

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Kotynski v Peter Ernest James Rogers t/a Rogers Pools & Anor* [2023] QCATA

PARTIES: **ALICIA KOTYNSKI**
(applicant)

v

PETER ERNEST JAMES ROGERS T/A ROGERS POOLS
(first respondent)

QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION
(second respondent)

APPLICATION NO/S: APL249-21

ORIGINATING APPLICATION NO/S: GAR200-20

MATTER TYPE: Appeals

DELIVERED ON: 23 June 2023

HEARING DATE: 15 May 2023

HEARD AT: Brisbane

DECISION OF: Member Matthews KC and Member Davies

ORDERS: **Application for leave to appeal dismissed.**

CATCHWORDS: APPEAL – LEAVE TO APPEAL – where grounds of appeal are only that the Member erred in fact – where appeal was only in relation to an additional ground of the decision – whether leave to appeal should be granted where grounds of appeal not substantiated.

Queensland Civil and Administrative Tribunal Act 2009, s142(3)(b)

Lida Build Pty Ltd v Miller & Anor [2011] QCATA 219.
O'Brien v Queensland Building and Construction Commission [2014] QCATA 177.

APPEARANCES & REPRESENTATION:

Applicant: Mr Kotynski

First Respondent: Mr Tindall of counsel instructed by Robinson Locke Litigation Lawyers

Second Respondent: Mr P Gordon (solicitor) of HWL Ebsworth

REASONS FOR DECISION

Procedural Background

- [1] On 11 June 2020 the first respondent, Peter Ernest James Rogers trading as Rogers Pools (“Rogers”) applied to the Tribunal for a review of the second respondent, Queensland Building and Construction Commission (“QBCC”) decision that the applicant, Alicia Kotynski (“Ms Kotynski”) had validly terminated her contract with Rogers having the consequence of allowing a claim for non-completion under the Queensland Home Warranty Scheme.
- [2] That application for review was heard in Brisbane via teleconference by a Member of the Tribunal on 5 August 2021.
- [3] On 11 August 2021, the Tribunal delivered its decision in respect of the application to review deciding that:

“The decision of the Queensland Building and Construction Commission made on 26 May 2020 is set aside, and a new decision substituted that Alicia Kotynski did not validly terminate the contract with Peter Ernest James Rogers trading as Rogers Pools.”
- [4] From that decision, on 8 September 2021, Ms Kotynski filed an application for leave to appeal or appeal with the Tribunal.
- [5] Pursuant to directions issued by the Appeal Tribunal on 1 December 2021, written submissions in relation to the error alleged by Ms Kotynski in her application for leave to appeal or appeal, amongst other directions, was made.

Factual Background

- [6] On 8 August 2019 Ms Kotynski entered into a contract with Rogers for the construction of a swimming pool at her home. Clause 11.6 of the contract provided that Rogers was entitled to claim progressively on completion of stages as set out in part D of the Appendix to the contract. One such stage was the “completion of Excavation” in the amount of \$16,167.20 (including GST). Part B of the Appendix also included a provisional sum for pool excavation in the amount of \$3,000.00 (including GST).
- [7] The contract had attached a plan of the layout of the pool, which plan does not on its face show the distance of either the pool or wading pool from the house and the alfresco area, respectively. The want of such dimensions is discussed in these reasons below.

- [8] Of importance was that the engineering plans indicated the pool was to be located 1200mm from the home and the wading pool to be 800mm from the alfresco area but further that no work was permitted closer than 1.2m from any council infrastructure.¹
- [9] The parties fell into dispute when it was ascertained that the dimensions of the alfresco were different from those contained on the engineering plan after it seems the extent of the slab for that area was fully exposed at the commencement of excavation.
- [10] Some other matters occurred that are referred to by the Member below in late September to October 2019. On 25 October 2019, Rogers provided Ms Kotynski with a tax invoice for \$3,526.000 being for excavation overrun and Rogers' solicitors forwarded to her a variation document requesting a variation to obtain a relaxation from Redlands City Council to enable works to continue within 1.2m of the sewer line.
- [11] On respectively 29 October 2019 and 1 November 2019, Rogers provided Ms Kotynski with a notice of intention to terminate on the basis that she was in substantial breach of the contract by failing to pay the excavation overrun claim and substantial breach by not agreeing to the variation which had been sought to the contract.
- [12] It is not in dispute that Ms Kotynski failed to pay the excavation overrun claim nor that she provided written notice agreeing to the variation, the result of which was that on 28 November 2019 Rogers gave notice of termination of the contract.

Grounds of Appeal

- [13] The handwritten grounds of appeal in the application are plainly grounds which assert errors of fact only and not error of law. They are as follows:
- “Incorrect decision based on fact. Member Cranwell has acknowledged that there was a small amount of hand excavation that needed to be completed but that he considered the excavation is complete. This decision doesn't align with the english language to the best of my knowledge. Secondly the plan clearly shows an 800mm concourse as its scaled & never did we instruct that the pool be located 1200mm from the house and the evidence provide supports this fact.”
- [14] What flows from these grounds is that Ms Kotynski may only appeal on a question of fact if we grant leave to appeal.²
- [15] The appeal jurisdiction of the Tribunal is not generally the proper forum to receive evidence and dispute the facts.³ We accept the written submission in response by Rogers that leave to appeal will ordinarily only be granted:

¹ This condition was one of those of approvals by the private certifier on 23 August 2019.

² *Queensland Civil and Administrative Tribunal Act 2009* (“QCATA”) s142(3)(b); *Lida Build Pty Ltd v Miller & Anor* [2011] QCATA 219, [6].

³ *Lida Build* (supra), [4].

- (a) When a question of general importance upon which further argument in a decision of the Appeal Tribunal is to the public advantage;
- (b) there is a reasonably arguable case that the primary decision maker made an error;
- (c) there are reasonable prospects that the applicant would be granted orders in their favour; and
- (d) to correct a substantial injustice to the applicant caused by error.⁴

[16] Similar submissions were made in the QBCC's written submissions.⁵

[17] At the hearing of the application for leave, Ms Kotynski was represented by her husband, Mr Kirk Kotynski, pursuant to leave previously granted in that regard by the Appeal Tribunal.

The Parties' Contentions

[18] At the outset of his oral submissions, Mr Kotynski made plain that there were two what he described as "critical" points and articulated them to the effect that:

- (a) Whether the pool excavation was complete; and
- (b) whether a concurrence of a particular dimension between the edge of the wading pool and Mr and Ms Kotynski's dwelling house was a contractual obligation to be fulfilled by Rogers.

[19] In other words, Mr Kotynski articulated at the outset the two errors of fact identified in the grounds of appeal.

[20] When asked to clarify whether there was any challenge to the Tribunal's finding that the termination by Rogers given on 28 November 2019 was on the footing that Ms Kotynski did not pay the excavation overrun claim, nor did she provide written notice of agreeing to the variation. Mr Kotynski replied in the negative.

[21] The Tribunal's reasons based upon a consideration of the terms of the contract outlined above was that Ms Kotynski had not remedied her breach within ten (10) business days thus justifying Rogers' termination on 28 November 2019. In other words, the outcome of the review proceeding in the Tribunal was founded upon those findings and that unchallenged evidence and, as noted above, error in that finding was specifically eschewed by Mr Kotynski during the oral hearing before us.

[22] The Member below then addressed two other issues which are those the subject of the contended factual errors.

[23] Because the critical finding is not the subject of challenge, the application for leave to appeal must be dismissed.

[24] However, as did the Tribunal below, out of deference to the written and oral submissions of Mr Kotynski, we will address the additional two issues which he has raised.

⁴ Rogers' submissions, paragraph 5.

⁵ At paragraph 3.

Reliance on Additional Evidence

- [25] Rogers has by its written submissions⁶ identified that Ms Kotynski's written appeal submissions include not only the transcript of the proceeding below but a great deal of additional material which was not previously placed before the Tribunal.
- [26] No application has been filed by Ms Kotynski to seek leave to adduce such further evidence.
- [27] Mr Kotynski was also specifically asked by us during the course of the hearing whether those additional documents had not been placed before the Tribunal to which he had replied in the affirmative and, further, whether they were all available at the time of the hearing below to which he also replied affirmatively.
- [28] In those circumstances such evidence should not be received on the appeal⁷ and as additional evidence is generally not received as it is important for litigation to be brought to a conclusion, we are of the view that the seeking to adduce this additional evidence is simply an attempt to relitigate factual matters in the hope of a different outcome. No material was placed before us to explain why that evidence had not previously been adduced, other than Mr Kotynski's submissions made early in his submissions that he and his wife, understandably for lay litigants, could not understand the formality of the Tribunal process below. However, Mr Kotynski's submissions did not, in our view, go so far as to suggest that his wife had not been accorded procedural fairness in the Tribunal.

Submissions as to Credibility

- [29] A further matter raised by Mr Kotynski in his submissions is to the effect that the Tribunal Member erred in accepting as credible the evidence of the Rogers' witnesses asserting that those witnesses had made "false declarations". This submission is at the heart of one of two "critical" matters, namely the "setback" of 1200mm.
- [30] Our review of the transcript is indicative of the Tribunal Member assisting Mr Kotynski appearing on behalf of Ms Kotynski in the manner in which he ought to have cross-examined the Rogers' witnesses.
- [31] In particular, during the cross-examination of Mr Peter Rogers, the Member suggested that there was an incorrect measurement on a plan at page 52 as to the distance between the concourse and the wading area. The transcript at 1-38 to 1-39 records the following as having occurred:

"Yeah. Exactly. Yeah. Member, look, I'm not sure how the formalities with these things travel, but with the discussions earlier on, you are correct that the plan, on page 52, is not achievable. There is an incorrect measurement - - -"

MEMBER: All right. So, Mr Kotynski, what you're doing at the moment is asking questions of Mr Rogers.

MR KOTYNSKI: Yeah. Okay. Well, I guess my only question - - -

⁶ At paragraphs 30-34.

⁷ *O'Brien v Queensland Building and Construction Commission* [2014] QCATA 177, [8].

MEMBER: So if you want to put that to him, if you want to say, "Mr Rogers, I put it to you that the plan on page 52 is not achievable", then you can do that, but later in the hearing will be the time for submissions.

MR KOTYNSKI: Okay. Yeah.

MEMBER: But at the moment you're asking questions of Mr Rogers, and the question needs to be in a form that Mr Rogers is capable of answering.

MR KOTYNSKI: Yeah. No. I've got no questions. I'm happy for QBCC to – to play their part."

- [32] That passage highlights not only that the Tribunal Member sought to assist Mr Kotynski in the presentation of his case but that Mr Kotynski positively, it seems to us, elected not to put his wife's case to at least that witness or others. The transcript discloses that notwithstanding the submissions on appeal that Ms Kotynski's case was that the Rogers' witnesses were lacking in credibility, that was not, so far as we can see, put to them. This included the evidence that some hand digging was necessary to complete the excavation.
- [33] Further, there was no reason why the Member should not have accepted the Rogers evidence as to the agreement reached on site concerning the 1200mm setback, as Mr Kotynski's evidence was that he "did not recall", as was confirmed by him during closing submissions.⁸
- [34] The "instructions" by the Kotynskis as found by the Member is simply another way of expressing the agreement as to the setback.
- [35] What flows from this is that the Member's acceptance of the Rogers' evidence and the findings which flowed therefrom including the second "critical" issue as to whether excavation was complete, do not constitute in our view appellable error which would ground reasonable prospects of success on the appeal such that leave to appeal would be granted.
- [36] We cannot accept that the Member's "finding" (if the statement at [7] of the reasons is such) that the plan attached to the contract does not on its face show the setback was plainly incorrect. The attempt by Mr Kotynski before us to utilise a scale ruler to argue that the setback could be determined from the plan was and could not be evidence of that matter.

Other Relevant Matters on Leave

- [37] Further, we accept the submissions of the first respondent⁹ that even if the errors alleged by Ms Kotynski in her grounds of appeal were made out, those findings were immaterial to the critical finding founding the decision of invalidity of her termination of the contract and, as such, it cannot be said that a substantial injustice was done, nor does a question of general importance arise which would warrant the grant of leave to appeal.

⁸ See Transcript p1-91, lines 30 to 46.

⁹ First respondent's written submissions paragraphs 37-39; second respondent's written submissions paragraph 5.

Orders

It is ordered that:

The application for leave to appeal be dismissed.