SUPREME COURT OF QUEENSLAND

CITATION:	*Brisbane City Child Care Pty Ltd v Kadell & Anor* [2020] QCA 181
PARTIES:	**BRISBANE CITY CHILD CARE PTY LTD** ACN 106 662 337 (applicant) **v** **KYLIE KADELL IN HER CAPACITY AS DELEGATE OF THE REGULATORY AUTHORITY AND EARLY CHILDHOOD MANAGER, METROPOLITAN REGION - METRO NORTH DEPARTMENT OF EDUCATION OF THE STATE OF QUEENSLAND** (first respondent) **TONY COOK, REGULATORY AUTHORITY AND DIRECTOR-GENERAL, DEPARTMENT OF EDUCATION OF THE STATE OF QUEENSLAND** (second respondent)
FILE NO/S:	Appeal No 13933 of 2019 SC No 11535 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave/Judicial Review
ORIGINATING COURT:	Supreme Court at Brisbane – Unreported, 19 November 2019 (Dalton J)
DELIVERED ON:	1 September 2020
DELIVERED AT:	Brisbane
HEARING DATE:	15 May 2020
JUDGES:	Mullins JA, Ryan and Wilson JJ
ORDERS:	**1. Special leave to adduce the further evidence of the affidavit of Mr Buck sworn on 16 March 2020 refused with costs.** **2. Application for leave to appeal granted.** **3. Appeal allowed.** **4. Set aside the orders made by the primary judge on 19 November 2019.** **5. The further amended application for a statutory order for review and application to review filed on 23 July 2019 is remitted to the Trial Division for hearing on the merits.** **6. The respondents must pay the applicant's costs of the application for leave to appeal, the appeal and the appearances before the primary judge on 18 and**

19 November 2019, but otherwise the costs of the proceeding below are reserved.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – SETTING ASIDE – where the applicant owned and operated a child care centre – where the applicant entered into a contract to sell the child care centre to a third party – where the Regulatory Authority issued the required consent to the transfer of the service approval for the child care centre under the *Education and Care Services National Law (Queensland)* on conditions – where the third party withdrew from the purchase due to the conditions – where the applicant did not accept that the third party was entitled to terminate the contract – where the Authority repealed its decision to issue the consent to the transfer of the service approval – where the applicant sought a declaration that the imposition of the conditions on the consent to the transfer of the service approval was beyond power – where the primary judge considered it inappropriate to grant the relief that the applicant sought on the basis of lack of utility, the third party was not a party to the proceeding and the applicant was seeking an advisory opinion – where the applicant's proceeding was summarily dismissed under s 48(1)(a) *Judicial Review Act* 1991 (Qld) on the motion of the primary judge – whether it was inappropriate for the proceeding to continue – whether the primary judge erred in summarily dismissing the proceeding

APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – FROM SUPREME COURT – BY LEAVE OF COURT – GENERALLY – where the applicant owned and operated a child care centre – where the applicant required the consent of the Regulatory Authority to the transfer of the service approval of the child care centre – where the Authority sought to impose conditions on the consent to the transfer of the service approval – where the applicant's claim for a declaration that the imposition of the conditions was beyond power was summarily dismissed by the primary judge – where pursuant to s 48(5) *Judicial Review Act* 1991 (Qld) the applicant requires leave to appeal against the summary dismissal – whether the applicant is required to show a substantial injustice or important question of law before leave will be granted – whether leave to appeal should be granted

Education and Care Services National Law (Queensland) (Qld), s 3, s 18, s 51, s 55, s 58, s 59, s 60, s 62, s 65, s 66
Education and Care Services National Law (Queensland) Act 2011 (Qld), s 4, s 15
Judicial Review Act 1991 (Qld), s 48
Uniform Civil Procedure Rules 1999 (Qld), r 766

Amos v Wiltshire [2019] 2 Qd R 232; [2018] QCA 208, cited
Barrow v Chief Executive, Department of Corrective Services [2004] 1 Qd R 485; [2002] QSC 168, cited
Bell v Bay-Jespersen [2004] 2 Qd R 235; [2004] QCA 68, considered
Bell v Liebsanft [2004] QCA 267, considered
Clarke v Japan Machines Australia Pty Ltd [1984] 1 Qd R 404; [1983] QSCFC 52, cited
Commissioner of Police Service v Spencer [2014] 2 Qd R 23; [2013] QSC 202, cited
Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd [2008] QCA 83, considered
Johns v Johns [1988] 1 Qd R 138; [1987] QSCFC 36, cited
Reischl v West Moreton Regional Community Corrections Board [2004] QSC 108, cited

COUNSEL: R J Anderson QC for the applicant
K A McMillan QC,with A L Wheatley QC for the respondents

SOLICITORS: Thomson Geer for the applicant
Clayton Utz for the respondents

[1] **THE COURT:** The applicant applies pursuant to s 48(5) of the *Judicial Review Act* 1991 (Qld) (the Act) for leave to appeal the order made by the learned primary judge on 19 November 2019 dismissing the applicant's further amended application filed on 23 July 2019 (the application) for a statutory order of review and application to review with costs, including reserved costs. The applicant also applies for special leave to adduce further evidence, being the affidavit of Mr Buck sworn on 16 March 2020.

Background

[2] The applicant owns and operates a child care centre for which it has a service approval issued pursuant to the *Education and Care Services National Law (Queensland)* (the National Law). A service approval is granted subject to the conditions that apply under s 51 of the National Law. Section 51(5) provides that a service approval is granted subject to any other conditions prescribed in the National Regulations or imposed by the National Law or the Regulatory Authority under the National Law.

[3] The National Law is part of a legislative scheme that was adopted in Queensland pursuant to the *Education and Care Services National Law (Queensland) Act* 2011 (Qld) (the 2011 Act) to regulate education and care services for children. The National Law is the result of the adoption pursuant to s 4 of the 2011 Act of the Education and Care Services National Law, as in force from time to time, set out in the schedule to the *Education and Care Services National Law Act* 2010 (Vic) and is applied as a law of Queensland. The objectives and guiding principles of the National Law are set out in s 3 of the National Law. Under s 3(1), the objective of the National Law is to establish a national education and care services quality framework for the delivery of education and care services to children. First among the objectives of the national education and care services quality framework that are set out in s 3(2) is "to ensure the safety, health and wellbeing of children attending education and care

services". The guiding principles of the framework are then set out in s 3(3) and include that the rights and best interests of the child are paramount and that best practice is expected in the provision of education and care services.

[4] On 2 July 2018 the applicant entered into a contract for the sale of the child care business to Affinity Education Group Ltd. The child care centre is in a three storey building and operates over more than one floor. Affinity held a provider approval under the National Law or the equivalent law in other States and Territories which under s 18 of the National Law authorises the approved provider to operate an approved education and care service, if the approved provider is the holder of the service approval for the service. Under s 58 of the National Law, a service approval can be transferred only to another approved provider. Section 60 of the National Law specifies that a service approval cannot be transferred without the consent of the Authority. By clause 4.1 of the special conditions, the contract was subject to the Authority under the National Law either confirming that it had no intention to intervene with a transfer of the service approval or consenting to, or being taken to have consented to, the transfer of the service approval under the National Law on the same terms and conditions as the service approval or on terms and conditions satisfactory to Affinity in its absolute discretion.

[5] The applicant and Affinity, as they were required to do under s 59 of the National Law, jointly applied to the Authority on 16 August 2018 for the consent to the transfer of the service approval. The Authority notified them on 28 August 2018 of the decision to intervene pursuant to s 62 of the National Law. This notice expressly raised the concern the Authority had about education and care services in multi-storey buildings on the basis they "present unique evacuation and egress issues for approved providers, which are relevant to the health, safety, and wellbeing of children attending education and care services in multi-storey buildings". Reference was made to correspondence between the Authority and the applicant about its existing policies and procedures in relation to emergency and evacuation. The notice referred to the fact that Affinity intended to take operation of the child care centre using the existing policies and procedures, but was willing to undertake a detailed review of all current emergency and evacuation procedures and engage a certified fire safety advisor to evaluate current plans and advise on rectification required and it was indicated that the authority would require a confirmed and very short review timeframe by Affinity for the review. Reference was also made to the fact that Affinity did not hold any existing service approvals for education and care services in Queensland that operate in a multi-storey building, but it operated two services in New South Wales which had their own detailed emergency and evacuation plans complying with multi-storey buildings, but did not provide any copies of those policies and procedures to the Authority nor any detail of how its experience in those services could be translated to the specific circumstances of the service being acquired from the applicant. It was foreshadowed that in deciding whether to consent to the transfer, the Authority considered that the adequacy of Affinity's emergency and evacuation policies and procedures for the service would be relevant. A detailed request for further information was therefore made.

[6] A monitoring visit to the child care centre was conducted on 31 August 2018 by the Authority with three authorised officers in attendance, together with a representative of RED Fire Engineers Pty Ltd which conducts fire engineering consultancy services and had been engaged as a consultant by the Authority in April 2018. (Under s 197 of the National Law, an officer authorised by the Authority may enter an education

and care service premises for the purpose of monitoring compliance with the National Law.)

[7] The Authority engaged in a process of intervention during which Affinity provided information in response to the fire safety concerns raised by the Authority. A lengthy response to the intervention notice was provided by Affinity to the Authority on 11 September 2018 that included advice that Affinity had engaged Hendry Group to conduct a comprehensive review of all current building fire safety and emergency planning compliance material documentation, complete an onsite essential safety measures inspection, develop a new emergency management plan, incorporate a fire evacuation plan covering compliance with the relevant Queensland regulations, draft and develop evacuation signs and diagrams for the site in accordance with the relevant regulations and train all staff in the new procedures. Affinity informed the Authority by letter dated 25 September 2018 that the Hendry Group visited the child care premises on 24 September 2018, but was only granted brief access for 30 minutes by the applicant and, as a result, Hendry could not give explicit consideration to the seven points of concern raised in the Authority's request for further information letter dated 20 September 2018. The letter concluded with Affinity advising the Authority that "it cannot operate the service nor rely on the Transferring Approved Provider's existing/revised policies and procedures for any period of time following settlement". On 26 September 2018 the Authority consented to the transfer on conditions. This is the first decision that was the subject of the proceeding before the primary judge.

[8] There were two sets of conditions in the letter of 26 September 2018 that relate to the first decision. The first set of conditions (the first conditions) were described as being imposed in accordance with s 66(2)(a)(ii) of the National Law and were the conditions that applied to the consent to the transfer of the service approval. Condition 1 covered the formality of providing specified documents to the Authority. Condition 2 provided:

> "within twenty-eight (28) days of the transfer the Receiving Approved Provider must ensure:
>
> (a) that the Hendry Group has completed a comprehensive assessment of the Service's policies, procedures, evacuation plans and routes including but not limited to:
>
> i. fire and emergency evacuation and egress;
>
> ii. child educator ratios; and
>
> iii. an assessment of the preferred location children should be situated within the Service having regard to mobility, age group, floor, and evacuation routes); and,
>
> advised the Receiving Approved Provider in writing what amendments and recommendations ought be made to ensure that the Service operates in accordance with Best Practice standards;
>
> (b) that it instructs the Hendry Group to take into consideration in formulating its amendments and recommendations (if any) the views of RED Fire Engineers, following receipt of any report provided by the [Regulatory Authority] to the Receiving Approved Provider; and

(c) that a copy of the Hendry Group assessment and recommendations and amended policies, procedures and any associated documents must be provided to the [Regulatory Authority] for its approval prior to their implementation."

[9] The second lot of conditions (the second conditions) were introduced in the letter of 26 September 2018 in terms that the consent to the transfer of the service approval was also subject to the second conditions being imposed upon the service approval itself in accordance with s 66(2)(b) of the National Law. The Authority appeared to be giving notice of conditions that it was proposing to impose pursuant to s 66(2)(b) on the service approval, when transferred to Affinity. Condition 1 of the second conditions provided:

> "In addition to the requirements of Regulation 97(3) of the National Regulations to conduct three (3) monthly emergency and evacuation procedures rehearsals, the Receiving Approved Provider must, from the transfer date, engage an appropriate expert such as a person/entity holding a Queensland Building and Construction Commission (QBCC) licence in emergency procedures, a fire safety advisor or fire safety engineer to observe and report on one rehearsal (including any proposed actions to improve evacuation procedures) within the first three (3) months of the Service's operation post transfer, and then at least annually thereafter."

[10] Section 66(2) of the National Law provides:

> "If the Regulatory Authority consents to the transfer, the notice –
>
> (a) must specify –
>
> (i) the date on which the transfer is to take effect; and
>
> (ii) any conditions on the consent to the transfer; and
>
> (b) may include notice of any condition that the Regulatory Authority has imposed on the provider approval or a service approval of the receiving approved provider because of the transfer."

[11] Affinity was dissatisfied with condition 2 of the first conditions and condition 1 of the second conditions. On 15 October 2018 Affinity purported to terminate the sale contract and gave notice to the Authority that it had withdrawn from participation in the transfer application. The applicant did not accept Affinity's termination. On 17 October 2018 the applicant advised the Authority that Affinity had purported to terminate the contract, but that the applicant disputed that position, and the applicant intended to file an application seeking judicial review and declaratory relief in respect of the first decision. Even though the applicant had not sought specific performance of the contract, it maintained the position throughout the proceeding before the primary judge that it considered the contract with Affinity remained on foot. (That was also the applicant's formal position in the hearing before this Court, but it recognised the difficulty of pursuing specific performance after the lapse of time since Affinity communicated that it was terminating the contract.)

[12] On 22 October 2018 the Authority advised it was repealing the first decision because it no longer had work to do, as the transfer application had to be brought jointly and Affinity had withdrawn from the process. That is the second decision that was the subject of the proceeding before the primary judge.

The proceeding

[13] The applicant commenced its proceeding in the Supreme Court on 23 October 2018 seeking orders for statutory review and review of the first and second decisions. Ms Kadell as a delegate of the Authority was the first respondent to the application and Mr Cook who is the Authority in Queensland was the second respondent. Affinity was not a party to the proceeding.

[14] Directions were made in the proceeding by consent on 29 October 2018. In accordance with the directions, the applicant filed points of claim on 21 December 2018, the respondents filed points of defence on 11 February 2019 and the applicant filed points of reply on 18 February 2019. The applicant obtained documents from the Department of Education under three Freedom of Information applications. As a result of obtaining those documents, the applicant pursued the respondents for further disclosure relevant to the issues in the proceeding. In the same application, the applicant also sought leave to amend the application that initiated the proceeding. An order was made by Flanagan J on 17 May 2019.

[15] The application, as amended pursuant to the order made on 17 May 2019, set out the relief sought in 10 numbered paragraphs. Paragraph 1 sought an order quashing or setting aside the first and second conditions referred to in the first decision and paragraph 2 sought, by way of alternative relief, an order quashing or setting aside both decisions under review. A *certiorari* order was sought in paragraph 3, declarations were sought in paragraphs 4, 5 and 6, an order referring the matter back to the respondents for decision according to law was sought in paragraph 7, and formal orders were sought in paragraphs 8, 9 and 10. The application raised in particular (O) of paragraph 20(e) of the grounds that the first conditions were beyond the power conferred on the Authority to impose conditions on consents to transfers of service approvals. The applicant raised in particulars (P) and (Q) of paragraph 20(e) of the grounds that the second conditions were not imposed in accordance with the requirement of s 55 of the National Law and, further, that the second conditions went beyond anything contained in regulation 97 of the National Regulation. The application was further amended on 23 July 2019. A further order was made in the proceeding by Flanagan J on 13 August 2019, as a result of another interlocutory application made by the applicant.

[16] The application was prepared for a full hearing that was listed for three days. A trial plan was prepared that resulted in the agreed estimate at the commencement of the hearing being revised to two days. The applicant's written submissions were filed on 30 October 2019 and the respondents' written submissions were filed on 14 November 2019. The applicant's reply submissions were then filed by leave at the hearing on 18 November 2019.

[17] The applicant set out in detail at paragraphs 92 to 102 of its written submissions the argument as to why the first conditions were beyond the power of the Authority to impose on a transfer of a service approval by reference to their content and the fact that there had never been any allegation by the Authority that the applicant was not

complying with the requirements of the National Law and the National Regulations. The applicant set out in detail at paragraphs 103 to 108 why the Authority did not have power to impose the second conditions on the transfer of service approval, as they were conditions that should have been imposed under s 55 of the National Law and exceeded the requirements of s 97(3) of the National Regulations.

[18] The respondents' response in their written submissions was that the applicant had misconstrued condition 2 of the first conditions, so that the question of power to impose the first conditions did not arise. (The respondent focused on condition 2 as that was the condition of the first conditions to which the applicant's arguments appeared to be directed.) The respondents submitted that the Authority had given notice of the second conditions as conditions to be imposed on the service approval of the receiving approved provider because of the transfer and were within the power of the Authority pursuant to s 51 of the National Law to impose conditions on the service approval. (The argument raised the factual issue of whether the second conditions were being imposed "because of the transfer" or being imposed because of the Authority's concern about fire safety where a child care centre is conducted on more than one level of a multi-storey building and the transfer was a convenient time for imposing the conditions on the service approval, without having to engage with the applicant in relation to the propriety of those conditions.)

[19] The applicant in its reply disputed the respondents' construction of the terms of condition 2 of the first conditions. The applicant's reply submissions proceeded on the basis that by the Authority giving notice of the second conditions as conditions that the Authority had imposed on the service approval of the receiving approved provider, because of the transfer pursuant to s 66(2)(b) of the National Law, the Authority had deprived the applicant of challenging those conditions under s 55 of the National Law. The parties' written submissions exposed the issue of the appropriate construction of s 66(2) of the National Law as to the nature and extent of the conditions that could be imposed by the Authority when consenting to the transfer of the service approval.

[20] Prior to the hearing, the respondents had not foreshadowed any application pursuant to s 48(1) of the Act. The respondents' written submissions dealt with the futility of the relief sought in respect of the first decision on the basis that the first decision was no longer of any effect and there was nothing to remit for the Authority to consider, as there was no longer a joint notification of transfer which gave the jurisdiction to the Authority to deal with the consent to the transfer. The respondents' submissions characterised paragraph 1 of the claim for relief as, in substance, seeking an order quashing or setting aside part of the first decision which it was submitted would be an inappropriate exercise of the judicial review power, but noted at paragraph 80 of the submissions that there was alternative relief seeking to quash the entire decisions which did not "save the relief in paragraph 1, but means that a s 48 application under the JR Act was not appropriate". No application was therefore brought by the respondents in advance of the hearing to dispose of the application summarily pursuant to s 48 of the Act.

The hearing before the primary judge

[21] The hearing of the application commenced before the primary judge on 18 November 2019. A three volume trial bundle of documents was tendered as exhibit 1. The primary judge raised concerns about the application and of particular concern was the

fact that Affinity had been party to the joint application to the Authority to obtain consent to the transfer, but Affinity was not a party to the application for judicial review and would not be bound by the decision. The primary judge invited submissions as to why the proceeding ought not be dismissed under s 48(1)(a) of the Act. During the hearing of the oral submissions on that day about the application of s 48 of the Act, counsel who then appeared for the applicant narrowed the ambit of the proceeding, at least for the purpose of that argument, by limiting the relief sought against the respondents to a declaration in the following terms:

> "A declaration that upon the proper construction of ss 65(2) and 66(2) of the National Law the second respondent may not impose conditions on a consent to transfer other than as are necessary to maintain the standards of the existing service approval held by the applicant."

[22] Mr Anderson of Queen's Counsel who appeared for the applicant in this Court made the point that the applicant's counsel before the primary judge did not formally abandon the relief that was sought in the application, but it was apparent from the transcript of the hearing before the primary judge that the applicant's counsel was seeking the narrower declaration "at a minimum" in the circumstances in which the primary judge invited submissions about summary dismissal. The applicant relied on the fact that it was the primary judge during argument who expressed the possible outcomes of the hearing as a choice between hearing the application on the basis the relief sought was the narrower declaration and dismissing the application summarily. The respondents asserted that the applicant's counsel before the primary judge at the least "implicitly" abandoned the relief sought in the application. It is not necessary for the purpose of the application in this Court to resolve the difference between the parties as to the effect of what happened on this aspect before the primary judge.

[23] The primary submission made by the applicant to the primary judge on the utility of the declaration was that the Authority was using the transfer provisions of the National Law to impose conditions on the consent to the transfer that were properly conditions that should be attached to the service approval under s 55 of the National Law and thereby deprived both the applicant and the purchaser of the merits review before the Queensland Civil and Administrative Tribunal otherwise available under the National Law in respect of any conditions imposed on the service approval, pursuant to part 8 of the National Law and s 15(2) of the 2011 Act. The applicant relied on the limitation that applied under s 62(1) of the National Law to the matters that could justify the Authority's intervention on the transfer of a service approval which was by reference to the matters in paragraphs (a) and (b) that were directly relevant to the capacity of the receiving approved provider to operate the education and care service and comply with the National Law. The further matter in s 62(1)(c) which could trigger intervention was "any other matter relevant to the transfer of the service approval" which the applicant argued must be informed by the focus of the balance of the subsection on the transferee. It was argued that the conditions were imposed on the consent to the transfer because of the Authority's policy in relation to multi-storey facilities and not because of the transfer. In light of the views expressed by or on behalf of the Authority in the documents to which the applicant's counsel referred the primary judge, it was submitted that it was not fanciful or hypothetical that like conditions to the first and second conditions would be imposed on any subsequent transfer.

[24] The applicant's counsel conveyed to the primary judge that the applicant did not wish to join Affinity to the proceeding, as it would delay the determination of the applicant's claims against the Authority and there may be defences to the specific performance claim raised by Affinity that were not related to the relief sought against the Authority. It was submitted there was nothing wrong with the applicant not wanting to litigate against Affinity or any subsequent purchaser, when all it wanted to do was to sell the child care business free from what it contended was the unlawful imposition by the Authority of conditions on the transfer.

[25] The respondents argued before the primary judge that the powers of the Authority had to be considered in the context of the objectives and guiding principle set out in s 3 of the National Law and drew attention to the guiding principle that "best practice" is expected in the provision of education and care services. It was emphasised that there is a temporal aspect to what is best practice and that must affect at any time the conditions that are imposed on the service approval or the conditions that may be applicable to the consent to a transfer of the service approval. The respondents relied on the functions of the Authority set out in s 260 of the National Law and the powers of the Authority set out in s 261 of the National Law, including the power conferred on the Authority under subsection (1) to do all things that are necessary or convenient to be done for, or in connection with, or that are incidental to the carrying out of its function under the National Law. The respondents argued that condition 2 of the first conditions was a bespoke condition applicable to Affinity that had been offered by Affinity and there was no basis for the applicant to assert that this condition would be likely to be imposed in any future consent to a transfer of the service approval. The respondents disputed that s 62 and s 66 of the National Law should be read down to limit the conditions that could be imposed on the consent to the transfer to those that were necessary to maintain the standards of the existing service conducted by the applicant. The respondents also argued that the second conditions could have been subject to the merits review that was applicable to conditions imposed under s 55 of the National Law after the transfer had proceeded, if Affinity wished to have them reviewed. There was therefore a subsidiary issue between the applicant and the Authority as to whether the merits review that applied to conditions imposed on a service approval under s 55 of the National Law applied to conditions notified in the consent to the transfer pursuant to s 66(2)(b).

[26] The respondents maintained their position before the primary judge about the futility of the application in relation to the narrower declaration sought by the applicant. The respondents did not attempt to dissuade the primary judge against summary dismissal of the application.

The reasons

[27] The primary judge's oral reasons delivered on 19 November 2019 can be summarised as follows. The primary judge set out the response by Affinity in the letter dated 11 September 2018 to the Authority's intervention notice and the contents of Affinity's further letter of 25 September 2018 to the Authority and observed that "As a result, one might think substantially, of matters communicated to it by Affinity, the decision to allow a transfer of the childcare centre was one with conditions". The primary judge recited that Affinity rejected the Authority's conditions on 28 September 2018 and on 15 October 2018 purported to terminate the sale contract and gave notice to the Authority that it withdrew its application to transfer the service approval. The primary judge noted the applicant's response that it did not accept the

contract had been validly terminated and the Authority's response to accept the withdrawal of Affinity's application for approval to the transfer. The primary judge noted that the point that the Authority's decision to impose conditions in the first decision was beyond power, having regard to s 66(2) of the National Law, was not made until its written submissions were filed on 30 October 2019.

[28] The primary judge outlined the two concerns her Honour had at the commencement of the hearing in relation to the relief sought by the applicant. The first was a lack of utility, because Affinity was not a party and would not be bound by any decisions made in the proceeding. The second was the undesirable potential for different decisions on the same questions of law, if the applicant succeeded in the proceeding, and then a subsequent proceeding between the applicant and Affinity raised the same issues that were decided between the applicant and the Authority.

[29] The primary judge observed that if it were determined that the conditions attaching to the first decision were invalid, it would be necessary pursuant to s 30(1)(a) of the Act to determine the date from which that invalidity should take effect and that would be a question of great importance to Affinity in any subsequent proceeding about specific performance. A similar observation applied to any decision to set aside only the conditions attaching to the first decision. Affinity should therefore be a party to the proceeding between the applicant and the Authority.

[30] In relation to the narrower declaration, the primary judge noted the applicant's argument in relation to utility that the applicant still wished to sell the child care centre and anticipated that any future contracts submitted to the Authority would be subject to the imposition of similar conditions on transfer and that it would be of assistance to both the applicant and the Authority to know whether such conditions were beyond the Authority's power under s 65 and s 66 of the National Law.

[31] The primary judge referred to the three pieces of evidence to which the applicant had made reference in the course of the argument that showed the Authority had general concern about fire and evacuation plans in multi-level child care centres and that it was likely to impose similar conditions on a future transfer of the applicant's child care centre. The first matter listed by the primary judge was the assertion in paragraph 34(3) of the respondent's points of defence that the first decision did not involve any errors of law or was otherwise contrary to law as the Authority properly applied the provisions of division 3, part 3 of the National Law, taking into account the scope, subject matter and purpose of the National Law, including the objectives and guiding principles. (The inference to be drawn from that assertion was that the Authority maintained it had the power to impose the first and the second conditions.) The second was an internal Department of Education document from December 2017 that expressed ongoing departmental concerns about evacuation and conditions for multi-storey child care centres and one of the conditions canvassed in the document was similar to condition 1 of the second conditions. The third document dated 12 April 2018 was a departmental request for procurement of expert opinion or fire safety advice and expressed similar concerns to those raised with the applicant and Affinity and discussed some conditions similar to those that the Authority sought to impose on the transfer in its first decision.

[32] The primary judge noted that the declaration in narrower terms that was ultimately pursued by the applicant (when dealing with the question of whether the application should be summarily dismissed) did not deal with the undesirable consequences that

would flow, if a declaration were made without Affinity being joined to the proceeding. In relation to that point, the primary judge stated that "while the applicant was quite clear that it would not join Affinity to this proceeding, it gave no undertaking as to any future contractual proceedings against Affinity". The second point was the declaration would also amount to an advisory opinion as to the law.

[33] On the basis of the three pieces of evidence that were put before the primary judge, her Honour did not consider that there would inevitably be, or likely be, an imposition of the same conditions or type of conditions on transfer should there be a new contract and a new joint application to the Authority. The primary judge also noted that the origin of the conditions imposed in the first decision could be seen in the history of the correspondence and the interaction between Affinity, the applicant and the Authority as part of the intervention period and that the Hendry Group had been proposed by Affinity, rather than the Authority. The primary judge observed that, at a different level of analysis, the conditions sought to be imposed by the Authority had their origins in the long-running correspondence between the applicant and the Department regarding the Department's long-running concerns about fire evacuation in this particular child care centre. There was the possibility that the concerns the Authority had in respect of fire evacuation in this particular centre may be resolved before another contract was entered into, either by the applicant taking some action to allay the concerns of the Authority or the Authority imposing conditions on the applicant's service approval. The primary judge also emphasised the hypothetical nature of the exercise that her Honour was being asked to undertake, when another purchaser may not have the same clause 4.1 in the sale contract, and the court should not make a declaration in the general terms that was sought, when it did not have any particular dispute and any argument based on the facts and circumstances of that particular dispute before it.

Grounds for leave to appeal

[34] The applicant relies on the following matters for seeking leave to appeal:

(a) the decision was in error, as there was utility for the applicant in obtaining the narrower declaration in circumstances where it still wished to sell the child care centre and the absence of Affinity did not justify a conclusion that it was inappropriate to continue the proceeding;

(b) the decision arose from the court's own motion and with little notice and resulted in the summary dismissal of the application for inutility, without considering the merits;

(c) the first decision of the first respondent was a substantial inhibition to the applicant's right to deal with its commercial interests;

(d) the questions that arise on the proposed appeal are substantive and not merely procedural;

(e) there is only limited judicial direction on the meaning of the phrase "inappropriate" in s 48(1)(a) of the Act which is important public interest legislation;

(f) the appeal considers, in part, the operation of the National Law relating to education and child care services.

Application for special leave to adduce further evidence

[35] For the purpose of the application for leave to appeal, the appellant seeks to rely on the affidavit of its sole director, Mr Buck, sworn on 16 March 2020. After the primary judge dismissed the application for judicial review, Mr Buck did a search of the national register of child care service approvals which is on the website of the Australian Children's Education and Care Quality Authority (ACECQA). Mr Buck recorded, in paragraph 4 of his affidavit, the description of ACECQA from its website as "an independent national authority that assists governments in administering the National Quality Framework for the education and care of children" and "in monitoring and promoting the application of the Education and Care Services National Law".

[36] Mr Buck exhibits the results of searches he downloaded from the ACECQA website of 23 child care centres in Queensland which set out the conditions on the service approval, all of which contained a condition relevant to fire safety that was not identical to condition 1 of the second conditions, but did provide for an expert report to be obtained at least annually in respect of one rehearsal of emergency and evacuation procedures.

[37] Mr Buck accepts that the further evidence was available from the ACECQA website prior to the hearing before the primary judge, but deposes that the relevance of the further evidence was not apparent to the applicant until the primary judge raised and then summarily dismissed the application for judicial review. The further evidence is relied on by the applicant to support the contention that it was highly likely that the Authority would seek to impose the same or similar conditions as the second conditions, if the applicant sold the child care centre in the future.

[38] The respondents oppose special leave being given in respect of that further evidence. Apart from the question of whether special leave should be given in respect of evidence that was obtainable with reasonable diligence for the purpose of the hearing before the primary judge, the respondents submit that the further evidence would not have had any influence on the result of the summary dismissal, because it was evidence of conditions which had been placed upon existing service approvals granted to other child care centres and was not evidence of conditions imposed upon the consent to the proposed transfer of a service approval of a child care centre.

[39] The decisions of the Authority that were the subject of the application before the primary judge related to the conditions on which the authority proposed to consent to the transfer of the applicant's service approval to Affinity. The evidence that was before the primary judge disclosed the concern of the Authority about the evacuation procedures, in the event of an emergency or fire, from the applicant's multi-level child care centre and that the Authority had this concern in relation to any child care centre in a multi-storey building where the centre was on more than one level.

[40] After the primary judge summarised the three matters relied upon by the applicant to indicate the likelihood of the Authority imposing conditions on a future transfer of the applicant's child care centre in similar terms to those imposed on the proposed transfer to Affinity, the primary judge observed that there was "precious little indication in the three pieces of documentary evidence" that there would inevitably be or even likely be, an imposition of the same conditions or type of conditions. It is therefore understandable why Mr Buck wishes to bolster the evidence that was before

the primary judge on the likelihood of the Authority imposing similar conditions as the second conditions in respect of any future transfer of the child care centre, but the evidence does not add materially to the evidence before the primary judge.

[41] The test of special grounds for the court on appeal to receive further evidence as to questions of fact, pursuant to r 766(1)(c) of the *Uniform Civil Procedure Rules* 1999 (Qld), has been long-settled: *Clarke v Japan Machines Australia Pty Ltd* [1984] 1 Qd R 404, 408. Although the primary judge used the description of "precious little indication in the three pieces of documentary evidence", the subsequent reasoning of the primary judge showed that her Honour proceeded on the basis that the material indicated the existing concerns of the Authority about the evacuation procedures from any child care centre in a multi-storey building, where the centre was on more than one level. In view of the fact that Mr Buck's further evidence reinforces the evidence that was before the primary judge about those concerns, it does not meet the test of being evidence that would have influenced the result of the hearing before the primary judge. The application for special leave to adduce that further evidence should be refused with costs.

The test for a grant of leave under s 48(5) of the Act

[42] Both parties referred to authorities that give some guidance as to circumstances that will justify a grant of leave pursuant to s 48(5) of the Act. There is nothing within s 48(5) itself which acts as a constraint on the exercise of the discretion to grant leave to appeal. The issue of what must be shown to obtain leave under s 48(5) was considered in *Bell v Bay-Jespersen* [2004] 2 Qd R 235. That was concerned with an application for security for costs for an application for leave to appeal to the Court of Appeal against the summary dismissal pursuant to s 48(1) of an application made in reliance on s 20 and s 43 of the Act. McPherson JA referred at [4] to the statutory criteria that then applied to an application for leave to appeal to the Court of Appeal from designated decisions of the District Court (which was that leave should not be granted unless some important question of law or justice was involved) and authorities, including *Johns v Johns* [1988] 1 Qd R 138, that considered the application of that requirement. McPherson JA referred to those authorities again at [11]:

> "If the rule adopted in *Johns v. Johns* [1988] 1 Qd.R. 138 and *Jiminez v Jayform Contracting Pty Ltd* [1993] 1 Qd.R. 610 is applied to applications for leave to appeal under s. 48(5) of the *Judicial Review Act* as it has been to applications for leave to appeal under s. 118(3) of the *District Court of Queensland Act* 1967, the [applicant] has no prospect at all of obtaining leave to appeal against the order dismissing his applications under the *Judicial Review Act*."

[43] The same applicant, Mr Bell, then made an application to extend the time within which to seek leave to appeal to the Court of Appeal from the judgment of the Supreme Court that had summarily dismissed his application for judicial review: *Bell v Liebsanft* [2004] QCA 267. Davies JA (with whom the other members of the court agreed), after quoting the passage from McPherson JA's judgment at [11], then stated:

> "This Court has declined to state principles upon which leave will be granted and the circumstances in which leave will be granted are not, in my opinion, limited to those stated in *Johns*. On the other hand the absence of any of those circumstances renders it unlikely that leave will be granted in the absence of some other compelling circumstances."

[44] Mr Bell's application for extension of time was struck out.

[45] The applicant submitted that it is not a necessary component of the application for leave pursuant to s 48(5) of the Act to demonstrate an important principle of law or justice or the suffering by the applicant of substantial injustice or prejudice, if leave is not granted. The applicant relied on the combination of all the factors that support the grant of leave to appeal, as providing the circumstances which justify the grant of leave.

[46] The respondent submitted that not only does the applicant need to satisfy the court of the merits of the appeal in terms of it being reasonably arguable that the primary judge erred in dismissing the judicial review application summarily, the applicant had to establish that the appeal has utility, that an important principle of law or justice should be identified (in accordance with *Johns*), and there should be substantial injustice or prejudice to the applicant, if the claimed error were not corrected: *Amos v Wiltshire* [2019] 2 Qd R 232 at [36].

[47] In order to decide whether leave to appeal should be given in this matter, it is not necessary to be prescriptive about the circumstances that will generally warrant the grant of leave. The authorities relied on by the parties give guidance to relevant considerations on whether leave to appeal should be given, but allow for some flexibility in determining the considerations. The question is whether the circumstances of the particular case warrant the grant of leave in the light of this approach. It is necessary therefore to consider the combination of factors on which the applicant relies to support the grant of the leave to appeal.

How should "inappropriate" in s 48(1)(a) of the Act be construed?

[48] The applicant's main argument for seeking leave to appeal is that the decision was in error. Before dealing with that argument, it is logical to deal with the construction issue raised by the applicant about the test under s 48(1)(a) of the Act as to when it would be inappropriate for a proceeding to be continued or for the application or claim to be granted, as that is relevant to the consideration of whether the decision was in error.

[49] Section 48(1) of the Act provides:

> "The court may stay or dismiss an application under section 20, 21, 22 or 43 or a claim for relief in such an application, if the court considers that—
>
> (a) it would be inappropriate—
>
> (i) for proceedings in relation to the application or claim to be continued; or
>
> (ii) to grant the application or claim; or
>
> (b) no reasonable basis for the application or claim is disclosed; or
>
> (c) the application or claim is frivolous or vexatious; or
>
> (d) the application or claim is an abuse of the process of the court."

[50] The applicant submitted that the power to dismiss summarily under s 48(1) of the Act is not unfettered, but is limited to the express categories set out in paragraphs (a) to (d) which is consistent with the principle that such a power should be exercised in a clear case for bringing the proceeding to an end, with caution or where there is a high degree of certainty about the ultimate outcome. The meaning given to the description "inappropriate" in s 48(1)(a) should be taken from the other grounds set out in paragraphs (b) to (d) which point to the proceeding being doomed to fail: either there is no reasonable basis for the proceeding or it is frivolous or vexatious or an abuse of the process of the court.

[51] The applicant relied on examples of cases that illustrated this approach to the exercise of the power under s 48(1)(a). In *Reischl v West Moreton Regional Community Corrections Board* [2004] QSC 108, the prisoner applied for judicial review of the Board's decision to decline his release on parole, in accordance with the recommendation made by the sentencing judge. A further application to the Board had been made by the prisoner and was under consideration at the time of the hearing of the judicial review application. The decision was reserved, but re-listed after the Board advised the court that the prisoner had been successful in the further application and his release was imminent and sought the dismissal of the judicial review application. The prisoner did not consent to the dismissal, as he wanted the court to rule on the matters of principle that his judicial review application raised. Mackenzie J dismissed the application pursuant to s 48(1)(a), stating at [8] that it would be inappropriate for the proceeding to be continued or to grant the application, as "the orders sought have no practical purpose or consequences".

[52] The applicant also relied on *Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd* [2008] QCA 83. The judge at first instance had dismissed an application for a statutory order of review of an adjudicator's decision under the *Building and Construction Industry Payments Act* 2004 (Qld) on the basis that s 100 of that Act was a provision by a law under which the applicant was entitled to seek a review of the matter by another court. Although disagreeing with the reason given at first instance that s 100 of that Act was a law under which the applicant was entitled to seek a review of the matter, Muir JA (with whom Holmes JA and Chesterman J agreed) considered the purpose of that Act and the role of adjudicators and concluded at [54] that judicial review of adjudicators' decisions sat uncomfortably with the Act's purpose of providing an expeditious, interim determination by adjudicators. Muir JA considered that if the appeal did succeed, the matter may be remitted to another adjudicator for a determination and there would then be two determinations and an appeal interposed with the likelihood of litigation to determine finally the parties' contractual rights, so that remission to another adjudicator would not advance the resolution of the parties' dispute. Instead of relying on the reasoning of the judge at first instance, Muir JA applied s 48(1)(a) of the Act as the source of the court's power for dismissing an application for judicial review where it would be inappropriate to grant the application, observing at [57] that the power conferred by that provision is "a broad one".

[53] The respondents also relied on Muir JA's description in *Intero* of the power under s 48(1) as a broad one to submit that the power under paragraph (a) is a broad discretionary power in relation to whether or not it is appropriate or inappropriate for the proceeding to continue and that it should not be read down by paragraphs (b), (c) or (d) which expressed separate bases upon which an application may be dismissed. The respondents relied on the observation made by Holmes J (as the Chief Justice

then was) in *Barrow v Chief Executive, Department of Corrective Services* [2004] 1 Qd R 485 at [6]:

> "Section 48(1)(a) of [the *Judicial Review Act* 1991] confers a general power on the court to stay or dismiss an application if it considers it inappropriate to permit proceedings to continue or to grant the application. That seems to me a wide enough power to enable the court to assess the circumstances of any given case to determine whether, notwithstanding a decision is made under an enactment, the court should not proceed to review."

[54] The respondents also relied on Henry J's exercise of the summary dismissal power in *Commissioner of Police Service v Spencer* [2014] 2 Qd R 23. The Commissioner applied pursuant to s 43 of the Act to review the decisions of two Magistrates in respect of the sentence imposed on the respondent. The Commissioner had no complaint of the eventual outcome, but asserted the first Magistrate's re-opening of the sentence originally imposed by that Magistrate and the re-sentencing of the respondent by the second Magistrate were in error. The respondent argued that, if error were demonstrated, it was not an appropriate case to grant an application for review, as the matter could be dealt with on appeal to the District Court and the application should therefore be dismissed pursuant to either s 12 or s 13 of the Act or, in the alternative, pursuant to s 48(1)(a) of the Act. Henry J found that error had been demonstrated, but concluded at [112] that the application should be dismissed pursuant to each of s 12, s 13 and s 48 of the Act. In relation to the application of s 48, Henry J explained at [111] that it was inappropriate to grant the application, as the respondent had served the probation order imposed by the second Magistrate and that could not be undone; and despite error being demonstrated, it was inappropriate to intervene where subsequent events had overtaken the initial decision "to the point where it would no longer be practicable to unravel those events if the application was granted".

[55] These authorities suggest that the circumstances in which the power should be exercised to dismiss summarily an application under the Act on the ground set out in s 48(1)(a) should not be read down by reference to paragraphs (b), (c) and (d) of s 48(1). Instead s 48(1)(a) should operate fully according to its terms which makes it subject only to the constraint that the inappropriateness relates either to the continuation of the proceeding or the granting of the application. Paragraphs (b), (c) and (d) of s 48(1) are more likely to apply where there is unlikely to be any error demonstrated on the part of the decision-maker, although lack of any error is not an essential pre-condition to the application of those paragraphs. Because of the breadth of the power under s 48(1)(a), that provision is not confined to cases where error is demonstrated. The authorities show that s 48(1)(a) can be used, however, even if error on the part of the decision-maker could be shown, where there is good reason for otherwise not allowing the proceeding to continue or not granting the relief sought. That may include that no practical consequences would flow from the outcome or there is an alternative practicable or preferable means for addressing an applicant's complaint which may not fall strictly within s 12 or s 13 of the Act. As the granting of any relief in respect of an application for judicial review is discretionary, it may be that where the court foresees that in a particular case it would exercise the discretion to refuse the relief, that may also be an appropriate case for summary dismissal under s 48(1)(a). The test of "inappropriate" makes the power under s 48(1)(a) "a broad one". It is not necessary for the purpose of this application to identify all the

categories of cases to which it could apply. It is sufficient to say that it will include the category of case where there may have been an error, but the circumstances in which the decision was made and/or the subsequent events or the circumstances of the parties' ongoing relationship do not warrant addressing in a proceeding under the Act whether there was error by the decision-maker.

Was the decision in error?

[56] The decision of the primary judge to dismiss summarily the applicant's application must be considered in the context that for the purpose of responding to the issue before the primary judge of whether the application should be summarily dismissed under s 48(1)(a) of the Act, the applicant sought to pursue only a declaration in terms that were general in nature about the power of the Authority to impose conditions on a consent to the transfer of a service approval.

[57] It was a legitimate concern of the primary judge that the proceeding may not have been properly constituted without the joinder of Affinity as a party. The pursuit of the narrower declaration confined the issue to that which was raised in the material between the applicant and the Authority, namely the nature and the extent of the conditions that the Authority was empowered by the National Law to impose pursuant to s 66(2). Although the applicant was not willing to abandon its right to seek to enforce the contract it had entered into with Affinity, its interest in pursuing declaratory relief pursuant to s 43 of the Act was to ensure the future sale of the child care centre (whether to Affinity or another purchaser) was not impeded by the imposition of conditions on the consent to the transfer that it claimed were beyond power. It was not essential to the resolution of that dispute between the applicant and the Authority for Affinity to be a party to the proceeding. The applicant had made the deliberate choice in bringing the proceeding under the Act against the Authority not to seek relief against, or otherwise join, Affinity in the same proceeding.

[58] One of the reasons for the primary judge to dismiss the proceeding summarily was the conclusion her Honour reached that, by reference to three pieces of evidence referred to in argument, the dispute between the applicant and the Authority over the conditions sought to be imposed by the Authority might be resolved before another contract was entered into by the applicant for the sale of the child care centre. That analysis did not address the fundamental submission that was made on behalf of the applicant that there was no power for like conditions to condition 2 of the first conditions and condition 1 of the second conditions to be imposed by the Authority on the consent to the transfer. It was a matter of speculation by the primary judge as to how the matter might be resolved between the applicant and the Authority that was based on limited aspects of the evidence. The reliance by the primary judge on the possibility that a contract with another purchaser may not have an equivalent clause to the clause relied on by Affinity to terminate the contract did not address the dispute between the applicant and the Authority as to the power to impose the first and second conditions on the consent to the transfer that was regarded by the applicant as an impediment to the sale of the child care centre.

[59] The primary judge's concern that the narrower declaration amounted to an advisory opinion on the law overlooked that there was a real dispute between the parties that resulted in the formulation of the narrower declaration as to the powers of the Authority on a consent to a transfer of the service approval for a child care centre that would have continuing significance for the applicant who was seeking to sell the child

care centre. The primary judge did not consider, and therefore did not determine, the substantive question raised in respect of the parties' competing constructions of s 66(2) of the National Law which has continuing relevance to the relationship between the parties.

[60] The reasons given by the primary judge for the summary dismissal therefore did not justify that course in the circumstances of the existence of the substantive dispute between the applicant and the Authority. In short, there was utility in the court embarking upon the consideration of whether the narrower declaration should be made and the decision to dismiss the proceeding summarily was in error. It was not an appropriate case to exercise the broad power under s 48(1)(a) of the Act.

Whether leave to appeal should be granted

[61] In considering whether the leave to appeal should be granted, reference should be made to the grounds on which leave is sought, other than that the decision was in error. The fact that the decision to dismiss the proceeding summarily arose from the suggestion by the primary judge that the parties should address summary dismissal is not itself a reason for granting leave. There may be many instances when parties have been blind to obvious reasons why s 48(1)(a) should be applied.

[62] The ongoing relationship between the parties in relation to the sale of the child care centre is a relevant consideration for addressing the substantive dispute between them. Although the objective and guiding principles of the National Law and the objectives of the national education and care services quality framework must be at the forefront of the decision-making of the Authority, the dispute between the applicant and the Authority is not about avoiding best practice in the provision of a child care service, but about the timing and content of conditions that can be imposed by the Authority in relation to the transfer of the service approval.

[63] The applicant's notice of appeal did seek orders from this Court in relation to the proper construction of s 65(2) and s 66(2) of the National Law. The application for leave to appeal was argued on the basis, however, of endeavouring to show that leave to appeal should be given and that, if the appeal were allowed against the summary dismissal of the proceeding by the primary judge, the matter should be remitted to the Trial Division for the substantive issues between the parties to be decided. All that needs to be observed at this stage in relation to the substantive issues is that the applicant's construction of s 66(2) of the National Law is sufficiently arguable in the context of the other provisions of the National Law, but particularly division 3 of part 3, to warrant consideration on the merits.

[64] Whether or not leave is given to the applicant, it has been necessary for the purpose of the application pursuant to s 48(5) of the Act to consider the meaning of "inappropriate" in the context of s 48(1)(a) of the Act. The other grounds relied on by the applicant do not add anything further to the question of whether leave should be granted.

[65] The primary judge did not embark on a hearing of the merits of the application, when both parties were fully prepared for such a hearing (after interlocutory hearings) and the applicant had a real interest in obtaining the court's assistance in determining the fundamental dispute between the applicant and the Authority. The fundamental issue was hidden by the very lengthy grounds set out in the application that was followed

by extensive points of claim, points of defence and points of reply. A substantial injustice was caused to the applicant by the summary dismissal of the proceeding that was made in error. That injustice in the circumstances of the ongoing relationship between the parties and the fact that there is a substantive issue between the parties which needs to be determined justify the grant of leave to appeal.

[66] The outcome of the appeal has been determined by the consideration of whether the decision was in error for the purpose of the application for leave to appeal. The appropriate course is to grant the leave to appeal, allow the appeal, set aside the orders made on 19 November 2019 and remit the proceeding to the Trial Division for the application to be heard on the merits.

[67] The proceeding that is remitted for hearing is the one initiated by the application filed on 23 July 2019. It has not been necessary for the purpose of determining the application for leave to appeal in this Court to decide whether there was, in fact, an abandonment by the applicant before the primary judge of all relief other than the narrower declaration. There was never any formal amendment made to the application. That can be a matter the parties can argue before the trial judge before whom the further hearing is listed. There may be advantages for both parties, if they can agree on confining the further hearing to the real dispute between them.

[68] As the application is being remitted for further hearing, the only costs wasted in the proceeding were the appearances before the primary judge on 18 and 19 November 2019. The applicant should have its costs of the application for leave to appeal, the appeal and the appearances before the primary judge on 18 and 19 November 2019. The costs of the proceeding below should otherwise be reserved and dealt with in the usual course by the judge who hears the application on the merits.

Orders

[69] The orders that should be made are:

1. Special leave to adduce the further evidence of the affidavit of Mr Buck sworn on 16 March 2020 refused with costs.
2. Application for leave to appeal granted.
3. Appeal allowed.
4. Set aside the orders made by the primary judge on 19 November 2019.
5. The further amended application for a statutory order for review and application to review filed on 23 July 2019 is remitted to the Trial Division for hearing on the merits.
6. The respondents must pay the applicant's costs of the application for leave to appeal, the appeal and the appearances before the primary judge on 18 and 19 November 2019, but otherwise the costs of the proceeding below are reserved.