reduced.

[23] Failure to observe natural justice is an error of law.<sup>16</sup> The Federal Court of Australia has held that if a Tribunal decides an issue adversely to a party without giving notice of the issue to the party that it intends to do so and the opportunity to address the issue, then it makes an error of law.<sup>17</sup> However, the High Court of Australia has held that the requirements of natural justice are flexible and vary according to the circumstances.<sup>18</sup> Natural justice requires that a person whose interests may be affected have the opportunity to respond to allegations made which are adverse, relevant and credible.<sup>19</sup>

[24] In essence, the requirement is to act fairly in all of the circumstances.<sup>20</sup> When a statutory power is exercised, the requirements will depend upon a proper construction of the statutory provision, having regard to the common law principles.<sup>21</sup>

[25] The difficulty here is that at the conclusion of the evidence and oral submissions, neither party nor the Tribunal knew what documents would be disclosed, or what use the Tribunal would make of those documents. Although Mr McClintock received a copy of the documents produced in accordance with the notice and was invited to make submissions on them generally, there was no direction or discussion as to what the submissions should specifically address.

[26] Although Mr McClintock did have an opportunity to respond to the Authority's submissions on the point, he did not do so specifically perhaps because, in fairness, the Authority's submissions could be said to be somewhat obtuse concerning the effect of the documents. Mr McClintock did however submit that the Authority sought to gain some advantage from the documents and by further general submissions, and in doing so impermissibly sought to go beyond the 'scope of the basis for the adjournment'. There is some force in this argument when one has regard to why the Notice was issued. He also made some arguments apparently in response to it, regarding public officers of companies under section 252 of

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<sup>15</sup> QCAT Act, s 4(c).

<sup>16</sup> *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Clements v Independent Indigenous Advisory Committee* (2003) 131 FCR 28.

<sup>17</sup> *Goldie v Minister for Immigration and Multicultural Affairs* [1999] FCA 1277, [33-35].

<sup>18</sup> *Kioa v West* (1985) 159 CLR 550.

<sup>19</sup> *Kioa v West* (1985) 159 CLR 550, 629; *Applicant Veal of 2002 v Minister for Immigration & Multicultural Affairs* (2005) 225 CLR 88.

<sup>20</sup> *Kioa v West* (1985) 159 CLR 550.

<sup>21</sup> *Kioa v West* (1985) 159 CLR 550.

the *Income Tax Assessment Act 1936*. However, he did not ask for the evidence to be reopened or for the oral hearing to be resumed for the purposes of making additional submissions.

[27] Affording a party natural justice requires ensuring the party has the opportunity to respond to allegations and evidence that is credible, relevant and significant. Given the objects of the QCAT Act and the functions of the Tribunal, it is open to the Tribunal to afford the opportunity in the manner it considers most appropriate in the proceeding, here it was done by way of further written submission. Was this sufficient in the circumstances? We are mindful that the Court of Appeal has recently been critical of the Tribunal in the manner in which it conducts its proceedings.<sup>22</sup>

[28] The hearing was not resumed where these matters could have been explored. The written submissions were made after the production of documents so the parties had, in effect, to guess or anticipate what use the Tribunal would make of them. Once it became apparent to the learned Member that the disclosure documents would be critical to his ultimate finding whether Mr McClintock was an influential person, they being fresh evidence in the hearing, the better course would have been to resume the hearing. The learned Member could then express his views about the possible impact of the documents and allow the parties to respond.

[29] Where fresh evidence emerges from the production of documents subsequent to the hearing at the request of the Tribunal, it is, in our view unfair not to afford both parties an opportunity to lead further evidence and make detailed submissions, in a resumed hearing, about the documents. The complaint by the applicant is a valid one. Mr McClintock was denied procedural fairness.

[30] Subject to what is said below, the appeal would be allowed. However, as the appeal has been decided on a question of law only, the Appeal Tribunal may substitute its own decision.

### **Was Mr McClintock an influential person?**

[31] It is conceded that Mr McClintock was a significant shareholder, 99%, in the company. Although the learned Member chose not to determine whether this of itself was sufficient to characterise him as an influential person, the Authority submits, in the alternative, that the decision of the learned Member should be affirmed by the Appeal Tribunal on this basis.

[32] The definition of 'influential person' includes an individual 'who is in a position to control or substantially influence the conduct of the company's affairs'. One example given is a 'shareholder with a significant shareholding'.

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<sup>22</sup> *Maher v Adult Guardian & Anor* [2011] QCA 225.

- [33] The Authority's submission before the learned Member was straightforward. The Tribunal should adopt the literal meaning of the section that Mr McClintock, as a significant shareholder, was in a position to control or substantially influence the conduct of the company's affairs.<sup>23</sup> Nothing more needed to be proved. By reason of the shareholding Mr McClintock could call meetings of the company whenever he chose and remove and appoint directors. He could influence the decisions of the company through the director/s.
- [34] The Authority shifted ground somewhat in its submissions on this point in the appeal. It submitted that it 'is unnecessary to go so far as to say that every shareholder with a 'significant shareholding' is an influential person' in order to make a finding that Mr McClintock was an influential person. We accept that it is necessary to consider the facts of the particular case.
- [35] The Authority not only relies on the significant shareholding, but also the factual basis that he funded the costs of the company's administration; that Mr McClintock put into effect advice that he should resign as a director; a new director was appointed; and the decision was made to put the company into administration. The last point is contentious because the changeover of directors was outside the relevant 12 month period and the decision to put the company into administration was that of Mr Hughes. However, it is reasonable to infer the instructions would have come from Mr McClintock.
- [36] It is questionable whether the funding of the administration could be regarded as conducting the affairs of the company. The critical decision is the one made to put the company into administration and once that was done, the directors and shareholders, significant or otherwise, are not in any position to conduct the affairs of the company.
- [37] If the Authority's approach is adopted, then irrespective of the involvement in the company of the type of individual described in the definition, they would automatically become excluded individuals under s 56AC(2)(c). This includes any third party financier or senior employee. We consider this approach too broad. Generally there would need to be some evidence of the individual's position within the company to establish they were in fact in a position to exercise the necessary control.
- [38] It is trite to say that the directors of the company are responsible for its management. So much is provided for in the *Corporations Act 2001* (Cth)<sup>24</sup> and is consistent with the general law.<sup>25</sup>
- [39] The correctness of adopting the Authority's submission was queried by the former Commercial and Consumer Tribunal. In *Nation v QBSA*,<sup>26</sup> the Chairperson said:

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<sup>23</sup> Transcript page 8.

<sup>24</sup> Section 198A.

<sup>25</sup> *Foss v Harbottle* (1883) 67 ER 189.

<sup>26</sup> (2006) QCCTB 114.



*“the BSA’s decision relied on the applicant being a substantial shareholder. The fact that the definition of influential person includes by way of example a person who has a substantial shareholding is not determinative of the issue. It does not mean that in every case a substantial shareholder is an influential person. The Macquarie Concise Dictionary defines “influential” as “having or exerting great influence”.”*

[40] As a general observation, we accept what the Chairperson said because there will be situations where, even with a significant shareholding an individual may not be able to exercise influence over the conduct of the company. Each case must be considered on its own facts.

[41] However, that is not relevant here because, given the level of Mr McClintock’s shareholding, he was clearly in a position to control the affairs of the company if he so wished. There is no evidence that Mr McClintock attempted to exert influence over Mr Hughes’ conduct of the company even though he was in a position to do so by removing him. However, Mr Hughes was answerable to Mr McClintock for his actions.

[42] Even though Mr McClintock was of the opinion that the company was finished and he had no reason to influence the conduct of its affairs he was in a position to do so, if he so chose. He is therefore caught by the definition of influential person.

[43] Accordingly, although Mr McClintock was denied procedural fairness in respect of the produced documents, he was an influential person. The decision of the tribunal to affirm the decision of the Authority to categorise him as an excluded individual was correct.

[44] Therefore, the decision of the tribunal is confirmed.