SUPREME COURT OF QUEENSLAND

CITATION:	*Queensland Building & Construction Commission v Robuild Pty Ltd* [2014] QCA 81
PARTIES:	**QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION** (applicant) **v** **ROBUILD PTY LTD** ACN 065 478 408 (respondent)
FILE NOS:	Appeal No 8882 of 2013 QCAT No 226 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Queensland Civil and Administrative Tribunal Act*
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal at Brisbane
DELIVERED ON:	15 April 2014
DELIVERED AT:	Brisbane
HEARING DATE:	21 March 2014
JUDGE:	Holmes and Muir JJA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application for leave to appeal is refused.**
CATCHWORDS:	ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – where a tribunal member of the Queensland Civil and Administrative Tribunal (QCAT) found that the applicant, Queensland Building Construction Commission, had not effected proper service of an infringement notice on the respondent – where the appeal tribunal of QCAT refused leave to appeal the tribunal member's decision – where the applicant sought leave to appeal what were said to be errors of law by the appeal tribunal – whether any question of general importance was involved – whether any substantial injustice had resulted from the appeal tribunal's decision – whether leave should be granted to appeal *Acts Interpretation Act* 1954 (Qld), s 39, s 39A *Queensland Building Services Authority Act* 1991 (Qld), s 72(10), s 99, s 109 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 150

Polstar Pty Ltd v Agnew (2007) 208 FLR 226; [2007] NSWSC 114, cited

COUNSEL: C M Muir for the applicant
No appearance for the respondent

SOLICITORS: Robinson Locke Litigation Lawyers for the applicant
No appearance for the respondent

[1] **HOLMES JA:** The applicant, Queensland Building Construction Commission[1] (QBCC), seeks leave to appeal a decision of the appeal tribunal of the Queensland Civil and Administrative Tribunal which refused leave to appeal a tribunal member's decision. The tribunal member found that QBCC had not effected proper service of an infringement notice on the respondent, Robuild Pty Ltd. The infringement notice was for an offence under s 72(10) of the *Queensland Building Services Authority Act* 1991,[2] of failing to rectify defective building work as required by a direction. QBCC had sought to strike out Robuild's application to review the direction to rectify; whether the strike-out application succeeded depended on whether the infringement notice had been properly served. Proper service of the notice in combination with the lapse of a statutory time period for the application for review would preclude the tribunal from reviewing the direction to rectify.[3]

[2] Section 150 of the *Queensland Civil and Administrative Tribunal Act* 2009 permits appeal from the appeal tribunal to the Court of Appeal only on a question of law and with this Court's leave. The granting of leave has generally been considered by reference to the same criterion as leave to appeal under s 118(3) of the *District Court of Queensland Act* 1967: whether the interests of justice warrant this court's intervention. Robuild did not appear on the application, relying instead on the submissions it had made in the tribunal. As it transpired, QBCC's arguments had shifted considerably since then.

The proposed grounds of appeal

[3] The grounds of appeal which QBCC at the start of the hearing sought leave to advance were as follows:

> "(1) The learned Member erred in law in finding at paragraph [16] of the Decision that the *Acts Interpretation Act* 1954 (Qld) does not apply to service pursuant to section 109A of the *Queensland Building and Construction Commission Act* 1991 (Qld);
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> (2) The learned Member erred in law in failing to find that service was [not] effected in accordance with s 39 of the *Acts Interpretation Act* 1952 (Qld) – as such a finding was [not] open on the evidence;
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> (3) The learned Member erred in law in finding at paragraph [18] of the Decision that the presumption of delivery provided for under s 39A of the *Acts Interpretation Act* 1952

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1 Formerly the Queensland Building Services Authority.

2 Now the *Queensland Building and Construction Commission Act*.

3 By virtue of s 86(2)(b)(i) of the *Queensland Building Services Authority Act*.

(Qld) had been rebutted – as such a finding was not open on the evidence."

As argument progressed, the focus shifted to the first of those grounds; QBCC did not press the second and third.

Legislation relating to service

[4] QBCC relied in the tribunal at first instance and in the appeal tribunal on s 109A of the *Queensland Building Services Authority Act*, which provides for service of documents under the Act:

> "**109A Service of documents**
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> (1) A document may be served under this Act on a licensee by leaving it at, or sending it by post, telex, facsimile or similar facility to, the address of the licensee in the register of licensees kept by the authority.
>
> (2) Subsection (1) does not limit the *Acts Interpretation Act 1954*, section 39."

Section 99 of the *Queensland Building Services Authority Act* provides for a register of licensees which must include particulars of a "licensee's full name, business address and licence number".[4]

[5] As a fall-back position, QBCC relied on s 39 of the *Acts Interpretation Act* 1954, referred to in s 109A(2), which provides, relevantly,

> "**39 Service of documents**
>
> (1) If an Act requires or permits a document to be served on a person, the document may be served—
>
> ...
>
> (b) on a body corporate—by leaving it at, or sending it by post, telex, facsimile or similar facility to the head office, a registered office or a principal office of the body corporate..."

[6] Section 39A of the *Acts Interpretation Act* expands on how service by post may be carried out:

> "**39A Meaning of service by post etc.**
>
> (1) If an Act requires or permits a document to be served by post, service—
>
> (a) may be effected by properly addressing, prepaying and posting the document as a letter; and
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> (b) is taken to have been effected at the time at which the letter would be delivered in the ordinary course of post, unless the contrary is proved."

[7] At the hearing of the leave application, counsel for QBCC brought the court's attention to QBCC's very recent realisation that s 109A of the *Queensland Building Services Authority Act*, relied on below, was irrelevant. Instead, the applicable provision was s 13 of the *State Penalties Enforcement Act* 1999, which provides for service of an infringement notice where an authorised person reasonably believes that an "infringement notice offence" has been committed.

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4 Section 99(2)(a).

[8] "Infringement notice offence" is defined in schedule 2 to the Act to mean "an offence… prescribed under a regulation to be an offence to which this Act applies". Section 4(1) of the *State Penalties Enforcement Regulation* 2000 says that specified schedules to the Regulation prescribe infringement notice offences for the Acts mentioned in the schedules. Schedule 5 to the Regulation lists infringement notice offences under the *Queensland Building Services Authority Act*; they include offences under s 72(10), the offence provision concerned in this case. The *State Penalties Enforcement Act* does not contain any prescription for the manner of service, so that s 39 of the *Acts Interpretation Act* would apply.

The first instance QCAT decision

[9] QBCC's application to dismiss Robuild's review application turned, as has already been noted, on whether Robuild had been served with the infringement notice. QBCC put two affidavits put before the tribunal member. The first was sworn by an employee of QBCC, Ms Lenoy, who deposed that she had printed an infringement notice from QBCC's electronic "database of licensees", annexing what she described as "an extract from the Authority's database of the Applicant's Participant Profile". The document was, indeed, headed "Participant Profile" and it recorded Robuild's business address and registered office address as "Unit 4A, 5-9 Turnbull Street, Garbutt". Ms Lenoy said that she had caused the notice to be collected by Australia Post on 15 October 2012 for delivery to the business and registered office address shown in the Participant Profile.

[10] Ms Van Eyk, a lawyer employed by QBCC, was the author of the second affidavit. She deposed to having conducted a search of the applicant's address history on QBCC's "database of licensees", and annexed to her affidavit an extract headed "Address History" which showed Robuild's address, since September 2012, as "5-9 Turnbull Street, Garbutt".

[11] The tribunal member was thus faced with two affidavits from QBCC giving different forms of Robuild's address, in each case said to be from QBCC's "database of licensees". Neither deponent said that the database she relied on was actually the statutory register of licensees. QBCC's written submission was entirely silent on the point, and on the discrepancy between the databases. It would not have been surprising had the member found that there was no evidence of any address for Robuild in the register of licensees, but he appears to have accepted the lawyer's affidavit as authoritative, finding that the register showed Robuild's business address as "5-9 Turnbull Street, Garbutt QLD 4814".

[12] Robuild's sole director and nominee, Mr William Stainton, and his wife, Mrs Robyn Stainton, both deposed that the notice had not been received at Robuild's business premises, which they described as "located at Unit 4A, 5-9 Turnbull Street, Garbutt, Townsville". Mrs Stainton explained, moreover, that there was no street mailbox for Unit 4A. The mail, if sent to the street address of 7 Turnbull Street, Garbutt shown on the company's letterhead, was usually placed in box number 7.

[13] The tribunal member found that since QBCC had addressed the notice to "Unit 4A", it had not served the notice at the licensee's address in the register of licensees and had not served in accordance with s 109A(1). He went on to consider whether service had been effected pursuant to s 39 of the *Acts Interpretation Act*. The member observed that there was no evidence before him as to whether the address

at Unit 4A, 5-9 Turnbull Street, Garbutt was "the place at which the business of the company is controlled and managed"[5] so as to constitute a principal place of business. Nor was there evidence of an "office" in the sense referred to by Barrett J in *Polstar Pty Ltd v Agnew*.[6] The evidence of the Staintons went no further than very generally describing the Unit 4A as business premises. Consequently, QBCC could not show that it had served the notice under s 39 of the *Acts Interpretation Act*.

The application for leave to appeal in the QCAT appeal tribunal

[14] The grounds of appeal on which QBCC sought leave to appeal to the appeal tribunal were that the member had erred in finding that Robuild's office at Unit 4A, 5-9 Turnbull Street, Garbutt was not a "principal office" and that he had erred in law and fact in finding that there had not been effective service of the infringement notice.

[15] The appeal tribunal endorsed the tribunal member's finding that there had not been effective service under the *Queensland Building Services Authority Act*. The appeal tribunal member noted that the application of the *Acts Interpretation Act* could be displaced by a contrary intention appearing in another Act[7] and expressed his view that s 109A(1) of the *Queensland Building Services Authority Act* did express a contrary intention by referring only to service at the address in the register of licensees. In any event, he continued, the presumption in s 39A of service by post as effected at the time of delivery in the ordinary course of post could be rebutted. The tribunal member was entitled to conclude, from the evidence of the Staintons, and the absence of reference to Unit 4A in the QBCC register, that the document was not received. The appeal tribunal concluded that there was no reasonably arguable case of error in the findings.

Leave to appeal to this court

[16] The appeal tribunal member took the view that s 109A expressed a contrary intention to application of the *Acts Interpretation Act* because it referred specifically to service at the address in the register of licensees. I would view s 109A(2), however, as making it clear that a more expansive view is to be taken of service, including the means available under s 39. However, if the appeal tribunal member was wrong in this regard, the error would not justify a grant of leave to appeal, for a number of reasons.

[17] QBCC's solicitor deposed that the proposed appeal grounds concerned

> "matters of general importance in the context of [QBCC's] being able to have efficient and consistent systems and clarity as to the service of documents and infringement notices as part of its administration of the Home Warranty Scheme."

It is difficult to see that the aims of efficiency, consistency and clarity are likely to be served in circumstances where the entire argument was mounted, until the hearing of the current leave application, on the basis of legislation which QBCC now contends does not apply.[8] There would seem little justice or, indeed, point, in

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5 *Palmer v Caledonian Railway Co* [1892] 1 QBD 823 at 827 per Lord Esher MR.

6 (2007) 208 FLR 226 at 230.

7 *Acts Interpretation Act* s 4.

8 One might also observe that the aims of "efficient and consistent systems and clarity as to the service of documents" under the *Queensland Building Construction Commission Act* would be well-served by QBCC's being able to identify what constitutes its register of licensees.

this court's now intervening when QBCC's applications in the tribunal appear to have been misconceived throughout and Robuild has had no opportunity to respond to the submission that the *State Penalties Enforcement Act* applies.

[18] No substantial injustice has been shown to have resulted from the identified error. There is no reason to suppose, were leave granted, that a different outcome would be produced. The appeal tribunal member did not end his reasons with his conclusion as to the application of s 39. He went on to consider the position if the provision did apply, concluding that there was in any event evidence capable of rebutting the presumption of delivery. That seems correct: the Staintons' evidence went beyond mere non-receipt of the notice. Mrs Stainton explained why it was not possible for the postal service to effect a delivery to Unit 4A.

[19] Moreover, the tribunal member at first instance also considered the application of s 39 and rejected it because he was not satisfied that Unit 4A, 5-9 Turnbull Street, Garbutt was a "principal office" of Robuild, nor that it was the company's registered or head office. QBCC argued that he should not have found that the Unit 4A address was not Robuild's principal office in light of the references in the Staintons' material to it as the company's business address; but it seems to me that finding was open to him.

[20] I would refuse the application for leave to appeal.

[21] **MUIR JA:** I agree that the application for leave to appeal should be refused for the reasons given by Holmes JA.

[22] **APPLEGARTH J:** I also agree that the application for leave to appeal should be refused for the reasons given by Holmes JA.