

**JUDGEMENT : DURWARD SC DCJ : DISTRICT COURT OF QUEENSLAND. Brisbane. 17 January 2007**

- [1] This appeal turns on two issues: Whether the appellant's claims were matters for the determination of the Commercial and Consumer Tribunal ("the Tribunal"). That is whether the Tribunal is a "Court of Competent Jurisdiction" for the purposes of the Building and Construction Industry Payments Act 2003 ("the Act"); and whether the Magistrate erred by ordering that the proceedings be permanently stayed and be restarted in the Tribunal.

**THE PROCEEDINGS**

- [2] The appellant commenced proceedings in the Magistrates Court at Caboolture against the respondent, seeking payment for work pursuant to a building contract, for interest on outstanding payments and in the alternative, payment of the sum as a statutory debt owed to it. At least, that is my appreciation of the appellant's pleading.
- [3] The proceedings were not defended in respect of the allegations that money was owed. However, the respondent filed a conditional defence to challenge the jurisdiction of the Magistrates Court to determine the claim and applied to transfer the proceedings to the Tribunal. The Court granted the application.
- [4] There was no transcript of the proceedings below. However, I accept the affidavit evidence of Mr Kissane about the outcome of the proceedings (there being no issue about this) and particularly the critical decision made by the Magistrate, to this effect: That a claim made under section 19(2)(a)(i) of the Act could or should be made and determined in the Tribunal and that the proceeding be transferred to the Tribunal pursuant to section 40(1) of the Commercial and Consumer Tribunal Act 2003 ("CCTA") for determination.

**THE ISSUES ON APPEAL**

- [5] The appellant asserts that the Magistrate erred in law. The issue on this appeal is essentially one of statutory construction, namely: What is the scope and meaning of the phrase "Court of Competent Jurisdiction" in the context of the Act and particularly section 19(2)(a)(i) thereof? The other issue as to whether the appellant's claims were matters for the Tribunal or the Magistrates Court falls to be considered in the context of the statutory construction issue.
- [6] The appellant argued that the primary relief sought in the proceeding was for money owing as a debt pursuant to section 19(1)(a) of the Act and that the CCTA did not confer jurisdiction on the Tribunal. That is, its entitlement arose from operation of the Act and not from the contract or the performance of work pursuant to the contract. This was the primary claim in the proceedings and the claim for money owing under the contract was a secondary claim.
- [7] The appellant sought orders setting aside the order below and returning the proceeding to the Magistrates Court for hearing and determination.
- [8] The respondent argued that, conversely, the primary claim was for money due under the contract and thus was a matter for the Tribunal. It argues that the claim pursuant to the Act was expressed in the alternative.
- [9] That raises the issue of whether the Tribunal has jurisdiction where one part of the claim is said to be a matter for a Court to determine. That is, does the Tribunal have jurisdiction to hear and determine the claim under section 19(2)(1)(a) of the Act?
- [10] The respondent argues that it does; that the section should not be construed so as to oust the jurisdiction of the Tribunal; that the section is a "facilitative" and not, in essence, a substantive provision; and that the entitlement to progress payments (to which the section relates) is a contractual matter that depends on and is related to the performance of reviewable commercial work as described in the Act and related legislation.
- [11] The appellant argues that it does not. The Tribunal, it says, is not 'a Court of competent jurisdiction; that the claim pursuant to section 19(1)(a) arises from operation of the Act, that the respondent's liability has been determined by virtue of the Act and that the contract and performance of the work are not, in the circumstances, relevant to the claim.

**THE RELEVANT LEGISLATIVE PROVISIONS :**

**Building and Construction Industry Payments Act 2004 ("the Act")**

- [12] The expression "construction work" is defined in section 10 of the Act in broad terms and includes building work within the meaning of the Queensland Building Services Authority Act 1991 ("QBSAA"), but excludes drilling and mining activity. There was no issue raised by either party as to the subject work not being within this definition.
- [13] The other relevant definitions in the Act appear in the dictionary (section 9/schedule 2) and include the following:
- "Construction contract" means a contract, agreement or other arrangement under which one party undertakes to carry out construction work for, or to supply related goods and services to, another party.
  - "Payment claim" means a claim referred to in section 17.
  - "Tribunal" means the Tribunal under the Commercial and Consumer Tribunal Act 2003.
- [14] The Act is described in the preamble as "an Act to imply terms in construction contracts, to provide for adjudication of payment disputes under construction contracts, and for other purposes."
- [15] The Act applies to construction contracts entered into, whether written or oral, or partly written and partly oral; and whether expressed to be governed by the law of Queensland or a jurisdiction other than Queensland: Section 3(1)(a). The exclusions in subsections (2) to (5) are not relevant here.

- [16] Section 5 retains a claimant's other entitlements under a construction contract and any remedies for recovering that other entitlement and they are not limited by the operation of this Act.
- [17] The object of the Act is expressed as follows:  
*"... to ensure that a person is entitled to receive, and is able to recover, progress payments if the person -*  
*(a) undertakes to carry out construction work under a construction contract; or*  
*(b) undertakes to supply related goods and services under a construction contract."*  
 The object is to be achieved by granting an entitlement to progress payments and establishing a procedure involving claims for payment and the determination of disputed claims and the payment of progress payments to which the claimant is determined to be entitled.
- [18] By virtue of section 12 a person is entitled to a progress payment if the person has undertaken to carry out construction work, or to supply related goods and services, under the contract.
- [19] Part 3 of the Act provides for, inter alia, the procedure for recovering progress payments:  
*(a) A payment claim may be made by a person referred to in section 12 who claims to be entitled to a progress payment. The section sets out the procedure for making the claim;*  
*(b) Payment schedules: Section 18(1) provides that a respondent served with a payment claim may reply to the claim by serving a payment schedule on the claimant, thereby incurring a liability to pay the claimed amount; and*  
*(c) Section 19 provides for the consequences of not paying the claimant if there is no payment schedule served the respondent becomes liable to pay the claimed amount through failure to serve a payment schedule on the claimant and failure to pay the whole or any part of the claimed amount, as required by the Act.*
- [20] Subsection (2) of section 19 is important in the context of this appeal and provides as follows:  
*"(2)The claimant –*  
*(a) may –*  
*(i) recover the unclaimed portion of the claimed amount from the respondent, as a debt owing to the claimant, in any Court of Competent Jurisdiction...*"(my underlining)
- [21] Section 20(2)(a)(i) is expressed in the same terms, so far as is relevant, as section 19(2)(a)(i) in circumstances where the respondent has not paid the claimant under a served payment schedule.
- [22] Hence both sections 19 and 20 of the Act use the expression "Court of Competent Jurisdiction" in describing jurisdiction.
- [23] The Act also provides for adjudication of disputes. Where this procedure is invoked and the respondent is required to pay the progress payment (including interest) - called the "adjudication amount" - pursuant to section 26(1), but fails to pay the whole or any part thereof (section 29), then the claimant may ask for an "adjudication certificate" (section 30).
- [24] The adjudication certificate can be filed as a judgment debt, in a "Court of Competent Jurisdiction": Section 31(1).
- [25] Part 4 of the Act deals with administration matters, including the granting, suspension and cancellation of registration of adjudicators. Where, for example, a registration of an adjudicator is suspended or cancelled, the decision to suspend or cancel (called an "information notice") is reviewable under part 5 of the Act. If the person seeking the review is dissatisfied with the review decision that is subsequently made, the person may apply to the Tribunal for a review of the review decision (my underlining).
- [26] In Part 6 of the Act, section 100 describes the effect of Part 3 on civil proceedings. There is reference in section 100(3) to payments required to be paid or paid, in proceedings before "...a Court or Tribunal..." having to be taken into account in those civil proceedings. Hence there is a distinction in that section, by reference to the terms used, between a Court and a Tribunal.

#### **COMMERCIAL AND CONSUMER TRIBUNAL ACT 2003 ("CCTA")**

- [27] The object of this Act is set out in section 4(1)(a) as follows:  
*The objects of this Act are -*  
*(a) to establish a Tribunal to deal with the matters it is empowered to deal with under an empowering Act; and*  
*(b) to have the Tribunal deal with matters in a way that is just, fair, informal, cost efficient and speedy."*
- [28] The Tribunal is established pursuant to section 6 of the Act. It replaces the Queensland Building Tribunal which was established under the Queensland Building Tribunal Act 2000, which is repealed by section 168 of the CCTA.
- [29] Part 5 division 3 of the Act deals with the transfer of proceedings between the Tribunal and the Courts. In section 40(1) the transfer of proceedings is described as follows:  
*If a proceeding is started in a Court and the proceeding could be heard by the Tribunal under this Act, the Court must order the entity who started the proceeding to start the proceeding again before the Tribunal under section 31."*
- [30] Subsections (2) to (5) provide for how the proceedings may subsequently be dealt with. In summary, if the Tribunal considers it does not have jurisdiction to hear all matters in a proceeding before it may order the entity who started the proceeding to start again before a Court, even though the proceeding had previously been transferred from a Court to the Tribunal pursuant to subsection (1). If the Tribunal sends the matters back to the Court, in the way described, then the Court cannot thereafter again transfer the proceedings back to the Tribunal.

- [31] Section 93 provides for the registration and enforcement of decisions of the Tribunal.
- "93(1) A party may register a decision by the Tribunal by filing the following in the Registry of a Court of Competent Jurisdiction -*
- (a) a copy of the decision certified as correct by the director;*
  - (b) the party's affidavit of -*
    - (i) service of a certified copy of the decision on the party against whom the decision was given; and*
    - (ii) non-compliance, or the extent of non-compliance, with the decision by that party."*
- [32] The registration and enforcement of decisions contemplates that that process is undertaken under the authority of "a Court of Competent Jurisdiction" rather than by the Tribunal itself. In other words, the Tribunal has no power to enforce its own decisions. The Court subsumes, in effect, the control over the enforcement of the decision as if it had been originally given as a judgment of the Court.
- [33] Part 5 Division 11 of the Act provides for District Court jurisdiction in respect of questions of law stated for the opinion of the District Court and for appeals, on grounds of error of law or want of jurisdiction.
- [34] Hence there is further legislative illustration of a distinction between a Court and the Tribunal.
- [35] The expression "empowering Act" is defined in the dictionary (section 5/schedule 2) and includes the Act and the QBSAA.

#### **QUEENSLAND BUILDING TRIBUNAL ACT 2001 ("ABTA")**

- [36] The Act was repealed by section 168 of the CCTA. However, some of its provisions are referred to in relevant authorities cited to me in the course of argument on the appeal and therefore those relevant provisions need to be referred to, albeit in summary.
- [37] Section 93 provided that the Tribunal may decide building disputes.
- [38] Section 96(3) provided that where another party to a dispute is discovered and the Tribunal does not have jurisdiction to decide the dispute, *"...the Tribunal must order that the proceeding be removed to a Court under section 117(3)."* There is an equivalent provision in section 80 of the QBSAA.
- [39] Section 117 dealt with the transfer of proceedings between the Tribunal and the Courts. It has its equivalent, for present purposes, in section 40 of the CCTA, although not expressed in precisely the same terms in section 94 of QBSAA.
- [40] Section 99 provided that a proceeding in the Tribunal stops action being taken by the Queensland Building Services Authority. This has its equivalent in section 83 of the QBSAA.

#### **QUEENSLAND BUILDING SERVICES AUTHORITY ACT 1991 ("QBSAA")**

- [41] Section 77 provided that the "Tribunal may decide building disputes". "Tribunal" meant the Queensland Building Tribunal. The equivalent provision in the QBTA is section 93(1).

#### **DISCUSSION**

- [42] The appellant's argument is that the CCTA does not confer jurisdiction, in respect of the statutory entitlement to recover the progress payment as a debt in the Tribunal. The appellant accepts that the work in this case was a commercial building dispute. It also accepts that the work was reviewable commercial work. Those terms are defined in schedule 2 of the QBSAA. However, it argues that the claim pursuant to the Act does not relate to the "performance" of any work but arises purely by operation of statute. That is, by the failure of the respondent to serve a payment schedule as required in the process provided in the Act. In other words, it is argued by the appellant that the Act, in providing for, inter alia, adjudication of payment disputes under construction contracts, effectively contains a statutory procedure to enforce payment of progress claims and that the claim made to the court was made in accordance with the statutory process.
- [43] The Act creates, in an appropriate circumstance as occurred here, a liability for the respondent to pay the appellant the amount of a progress payment the subject of the claim as a debt. The Act specifically excludes the right to make a counterclaim or defence to the proceeding. In effect, the claim is one which seeks enforcement of a debt due under a liability already created by virtue of the Act.
- [44] The appellant also argues that the Act and the other legislation distinguish the Court and the Tribunal in ways which demonstrate that they have a different jurisdiction depending upon the terms expressed in the relevant legislation. It is also argued that in so far as the Act is included in the schedule to the CCTA as an "empowering Act", that is relevant only to the registration and regulation of adjudicators, for example, and others for the purposes of Part 4 of the Act.
- [45] The respondent's argument depends to a large degree upon there being a relevant connection between the contract and reviewable commercial work (as that expression is defined) and the claim made in the Court below. It is argued that section 19 of the Act is not an "empowering provision" and that by its terms it does not necessarily invest a Court of competent jurisdiction with sole jurisdiction to provide the relief sought in the proceedings. In other words, it is said that the section is merely facilitative. It is argued that section 98 of the Act provides that the Tribunal is specifically empowered to stay the operation of a review process. Further, it is argued that the proceedings below are not merely a statutory claim but depend upon there being both a commercial building dispute and a relationship to the performance of reviewable commercial work. In other words, it is said that the entitlement to be paid a progress

payment depends on the existence of a construction contract. It is also argued that one needs to look at all of the related acts in the sense that they establish a "scheme of legislation" which is intended to operate together and therefore the meaning of expressions used in one Act ought to be determined by reference not solely to that piece of legislation but to the other related legislation.

- [46] The claim in the Court below was drafted in the following sequence. It asserted that there was a contract between the parties for the provision of roofing goods and services by virtue of a commercial subcontract agreement which was a "construction contract" for the purposes of the Act. There are a number of paragraphs that follow which refer to two payment claims having been served for progress payments but no payment schedules served in response on either claim. The pleading claims an entitlement to recover the progress payments as debts due pursuant to section 19 of the Act, together with interest on the amounts owing and payment of costs pursuant to a "credit agreement" on an indemnity basis. The relief sought is set out in the following sequence: Moneys owing pursuant to the subcontract; a debt owing pursuant to section 19 of the Act; interest pursuant to the QBSAA section 67P; and costs on an indemnity basis.
- [47] As I have said the parties assert that one claim or the other is the primary claim. In my view paragraphs 1 to 3 and arguably paragraphs, 4 and 5 to 16 are allegations relating solely to the statutory claim for the debt. It is arguable as to whether the credit agreement in relation to costs is a matter of itself that could be enforced by a Tribunal (paragraphs 17-19). It seems to me that it is in the claim for relief that the contractual claim (as distinct from the statutory claim) is elevated as the primary claim. Whether this is a drafting issue which simply reflects the sequence in which the paragraphs 1-16 were set out in the claim is arguable. In my view the contract, to the extent that it is properly pleaded in the claim at all, does not seem to be particularised as required by the UCPR. For example, there is no allegation that the roofing goods were supplied or that services were provided in terms of paragraph 3 of the claim. In my view the whole of the claim is primarily a claim made to enforce a debt created by virtue of the process described in the Act.
- [48] The Tribunal undoubtedly has jurisdiction to hear and determine a "contract claim" but does it also have jurisdiction to hear and determine a claim to enforce a debt created by the Act? In my view and for the reasons that follow the discussion of relevant authorities (infra), the Tribunal plainly does not.
- [49] The respondent's submission that section 19 was not, in effect, an empowering provision does not seem to me to be sustainable. It seems to me that the words in section 19 (and elsewhere in the legislation as described previously) "court of competent jurisdiction" would be superfluous if the Tribunal was authorised to hear and determine the statutory debt. Section 98 specifically empowers the Tribunal to stay the operation of a review but this power is provided pending an appeal under section 100 to a Court. In my view if, as was argued by the respondent, the Tribunal had jurisdiction pursuant to section 19 of the Act then the words "court of competent jurisdiction" would be superfluous.
- [50] The respondent's argument that the various statutes formed a "scheme of legislation" dealing with building disputes and therefore should be read together and construed so as to invest the tribunal with a complete and compendious jurisdiction is in my view too great a leap. The legislature in my opinion sought deliberately to distinguish between the tribunal and the Courts generally and to invest the tribunal with jurisdiction and powers limited to its specific function and purpose.
- [51] Section 19 is essentially an enforcement provision. That is, liability is established by operation of the process described in that part of the Act and what remains is simply a matter of enforcing payment of the debt that is deemed thereby to be due and payable.

The Tribunal itself has no enforcement powers such as Courts have. The Courts can deliver judgment and take steps to enforce the terms of the judgment by its execution.

#### THE RELEVANT AUTHORITIES

- [52] Counsel referred me to a number of authorities, some of which were sought to be distinguished according to the particular argument that was relied on.
- [53] In *The Haggarty Group Pty Ltd v Harmony Property Group Pty Ltd* CCT Application BD605-05 (25 January 2006), the Tribunal dismissed an application for a summary decision on the subject issue, that is whether the Tribunal was a court for the purposes of the Act. The original proceedings claimed monies due for the provision of goods and services and, in the alternative, a s.19 Act claim. The application was made to the Tribunal on the latter statutory claim only. The issue was squarely one as to whether the Tribunal had jurisdiction or not. That is, whether the Tribunal was a "court of competent jurisdiction" for the purposes of s.19 of the Act. The learned Tribunal member referred to the Queensland Court of Appeal decision in *Jackson-Knaggs v Queensland Newspapers Pty Ltd* (2005) QCA 145 and to s.49A of the Acts Interpretation Act of 1954 (Qld).
- [54] In his judgment the learned member concluded as follows in (Paragraphs 17 and 18:
- [55] "17. .... reading the provisions of the Queensland Building Tribunal Act 2000, it seems to me the same analysis applies to the Commercial and Consumer Tribunal Act 2003. In particular s.40 of that Act, as did s.117 of the Queensland Building Tribunal Act 2003, distinguishes between proceedings started in the court and proceedings which can be heard by the Tribunal. Further s.93 of the Commercial and Consumer Tribunal Act 2003 distinguishes between the tribunal and 'a court of competent jurisdiction'.

18. In the circumstances, I am satisfied that at least for the purposes of s.19 of the BCIPA, the Commercial and Consumer Tribunal is not a court or indeed a court of competent jurisdiction and accordingly the application for summary decision filed on 16 September 2005 is not within the jurisdiction of the tribunal and I dismiss the application. "

- [56] In **Jackson-Knaggs v Queensland Newspapers Pty Ltd** (supra), the issue was whether the former Queensland Building Tribunal was a "court of justice" for the purposes of the Defamation Act 1889. Williams JA (page 291) said that the answer to that question is "...essentially dependent upon the proper construction of the Act. The answer has relevance only for the purposes of the Act; the answer will not be necessarily determinative of whether the tribunal is a court of justice in some other context. Given all that, decisions at common law on whether or not a particular tribunal was or was not a court of justice for some purpose are of little, or no, assistance."
- [57] Keane JA (paragraphs 18 and 19) concluded that as a matter of statutory construction the proceedings of a "court of justice" were distinguishable from the proceedings of an enquiry conducted under statutory authority, such as the proceedings of the Queensland Building Tribunal. He concluded in the following terms:  
*"Finally, it may be observed that a different conclusion would be distinctly odd having regard to s.96, s.99 and s.117 of the QBT Act which expressly postulate that the QBT is not a court. It would be a strange result if a tribunal which is a creature of statute is not a court for the purposes of that constituting statute but is a court for the purposes of another statute such as the Act."*
- [58] It seems to me that those observations are opposite to the relevant construction of the terms of the Act in this case. The Act, in my view, deliberately uses the expression "court of competent jurisdiction" in a manner that distinguishes such a court from the Tribunal.
- [59] Hence I find myself in agreement with the learned member of the Tribunal in the matter of **The Haggarty Group Pty Ltd** and their conclusions expressed by him. In his judgment he referred to s.49A of the Acts Interpretation Act 1954 (Qld) and in the following terms:  
*"Section 49A Jurisdiction of Courts and Tribunals: If a provision of an Act, whether expressly or by implication, authorises a proceeding to be instituted in a particular court or tribunal in relation to a matter, the provision is taken to confer jurisdiction in the matter on the court or tribunal."*  
*"As can be seen, the section does not purport to define the meaning of the word "court". It simply acknowledges that insofar as any jurisdiction is conferred upon a court or a tribunal that the court or tribunal in fact has that jurisdiction. By its very terms, the section acknowledges the existence of two separate institutions."*
- [60] In **Australian Postal Commission v Dao & Anor (No 2)** (1986) 6 NSVLR 497, the issue was whether the Equal Opportunity Tribunal was a "court" for purposes of the Sutors Fund Act 1951. That Act provided for the recovery of costs awarded against parties from a statutory fund in the manner similar to the Appeal Costs Fund Act in Queensland. In this case the recovery or indemnification for the recovery of costs, concerned a cost award made against employees who were parties to a proceeding before the tribunal. The court answered "yes" to that question.
- [61] However, the judgment seems to me to be one which reflected the particular circumstances of that case and the legislation in question was quite properly referred to as being "remedial" legislation and therefore enabled a broad and liberal construction to be made. Hence that case is, in my view, one which involves special circumstances and is not necessarily authoritative, in so far as its outcome was concerned, in other cases.
- [62] However, there are some observations made in the course of that decision which ought for the purposes of this case, to be considered.
- [63] Kirby P observed the following (at p. 512):  
*"..... is the tribunal a "court" for the purpose of (the issue of a certificate under the Sutors' Fund Act?) The Tribunal is not called a "court". But it is the nature of the Tribunal and not its name which must determine whether it qualifies as a "court" for the purpose of this section."*
- [64] His Honour then reviewed the six features referred to by Lord Sankey in the Privy Council decision in **Shell Oil Co of Australia Ltd v Federal Commissioner of Taxation** (1931) AC 275. I do not need to refer to those features for the purpose of this judgment save that all six features were present in the case of that tribunal. Hence the determination of the issue was one which related to the particular legislation itself rather than in some more expansive basis. In other words, as Kirby P said (page 513), *"the sole consideration before the court is whether the Tribunal is a court for the rather special and limited purposes of the Sutors Fund Act."*
- [65] McHugh JA (page 515) said the following:  
*"The Court's function is to give effect to the purpose of the Act. That function cannot be performed by isolating the word "court" and asking whether the constitution and procedures of the Tribunal come within the supposed essence of that term. English nouns do not have the fixed meaning of scientific symbols. Dictionaries and decisions on the word "court" in other contexts are guides not determinants. The meaning of a statutory word or phrase is best ascertained when considered in its context and with the author's purpose in using it in mind."*  
*In ordinary usage the word "court" has many meanings: they range from the group who form the retinue of a sovereign to an area used to play certain ball games. Legal usage also gives the word several meanings. Thus a "court" may refer to a body exercising judicial power as in the constitution ... or to a body exercising non judicial powers such as the coroner's court or to a court of petty sessions hearing committal proceedings. It may even refer to*

*a body exercising judicial and arbitral powers such as the former Commonwealth Court of Conciliation and Arbitration or the Queensland Industrial Court. ... function and purpose, not labels, should be our guides. "*

- [66] His Honour considered the legislation in question to be remedial legislation that should have a beneficial construction. Accordingly, and reflecting that philosophy, he considered that the word "appeal" in the Sutors Fund Act (which was critical to the issue before the court) was given a liberal construction.
- [67] In **Roads Corporation v Melbourne Estates and Finance Co Pty Ltd (No 2)** (1993) 2VR 620, the court discussed authorities concerning *"the differences between a court and a board or a tribunal which does not exercise judicial power."* Reference was made (page 625-626) to the Australian Postal Commission case. Gobbo J said: *"There are therefore good reasons why the Australian Postal Commission case cannot safely be taken as laying down any basis for deciding generally when tribunals are to be treated as Courts."*
- [68] In **Bieto & Ors v Triline Australia Pty Ltd (No 2)** (2003) QDC 307, the jurisdiction of the Queensland Building Tribunal was in issue, in particular the jurisdiction of the Tribunal to grant a certificate under the Appeal Costs Fund Act 1973.
- [69] At paragraphs 44 to 46 of the Decision, His Honour accepted the reasoning of Robin DCJ in **QBSA v Morris** (Appeal 3319/97, 24.10.97, unreported) in respect to the construction of the expression "superior court" to include the District Court (in addition to the Supreme Court), in the context of granting the certificate, on an appeal from the Tribunal to the District Court. The definition of "court" in the Appeal Cost Fund Act was expressed widely enough to include the Queensland Building Tribunal, but only where an appeal lay to a "superior court." The appeal from the Tribunal lay only to the District Court.
- [70] Judge Robin allowed a certificate to issue essentially on the basis that the term "superior court" was not used in its technical sense but rather in a more informal sense and thus allowed the inclusion within its meaning of the District Court.
- [71] McGill DCJ also considered the issue of whether the Tribunal had any power pursuant to s.47 of the Supreme Court Act 1995 to award interest. He concluded (paragraphs 5 and 6 of the decision) that the Tribunal was not made a court by the Act and was not a court of record and hence had no power to award interest.
- [72] In **Fraser Property Developments Pty Ltd v Sommerfeld & Ors** (2005) QCA 134, the issue as to whether under the Queensland Building Services Authority Act, engineering designs were "tribunal work" and whether the Commercial and Consumer Tribunal had jurisdiction. McPherson JA referred to the construction of the provision of the QBSAA as being "convoluted" (my word) legislation. He made reference (at paragraph 23) to *"...the long standing rule that: nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged."*
- [73] The issue of the jurisdiction of the Queensland Building Tribunal was considered in **Anderson and Anor v Parkes Horticultural Services Pty Ltd** (1996) 17 Qld Lawyer Report Reps 48. It was argued that matters said to give rise to the exercise of the Tribunal's jurisdiction, concerned the manner in which the domestic building work (as it was in that case) had been carried out. The matters upon which the Applicant sought relief were directly connected with the contract for the performance of the work.
- [74] His Honour (at page-51) said this was a difficult argument to accept. He continued:  
*"Although the words 'in relation to' are potentially of wide import, where they are used in defining the jurisdiction of a specialised tribunal it is appropriate to confine them to a fairly direct relationship."*
- [75] In **O'Grady v The Northern Queensland Company Ltd** (1990) 169 CLR 536 the High Court had to consider s.80 (1) of the Mining Act 1968 which conferred on a Warden's Court exclusive jurisdiction in all actions 'arising in relation to mining or to any mining tenement.'
- [76] The plaintiff in a Supreme Court action claimed that a declaration that a joint venture agreement for the conduct of mining operations on a mining lease had been determined, and the company counterclaimed for declarations that the plaintiffs' purported rescission of the agreement was invalid and to enforce part of the agreement. It was held by the majority of the High Court that the counterclaim was not a matter within the exclusive jurisdiction of the Warden's Court under the passage quoted, or under an express conferral of jurisdiction *"with respect to ... (g) any matter arising between miners in relation to mining on Crown land..."*
- [77] The reference to that case continued at page 51, relevantly as follows: *"What is required of a relevant relationship, having regard to the scope of the Act. Where jurisdiction is dependent upon the relation with some matter or thing, something more than a coincidental or mere connection - something in the nature of a relevant relationship - is necessary."*
- [78] His Honour found that the Tribunal had jurisdiction because it had before it a dispute arising in relation to a contract for the performance of domestic building work being the work undertaken by the respondent pursuant to the relevant contract.
- [79] However, it seems to me that this decision is distinguishable from the present matter on the basis that the remedy being pursued by the appellant here is to enforce compliance with a requirement made on the respondent to make the progress payment, arising out of the statutory process in which liability has already been determined; and that the claim simply seeks to enforce the payment in terms of s.19 of the Act.



- [80] In **McKew v Proland Assets PAL td** (2005) CCT B142-04, relief byway of damages was sought in the Tribunal pursuant to provisions of the Fair Trading Act. Hence an issue arose as to whether the Tribunal had jurisdiction to grant such relief. It was argued that the Fair Trading Act was not an "empowering Act." The counter argument was that the claim was one which related to performance of reviewable domestic work under the QBSAA and that therefore the Tribunal had jurisdiction.
- [81] The Fair Trading Act claim was found not to be one relating to the performance of reviewable domestic work and therefore the claim was not within the jurisdiction of the Tribunal. The claim related to the provision of a catalogue and the representations contained in it, rather than the actual performance of the construction work. Hence the jurisdiction was determined on that basis, the claim being classified as one which reflected a basis other than one relevantly connected to the performance of the construction work. Further, it was held that the Tribunal could not grant the relief sought because of a reference to the recovery of damages being by "action": that is, "....legal action in a court of competent jurisdiction. The Tribunal is not a court. It follows that a proceeding in the Tribunal is not an "action" of the kind authorised by "the Act"."
- [82] In interpreting statutes, reference may be made to whether the use of words in a statute is consistent or not. The general rule is that the same words should be as far as possible given the same meaning in a statute, particularly when they are used in the same section: **Craig Williamson Pty Ltd v Barrowclif** (1915) VLR 450 at 452 (per Hodges J).
- [83] The Courts will construe words in a statute differently if the context in which they are used is different or if the court considers that the drafter did not use care in the choice of his words. See the observations of Gibbs J in **McGraw-Hinds (Aust Proprietary Limited v Smith** (1978-1979) 144 CLR 633 at 643: His Honour referred to the rule as being one which "must yield to the requirements of the context" and being "only a presumption". He said, "It is well recognised that a word may be used in two different senses in the same section of one Act."
- [84] In **Accident Towing and Advisory Committee & Anor v Combined Motor Industries Pty Ltd & Anor** (1987) BR 529 the Full Court of the Supreme Court of Victoria considered the issue of the construction of ambiguous or equivocal provisions in the tow truck licensing legislation in that State. At page 539-540, McGarvie J said the following: *"Because consistency in the use of words is expected in good drafting it is assumed in construing legislation that this has been done. However an examination of the legislation may show that this has not been done and the assumption that it has is not one of great weight."*
- [85] Reference was made to McGraw-Hinds (supra) and other authorities. His Honour concluded that legislation in question demonstrated "a deficiency of care by the draftsman both in consistently using the one expression to express the one thing and in using different expressions to denote different things or concepts. In setting out my view of the effect of the various regulations I have been conscious that with quite a number, the meaning of the individual regulation is not beyond argument."
- [86] In that case the legislation was patently unsatisfactory and uncertain in its drafting form and substance and the case ought, in my view, be restricted to its particular and special circumstances in that respect.
- [87] The issue of drafting "error" was pressed upon me by the respondent in argument but counsel, correctly in my view, conceded that it was a hard argument to make. In my view it could not be said that the draftsman of the Act had in any way not used care in his or her choice of the words 'Tribunal' and 'Court of Competent Jurisdiction'

#### DECISION

- [88] Quite to the contrary, it is my view that there has been a deliberate distinction made between the Tribunal and the Courts and that the Tribunal was not intended to be nor is a court of competent jurisdiction for the purposes of s.19 of the Act.
- [89] The analysis of the authorities, applying them to the factual circumstances in this case and having regard to the submissions made and arguments advanced by counsel for the parties, in my view supports that conclusion.
- [90] There may be some instances in which, for the particular special purposes and upon a broad liberal interpretation in the case of remedial legislation, a tribunal is for the purposes of that specific legislation a "court". However, I do not think that such a construction applies in respect of the use of the expression "court of competent jurisdiction" in s.19 of the Act.
- [91] The use of the expression "court of competent jurisdiction" in s.19 was in my view quite deliberate. The section is essentially an enforcement section and the tribunal does not have enforcement powers in respect of its orders, save for some specific matters such as contempt of its proceedings. In my view the enforcement of the requirement to progress payments pursuant to the legislation is beyond the power of the Tribunal in terms of the Act and can only be effected by a court. Hence the reference to a "court of competent jurisdiction" to give effect to the enforcement of the notice. In my view the use of the expression is intended to refer to any one of the Supreme Court, District Court or Magistrates Court depending upon the respective monetary jurisdictions and the sum of the claim that is to be enforced. Each of those latter Courts are courts of competent jurisdiction for the purposes of s.19. The Tribunal is not.

#### CONCLUSION

- [92] In my view the Magistrate erred in law in making the orders the subject of the appeal. Accordingly the orders below should be set aside and the proceedings returned to the Magistrates Court to be heard and determined.

**ORDERS**

[93] The order of the court is:

1. Appeal allowed.
2. Decision of the Magistrate sitting in the Magistrates Court at Caboolture dated 2 August 2005 be set aside.
3. That the proceedings be transferred to the Magistrates Court to hear and determine.

[94] I will hear the parties on the issue of costs upon the delivery of this judgment or on such later date as may be necessary

G I Thomson for Appellant instructed by Sawford Voll Lawyers

Ms E Longbottom for the Respondent instructed by Shand Taylor Lawyers