

**COURT OF APPEAL  
SUPREME COURT OF QUEENSLAND**

CA Number: 5740/20

Number: 2381/2019

**BETWEEN:**

**Appellants**

**QUEENSLAND TAXI LICENCE HOLDERS**

**AND**

**Respondent**

**THE STATE OF QUEENSLAND**

**APPELLANTS' AMENDED OUTLINE OF ARGUMENT**

1. The Appellants do not press the 18 grounds of appeal as separate grounds but rather, group them as follows:
  - a. Grounds 1-6, 9-10; the contract claim should be left for determination by a trial judge
  - b. Grounds 7-8; the conclusion that the appellants' claims constitute an impermissible fetter on executive action was erroneous
  - c. Grounds 12-15; the estoppel claim should be left for determination by a trial judge
  - d. Ground 16; it could not be determined that the appellants had no real prospects of success or that there was no need for a trial
  - e. Grounds 17-18; the complexity of the claims and the public interest necessitate a trial as appeals may be pursued

Ground 11 is expressly abandoned

**Grounds 1-6, 9-10 contract claim should be left for determination by a trial judge**

2. The scheme created by the Act involves a suite of licensing provisions that apply to various participants in the industry. Those provisions impose different obligations upon each such

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**AMENDED OUTLINE  
OF ARGUMENT**

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licence holder<sup>1</sup> [RB33]. Critically however, each one of those licence holders has a role to play in order for the actual taxi service to be delivered. The licensing provisions are not mutually exclusive but rather, operate as a collective whole.

3. Thus, the holder of a taxi service licence, is the overarching licence holder in the licensing regime for the provision of a taxi service. Where a licence holder leases the licence to another person for the provision of a taxi service by that other person, the lessor of such a licence remains an **operator**<sup>2</sup> who is required to have **operator accreditation**.<sup>3</sup>
4. All of the participants who hold the relevant licensing and accreditation for the provision of a taxi service provide a taxi service within the meaning of the Act<sup>4</sup>. It is not simply the driver who operates from point A to point B in carrying the passenger, but also the taxi service licence holder who facilitates the provision of the taxi service. Each one of those participants in the provision of the taxi service is liable to provide that taxi service in the area designated by the taxi service licence<sup>5</sup>. The service must be provided so as to meet or exceed specified performance levels which are established by the regulator.
5. The Plaintiff's claim was not simply that the obligations imposed upon licence holders were created by contract<sup>6</sup> [RB34] but rather, it is contended that the combined effect of the legislative provisions, coupled with the terms of the licences themselves and the manner in which the scheme operated as a whole, created contractual obligations<sup>7</sup> [RB145]. A proprietary interest arose in the taxi service licence which was protected by the contract thus created. In those terms, the contract alleged by the Plaintiffs is of much wider import than the mere regulatory obligations imposed by the Act.
6. The inability to transfer a licence without consent is a common feature of many contractual arrangements<sup>8</sup> [RB35]. A tenant to a commercial lease is, generally speaking, unable to

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<sup>1</sup> Reasons [41]-[43]

<sup>2</sup> See the definition in the dictionary contained in Schedule 3 to the Act

<sup>3</sup> Section 12(1) of the Act

<sup>4</sup> See the definition of "taxi service" in the dictionary, and "administers a taxi service" in section 64

<sup>5</sup> Section 69

<sup>6</sup> Reasons [48]

<sup>7</sup> FASOC at [72] and following

<sup>8</sup> See Reasons [58] as described in Ground 3

transfer or assign that lease without the landlords' consent. The common feature of such a provision however is that the consent of the landlord should not be unreasonably withheld.

7. The same features apply with respect to the transfer of the taxi services licence. The Chief Executive ("CE") is tasked under the Act with the responsibility of regulating licence holders. The CE has the power to decide who is granted a licence in the first instance and it is reasonable to infer that in deciding to issue a licence, the CE must be satisfied that the person whom the licence is to be issued is an appropriate person to hold such a licence. A taxi driver's licence would not be issued to a person who has a chronic history of motor vehicle offences.
8. Similarly, with the issue of a taxi service licence the CE would consider the appropriateness of issuing that licence to the applicant concerned. If that applicant eventually sought to transfer the licence, the same considerations apply. The CE has the power to amend, suspend or cancel a licence. There is no limitation upon the exercise of that power at a point in time, for example, of seeking a transfer of a licence. Further, the Plaintiffs alleged that transfers of taxi service licences were only made with the approval of the CE<sup>9</sup> [RB123].
9. His Honour accepted, correctly, that for the purposes of the determination of application for summary judgement, the Plaintiffs' allegations should be accepted as true<sup>10</sup>. No defence has yet been filed to the FASOC but no issue was taken with that allegation by the Defendant in the hearing below.
10. A taxi service licence only provides for the operation of one taxi in its designated area. Similarly, the licensed taxi driver may only drive a taxi under the scope of a taxi service licence. The one cannot function without the other. In that context, no one is able to provide a taxi service unless they operate under the umbrella of a taxi service licence. Moreover, the holder of the taxi service licence has a statutory obligation for the continued provision of the taxi service in the designated area.
11. One cannot simply obtain a licence and do nothing with it. It carries obligations to provide a provision of a taxi service. That service can be effected by the taxi service licence holder seeking operator accreditation itself or otherwise "sub-letting" the licence to another operator

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<sup>9</sup> FASOC at [22A]; reasons at [56]

<sup>10</sup> Reasons at [12]

for the provision of the taxi. In either instance, the taxi service licence holder still remains liable, by reason of section 69, for the proper provision of the taxi service carried out under the auspices of that particular licence.

12. Thus, the holder of a taxi service licence does not have to compete with others who do not hold a licence<sup>11</sup> [RB44]. No person can operate a taxi other than with the consent/agreement of a taxi service licence holder.
13. The combined effect of the allegations of fact, coupled with the provisions of the Act, give rise to an argument on behalf of the Plaintiffs which cannot be described as fanciful. The contention by the Plaintiffs that the nature of the scheme and the relationship that arose from the provision of a taxi service licence gave rise to a contractual obligation is a contention that ought not have been summarily dismissed but should properly have been left for determination by the Trial Judge.

#### **Grounds 7-8 An impermissible fetter on executive action**

14. The power of the State to enter into a contract cannot be doubted. It is accepted that a government cannot fetter future executive action which involves the exercise of discretionary powers for the public good<sup>12</sup> [RB40].
15. The implied terms alleged by the Appellants were not such as to impact upon the exercise of future discretionary powers. The Act itself recognised that the number of licences which may be issued by the State can rise or fall. Variations can be effected in a particular area so as to account for a change in the needs of the public. The overarching objective sought to be achieved is to maintain a balance between the need for the viability of the taxi service provider balanced by the continuing need to ensure the delivery of an effective service for the consumer<sup>13</sup>[RB120]. As population growth in one particular area increases, that necessarily means that further licences may be issued in that area.
16. The contract asserted by the Appellants gives rise to contractual rights which must be met. The state remains free to legislate in a manner contrary to the interests of the contract holders.

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<sup>11</sup> Reasons [103]

<sup>12</sup> Reasons [84]-[85]

<sup>13</sup> See FASOC at [18] and the particulars to same

There is no fetter on the exercise of that power in the sense that it cannot be exercised. It simply means that by the exercise of such a power that is contrary to the interest of the contracting parties, an obligation to compensate the aggrieved party may arise. The principle against fettering does not operate so as to deny the legal consequences which may arise from, for example, an estoppel.<sup>14</sup>

17. An impermissible fetter on executive action involves a positive restraint or purported restraint on the decision making processes of the authority concerned<sup>15</sup>. The contentions raised by the Appellants do not seek to restrict the way in which the executive may exercise its powers in the future nor does it seek to impose any limitation upon the legislative power of the State. It simply recognises that by reason of the rights which have accrued to the Appellants, any exercise of discretionary powers or legislative functions which impact upon those accrued contractual rights gives rise to a claim for compensation. The fact that compensation may have to be paid does not of itself operate as a fetter.

18. The two competing tensions namely;

- a. Individuals should be able to take the State's word on trust and organise their affairs accordingly; and
- b. The State should be free to develop and change policy, no matter how dramatic the change;

can operate harmoniously within the confines of the Appellants' case.

19. There is no inconsistency in a statutory authority such as the CE engaging in commercial and non-governmental activities so that private law principles apply. The power of the CE to approve an applicant for a taxi service licence goes to the heart of the CE's discretionary powers under the Act. The Appellants' contentions, whether looked at in terms of contract or estoppel, by their very nature seek to fulfil the political ideal of ensuring public accountability for government function as well as holding a government to its word.

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<sup>14</sup> *Unilan Australia Pty Ltd v Kerin* [1993] FCA 19 at [78] per Lockhart J

<sup>15</sup> *The Amphitrite* [1921] 3 KB 500 at 503; *Commissioners of Crown Lands v Page* [1960] 2 QB 274 at 291; *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54 at 78

20. In *Kurtovic*<sup>16</sup> Gummow J discussed the possibility that whilst estoppel cannot impede the exercise of a statutory power, it might nonetheless operate in the context of common law or prerogative powers<sup>17</sup>. His Honour acknowledged the difficult distinction between policy making decisions and their operational implementation but thought nonetheless that a public authority's commercial or non-governmental acts might be subject to estoppel insofar as they occurred at an operational level<sup>18</sup>.
21. In *Quin*<sup>19</sup> Mason CJ considered that the principal against subjecting public authorities to estoppel remains good whether the public power or function of stake is sourced in statute or the common law. His Honour nonetheless endorsed the statement by Gummow J of the general principal contained in *Kurtovic*, to the effect that no estoppel can alter the scope, content or criteria for the exercise of public powers and functions.
22. Mason CJ continued, noting that the question of the balance between competing public and private interests may be such that in some instances the interest of the individual in holding the State to its representations may be such that it outweighs the public interest and consequently, an estoppel may arise. The same considerations apply in respect of the application of private law and contract such as is asserted by the Appellants.
23. There is a public interest in maintaining the trust of the State and individuals should be able to organise their affairs on the basis of what they are told by the State's representatives. That does not prevent the State from subsequently changing its position. It places the State in a similar position as a participant in private law where having changed its position, the offending party may be answerable in contract and estoppel.
24. Bradley J determined at [177] [RB61] that the resolution of the tension between those competing public and private interests lies in favour of the public. The Appellants contend that it is not a resolution which can be justly achieved by summary disposition. The proper determination of that question can only be determined after the completion of interlocutory steps such as disclosure, followed by a trial.

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<sup>16</sup> *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 215-216

<sup>17</sup> At 214

<sup>18</sup> At 215-216

<sup>19</sup> *Attorney General (NSW) v Quin* (1990) 170 CLR 1 at 18

### Grounds 12 - 15 estoppel claim should be left for determination by a trial judge

25. As stated above, the legal consequences which might flow from an estoppel against the State remain able to be pursued by a private individual.<sup>20</sup> Where statements by Ministers are made for the purpose of inducing a limited class of persons to commit themselves to a financial course upon the basis that the statements are true, and those persons reasonably act in reliance on that statement, the law will impose an obligation on the maker of the statement. An estoppel may arise, as well as the imposition of a common law duty of care.<sup>21</sup>
26. The allegations of the Appellants are accepted as true for the purposes of a summary hearing. That necessarily includes the allegations of the making of the representations and the reliance placed by the Appellants upon them.<sup>22</sup> [RB122] The market restrictions placed upon the number of taxi service licences was stated to be a “*core element of the taxi system.....Too few licences and waiting times will deteriorate. To many licences and the underlying commerciality of the taxi system itself might be put at risk*”<sup>23</sup>[RB121]
27. On the Appellants’ case, the continued reiteration of assurances against deregulation<sup>24</sup> [RB117; 120] may amount to liability in both estoppel and negligent misstatement. The provision of disclosure by the State may elicit further examples. It cannot be said that the Appellants have no real prospects of succeeding. The issue should be the subject of a trial.

### Ground 16 No real prospects of success or no need for a trial

28. The requirements to be met before there is jurisdiction to grant summary judgment are twofold:
- a. there must be no prospect of succeeding in the claim; and
  - b. there must be no need for a trial.<sup>25</sup>
- The need for a trial is thus a different consideration and may still be extant even if a court considers that a proceeding has no prospect of succeeding.

<sup>20</sup> *Unilan Australia Pty Ltd v Kerin* [1993] FCA 19 at [78] per Lockhart J. See also *Searle v Commonwealth* [2019] NSWCA 127 at [97]-[112] per Bell P, Bathurst CJ and Basten JA agreeing

<sup>21</sup> *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 341 per Gibbs CJ, Mason, Wilson, Brennan and Dawson JJ at 357

<sup>22</sup> FASOC at [19]

<sup>23</sup> FASOC at [18] and the particulars thereto, citing the content of the Queensland Taxi Strategic Plan 2010-2015

<sup>24</sup> FASOC at [14] and [18]

<sup>25</sup> UCPR r 293(2)

29. The question addressed by His Honour in relation to the contract claim was whether the Act created a contract with the taxi licence holders, based on construction of the statute. Instead, the question arising on the pleadings is whether there is a contract between the State and the taxi service licence holders. [RB145]
30. It is not a matter that it is not possible to contract with the State in these circumstances (as implicitly recognised by Bradley J at [71][RB37]), but rather a question of whether there was in fact a contract; this requires explication following the exhaustion of all interlocutory procedures and a trial.<sup>26</sup>
31. The claim involves diverse factual assertions from a large number of individuals. Its consequences have significant ramifications to a large number of persons. Care should be exercised in dealing with such a case on a summary basis.<sup>27</sup> The fact that the claim is brought by a large number of plaintiffs necessarily means that there is a greater degree of generality in the claim than if it were brought by a sole plaintiff.<sup>28</sup>
32. There is nothing *per se* about the general allegation of the existence of a contract and its subsequent breach or a claim based on estoppel that is fanciful. It is a matter properly left for trial, particularly with respect to:
- a. the necessary level of generality pleading on behalf of a large group of plaintiffs;
  - b. the fact that the summary disposition binds all members of the group of plaintiffs;
  - c. the factual and legal complexity involved in the allegations made in the FASOC;
33. Where there is a question about the actual contracts between the plaintiffs and the defendant, ‘post-contractual conduct’ may be admitted to evidence the existence of a contract. Such analysis is not done at a summary proceeding, and the matter of the existence of a contract ought to be left for determination by a trial judge after hearing all of the relevant evidence.
34. Similarly, with the estoppel claim, His Honour simultaneously recognised the ability for the State to be estopped in certain circumstances and then concluded that these

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<sup>26</sup> *Spencer v Commonwealth of Australia* [2010] HCA 28 at [25]-[27]

<sup>27</sup> *Matthews* at [22]-[23]

<sup>28</sup> *Matthews (No 2)* [2011] VSC 168 at [24] and [123]



circumstances cannot have given rise to the representations as pleaded. The nature and existence of representations are established with reference to the surrounding circumstances in order to be properly understood in context. Not only does this identify with specificity the representations made – according to the evidence – but also founds proper consideration of the reasonableness of reliance on those representations. Given the large number of plaintiffs and the attendant complexity of subject matter, this ought not to have been summarily disposed of and instead should have been left to a trial judge.

35. Other factors which militate against summary determination and warrant a trial include:

- a. Numerous questions surrounding the intent behind the representations and the reliance of the plaintiffs upon them, as well as the allegations of the existence of a contract, can only be answered with a trial;<sup>29</sup>
- b. The question as to the scope of a duty of care for negligent misstatement, whilst not specifically pleaded, remains open;<sup>30</sup>
- c. The facts of the case, involving such a large and diverse group of plaintiffs, will be more fully explored at trial.

“Common experience teaches that it is usually more efficient and just to consider the viability of a cause of action when the facts said to support it are adduced and the suggested action can be judged with a full understanding of all relevant evidence. Testimony gives colour and content to the application and development of legal principle. That is why leave is usually required for an appeal from interlocutory orders. Appellate courts, including this Court, will usually require evidence to be adduced and a trial concluded before considering the application of the law to that evidence. Out of the detail of the evidence ultimately proved, affecting the relationship of the respondent and the appellant, may arise a finding of a duty of care which the common law of negligence would uphold.”<sup>31</sup>

- d. Complex cases are generally unsuitable for summary dismissal.<sup>32</sup>

36. A further telling point that militates against summary dismissal is that the case continues to trial with the claim under the *Australian Consumer Law* [RB101]. It will inevitably

<sup>29</sup> See for example *Garmin Australasia Pty Ltd v B and K Holdings (Qld) Pty Ltd* [2018] QCA 353 at [40]

<sup>30</sup> *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 341. See also *Matthews v SPI Electricity and SPI Electricity Pty Ltd v Utility Services Corporation Ltd (No 2)* [2011] VSC 168 at [113] and [121]

<sup>31</sup> *Wickstead v Browne* (1992) 30 NSWLR 1. See also *Matthews (No 2)* [2011] VSC 168 at [124]; *State of Victoria v Richards* (2010) 27 VR 343 at 345 [8].

<sup>32</sup> *Three Rivers District Council v Bank of England [No 3]* [2003] 2 AC 1 at 260-261 cited with approval *Spencer v Commonwealth of Australia* [2010] HCA 28 at [21] per French CJ and Gummow J

involve a large volume of evidence from a multitude of individual plaintiffs. Fragmentation of the case is undesirable in circumstances when large factual elements have been dismissed, but are nonetheless common with elements that remain alive for argument at trial.

**Ground 17-18**

37. Given the large number of Plaintiffs in the claim and the complexity of the issues raised on both a factual and legal basis, the probability of appeals being pursued by either party following a trial of the proceeding is realistic. The state of the existing authority is such that the questions raised in the proceeding might properly be the subject of consideration by the High Court. In circumstances where there is a real likelihood of challenges being pursued to the final appellant level, the proceeding should not be determined summarily<sup>33</sup>.
38. Even in circumstances where the state of existing authority may seem to be against a party's claim, the prospect of appeals militates against summary determination. Given the large number of Plaintiffs that have pursued the proceeding and the potential for a substantial award of damages in the event of success, the Plaintiffs ought be given the opportunity to run their case at trial and if unsuccessful, thereafter pursue it through the appeals process so as to potentially bring about a change in the state of the law<sup>34</sup>.

“Where the success of a proceeding depends upon propositions of law apparently precluded by existing authority, that may not always be the end of the matter. Existing authority may be overruled, qualified or further explained. Summary processes must not be used to stultify the development of the law.”<sup>35</sup>

**This outline of argument was settled by the following counsel**

**DAVID BENNETT AC QC**

**JOHN RIBBANDS**

**ALEX CAMPBELL**

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<sup>33</sup> *Deputy Commissioner of Taxation v Truhold Pty Ltd* [1985] 2QdR88

<sup>34</sup> *Briggs v James Hardie & Co* (1989) 7 ACLC 841

<sup>35</sup> *Spencer v Commonwealth of Australia* [2010] HCA 28 at [25]