QCAT

Queensland Civil and Administrative Tribunal

CITATION:	Queensland Building Services Authority v Robuild Pty Ltd [2013] QCATA 238
PARTIES:	Queensland Building Services Authority (Appellant) v Robuild Pty Ltd (Respondent)
APPLICATION NUMBER:	APL226-13
MATTER TYPE:	Appeals
HEARING DATE:	19 August 2013
HEARD AT:	Brisbane
DECISION OF:	**Dr J R Forbes, Member**
DELIVERED ON:	23 August 2013
DELIVERED AT:	Brisbane
ORDERS MADE:	**1. Leave to appeal is refused.** **2. The application for costs by Robuild Pty Ltd is reserved for decision by the Tribunal hearing the application to review.**
CATCHWORDS:	LEAVE TO APPEAL – *Queensland Building Services Authority Act* 1991 – order to remedy defective work – builder's application to review order to remedy – objection to jurisdiction by Authority – whether jurisdiction of Tribunal ousted – whether infringement notice duly served on builder – objection to jurisdiction dismissed – presumption of service rebutted - whether leave to appeal against jurisdictional ruling should be granted – leave refused *Queensland Civil and Administrative Tribunal Act* 2009*,* ss 32, 61, 142, Division 3 *Queensland Building Services Authority Act* 1991*,* ss 75, 86, 109A *State Penalties Enforcement Act* 1999*,* s 15 *Acts Interpretation Act* 1954, ss 4, 39, 39A *Uniform Civil Procedure Rules* 1999, r 430

Ken Harrison Homes v Queensland Building Services Authority [2007] CCT QR 125-06
Smith v Queensland Building Services Authority [2010] QCAT 448
Manwin v Queensland Building Services Authority [2007] QDC 298
Lowe v Aspley [2010] QCATA 59
Big4 Brisbane Northside Caravan Village v Schliebs [2012] QCAT 277
Sendall v Howe and Anor [2012] QCATA 41
Plowman v Palmer (1914) 18 CLR 339
Central Queensland Speleological Society Incorporated v Central Queensland Cement Pty Ltd (No. 1) [1989] 2 Qd R 512
Cameron v Cole (1944) 68 CLR 571
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321
Bull v Attorney-General (NSW) (1913) 17 CLR 370
Australian Postal Corporation v Forgie [2003] FCAFC 223
Ballada Pty Ltd v North Point Brisbane & Anor [2013] QCATA 184
Peter Boyd Enterprises Pty Ltd v QR Concrete Pty Ltd [2012] QDC 324
Fancourt v Mercantile Credits Ltd (1983) 154 CLR 87
Orchard v Orchard (1972) 3 SASR 89
Re Prowse; Ex parte the Debtor (1981) 39 ALR 639
Williams v Official Trustee in Bankruptcy (1994) 122 ALR 585
Deputy Commissioner of Taxation v Ahern (No 2) [1988] 2 Qd R 158
QUYD Pty Ltd v Marvass Pty Ltd [2009] 1 Qd R 41; [2008] QCA 257
Drew v Bundaberg Regional Council [2012] QPELR 350; [2011] QCA 359
Fox v Percy (2003) 214 CLR 118
Minister for Immigration and Citizenship v SZMDS & Another (2010) 240 CLR 611
In Re W (an infant) [1971] AC 682
Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014

APPEARANCES and REPRESENTATION (if any):

This matter was heard and determined on the papers pursuant to section 32 of the *Queensland Civil and Administrative Tribunal Act* 2009 (QCAT Act).

REASONS FOR DECISION

[1] This case depends upon a special statute of limitations in section 86 of the *Queensland Building Services Authority Act* 1991 ("the BSA Act"), as applied to the present facts and circumstances.

[2] Section 86(1) confers jurisdiction on this Tribunal to review[1] certain decisions of the appellant Queensland Building Services Authority (the BSA). Included in that list[2] is a decision to direct licensees of the Authority to rectify "*tribunal work".*[3]

[3] The respondent Robuild Pty Ltd ("Robuild") is a licensee of the appellant Authority.

[4] On 15 August 2012 the BSA's Townsville office directed Robuild to rectify a metal roofing system and other items at premises in Toorak Place, Townsville.[4]

[5] On the same day the BSA posted a notice of that direction to Robuild's Post Office Box 19, Belgian Gardens, Townsville. In the ordinary course of post[5] it was delivered to Robuild on 16 August 2012. Receipt of that notice is not disputed.[6]

[6] On 15 October 2012 the BSA posted an infringement notice[7] addressed to Robuild at "*Unit 4a, 5-9 Turnbull Street, Garbutt, Qld 4814"*, for failure to comply with the notice to remedy. At that time there were two addresses for Robuild in the BSA's records, namely "*PO Box 19, Belgian Gardens"* (to which the notice to rectify was sent) and "*5-9 Turnbull Street, Garbutt, Qld 4814*".[8]

[7] On 25 October 2012 Robuild filed a Form 26[9] seeking an order that Direction to Rectify No 37073 be "*vacated*" or "*withdrawn*". On 12

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1 QCAT Act Division 3 ss 17-24 (Review Jurisdiction).
2 BSA Act s 86(1)(e).
3 As defined in BSA Act s 75.
4 Direction to Rectify and/or Complete No 37973, submissions of the BSA dated 14 January 2013, annexure SUB-1.
5 *Acts Interpretation Act* 1954 s 39A(1)(b).
6 Application to Review Part B page 4. Further, receipt is implicitly admitted in email Robuild to BSA dated 12 September 2012, seeking extra time to comply with the Direction to Rectify: BSA submissions 14 January 2012 annexure SUB-5.
7 A notice under s 15 of the *State Penalties Enforcement Act 1999*, issued by an authorised person who reasonably believes that an infringement notice offence has been committed.
8 Affidavit of Anthea Leigh Lenoy sworn 27 February 2013, annexure AL-1; affidavit of Susan Lynne Van Eyk sworn 28 February 2013 annexure SVE-1.
9 Application for domestic building disputes.

November 2012 the company filed an appropriate Form 23[10], seeking the same relief.

[8] On 14 January 2013 the BSA sought dismissal of Robuild's application on the ground that the Tribunal had no jurisdiction to entertain it.

[9] The basis of that submission is that Robuild's application to review was not made within the time limited by section 86(2)(b)(i) of the BSA Act. Materially, that provision stipulates that the Tribunal "*must not review*" a notice to remedy if *"28 days have elapsed from the date the direction to rectify ... was served on the building contractor and the contractor has not, within that time, applied to the Tribunal for a review of the decision; AND (ii) the authority has - ... (C) ... served an infringement notice, for an offence against section 72(10).*" (emphasis added).

[10] On 3 May 2013 the Tribunal dismissed the BSA's application to strike out the proceedings for want of jurisdiction. From that decision the BSA appeals on these grounds:

> (1) The learned Member erred in law in finding that the office of Robuild Pty Ltd at 4a 5-9 Turnbull Street, Garbutt Qld 4814 is not a "*principal office"* of the company as defined by s 39 of the *Acts Interpretation Act 1954.*
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> (2) The learned Member erred in both law and fact in finding that "*there has not been effective service of an infringement notice pursuant to s 86(2)(b)(ii) of the Queensland Building Services Act 1992 and the review jurisdiction of the Tribunal has not been ousted pursuant to that provision.*"

[11] There is no application by Robuild for extension of time to seek review; if there were, it would necessarily be dismissed. The prohibition in section 86(2) defines and limits the jurisdiction of the Tribunal, and the form of action available to persons dissatisfied with BSA decisions. It is not merely a procedural rule that may be relaxed under section 61 of the QCAT Act. It is a mandatory, substantive rule of law,[11] and a condition of jurisdiction.[12]

[12] It is clear that more than 28 days elapsed between service of the Notice to Remedy and Robuild's filing of the application to review. The remaining and crucial question is whether the BSA served an infringement notice ("the notice") upon Robuild before its application for review was commenced.

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10 Application to review a decision.

11 *Ken Harrison Homes v Queensland Building Services Authority* [2007] CCT QR 125-06 at [18]; *Smith v Queensland Building Services Authority* [2010] QCAT 448 at [30]; *Manwin v Queensland Building Services Authority* [2007] QDC 298 at [16]; and compare *Lowe v Aspley* [2010] QCATA 59 at [11]; *Big4 Brisbane Northside Caravan Village v Schliebs* [2012] QCAT 277 at [23]; *Sendall v Howe and Anor* [2012] QCATA 41; *Plowman v Palmer* (1914) 18 CLR 339 at 348-349; *Central Queensland Speleological Society Incorporated v Central Queensland Cement Pty Ltd (No. 1)* [1989] 2 Qd R 512 at 518.

12 *Cameron v Cole* (1944) 68 CLR 571 at 584 per Latham CJ.

[13] Plainly the infringement notice was *issued* before review was sought, but there is evidence, accepted by the Tribunal[13], that Robuild did not *actually* receive it. Nevertheless, was the mere posting of it to Unit 4a, 5-9 Turnbull Street, Garbutt, Qld 4814 good service in law? The learned Member held that it was not, and rejected any suggestion that, in so doing, he relied on a "*mere technicality*":

> The provisions of s 86 of the QBSA Act allowing review of the decisions of the Authority are remedial in nature, providing to aggrieved parties affected by a decision an avenue of review. The fullest possible relief should be allowed ... in the application of the provision ... Limits to such remedial rights, such as [are] prescribed by s 86(2)(b) should be strictly interpreted.[14]

[14] There is no mention of "*Unit 4a*" in any of the BSA's records of Robuild's addresses. (Distinguish the address to which the notice to remedy was sent – an address that *is* in the BSA's records.) So far as those records are concerned, "*Unit 4a*" is, as the Member observed, "*a prefix gratuitously added*".[15] The Member's implicit view that the "*prefix*" amounts to a real, and not merely a technical difference finds support in the uncontradicted evidence of Mrs Stainton, who deposes that mail sent to Robuild's street address, as distinct from its Post Office box, is usually deposited in mailbox number 7 in the building shared by the company, and that there is no box numbered 4a. On the other hand Mr Stainton refers to Unit 4a (etc) as the company's street address,[16] but each deponent swears that the infringement notice was never received, and that searches of the company's office, and inquiries at the adjacent Rentokil office have all failed to locate it.[17]

[15] According to the Act, a document may be served by posting it to the address of the licensee in the register of licensees kept by the Authority.[18]

[16] It is true that the *Acts Interpretation Act* 1954 allows service by post upon the head office, a registered office or a principal office of a body corporate[19], but the application of that Act may be displaced by a contrary intention appearing in another Act.[20] In my view – *pace* the first ground of appeal - section 109A of the BSA Act expresses a contrary intention, by specifying that service may be effected at the address in the Authority's register, absent any mention of a "*head office, a registered office or a principal office*". There is no evidence that "*Unit 4a -9 Turnbull Street,*

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13 Affidavit of Robin Patricia Stainton sworn 12 February 2013, paragraphs 4, 7, 8; affidavit of William Duncan Stainton sworn 12 February 2013; Decision 3 May 2013 at [20].

14 Decision 3 May 2013 AT [24], citing *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321; *Bull v Attorney-General (NSW)* (1913) 17 CLR 370; *Australian Postal Corporation v Forgie* [2003] FCAFC 223.

15 Decision 3 May 2013 at [15].

16 Decision 3 May 2013 at [17].

17 Affidavit of Robin Patricia Stainton sworn 12 February 2013, paragraphs [8], [10]; affidavit of William Duncan Staunton sworn 12 February 2013 paragraphs [6], [7].

18 BSA Act s 109A(1).

19 *Acts Interpretation Act* 1954 s 39(1)(b).

20 *Acts Interpretation Act* 1954 s 4.

Garbutt, Qld 4814" is the address (or an address) of Robuild in the Authority's register.

[17] The *Acts Interpretation Act* 1954 provides that, if an Act requires or permits a document to be served by post, service is taken to be effected at the time at which the letter would be delivered in the ordinary course of post, unless the contrary is proved.[21]

[18] However, as the proviso "*unless the contrary is proved*" indicates, the presumption is rebuttable.[22] A bare denial of receipt is insufficient,[23] but the rebuttal evidence in this case does not end there. In my opinion, the negative condition of the Authority's register (with respect to Unit 4a), the evidence of the Staintons (which the Member, as judge of fact, accepted), and the legislative provisions already mentioned[24] are a combination of facts and circumstances that entitled him to conclude, according to the civil standard of proof, that the BSA did not effectively serve the infringement notice upon Robuild. With respect, the learned Member rightly emphasised the remedial character of section 86(1) of the BSA Act, which implicitly demands strict interpretation of the jurisdictional limits in sub-section (2).

[19] Accordingly, the jurisdiction of the Tribunal is not excluded by section 86(2), and Robuild's application to review may proceed. There will be an order to that effect.

[20] On the view that I have taken, it is unnecessary to discuss the additional evidence tendered by Robuild[25] or the BSA's objections thereto. Suffice it to say that it does not meet the tests for admission of fresh evidence,[26] and it does not identify the sources of its hearsay contents. That is essential, even in interlocutory proceedings.[27]

[21] Leave to appeal is required, as this is not the Tribunal's final decision in this proceeding, and the decisive question is not purely one of law.[28]

[22] On an application for leave to appeal one must examine the proceedings at first instance, to see whether there is a reasonably arguable case of error which, if not corrected, will cause substantial injustice to the applicant.[29] Findings of fact will not usually be disturbed if they have

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21 *Acts Interpretation Act* 1954 s 39A(1).

22 See for examples *Ballada Pty Ltd v North Point Brisbane & Anor* [2013] QCATA 184 at [10]; *Peter Boyd Enterprises Pty Ltd v QR Concrete Pty Ltd* [2012] QDC 324 at [17].

23 *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87 at 95.

24 Namely, the BSA Act s 109A(1), and the *Acts Interpretation Act 1954* ss 4 and 39A.

25 Affidavit of Timothy William McCheane sworn 27 June 2013.

26 *Orchard v Orchard* (1972) 3 SASR 89 at 98-99; *Re Prowse; Ex parte the Debtor* (1981) 39 ALR 639; *Williams v Official Trustee in Bankruptcy* (1994) 122 ALR 585.

27 *Deputy Commissioner of Taxation v Ahern (No 2)* [1988] 2 Qd R 158; *Uniform Civil Procedure Rules* 1999 r 430.

28 QCAT Act ss 142(3)(a)(ii), 142(3)(b).

29 *QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41; [2008] QCA 257 at [6]; *Drew v Bundaberg Regional Council* [2012] QPELR 350; [2011] QCA 359 at [18].

rational, albeit debateable support in the evidence.[30] Ultimately the decision in question turns, not on an abstruse point of legal interpretation, but on assessment, by the primary decision maker, of the weight of evidence in rebuttal of the presumption of due service. That was precisely the function of the primary adjudicator, and I can see no appellable error in the view that he has taken. It is essentially a finding of fact under the proviso to section 39A of the *Acts Interpretation Act* 1954*,* in the circumstances summarised in paragraph [18] above. It is not appellable error to prefer one version of the facts to another, or to attribute more weight to the submissions of witness "A" than to those of witness "B". Where reasonable minds may differ, a decision cannot properly be called erroneous, simply because one rational conclusion has been preferred to another possible view.[31]

[23] Leave to appeal will be refused.

[24] The question of Robuild's costs will be reserved to the Tribunal hearing the application to review.

ORDERS

1. Leave to appeal is refused.
2. The application for costs by Robuild Pty Ltd is reserved for decision by the Tribunal hearing the application to review.

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30 *Fox v Percy* (2000) 214 CLR 118 at 125-126.

31 *Minister for Immigration and Citizenship v SZMDS & Another* (2010) 240 CLR 611 at [131]; *In Re W (an infant)* [1971] AC 682 at 700 per Lord Hailsham; *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1025.

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