Building

The Queensland Building Tribunal - Jurisdiction - Engineers and Architects

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Object and Powers of the Queensland Building Tribunal

The Queensland Building Tribunal was established by the *Queensland Building Services Authority Act* ("*Act*"). The major parts of the *Act* commenced on 1 January 1992.

The objects of the *Act* are to, inter alia:

- regulate the building industry to ensure the maintenance of proper standards in the industry; and
- to provide for the efficient resolution of building disputes.

The *Act* also established the Queensland Building Tribunal ("QBT"). The QBT has power to adjudicate domestic building disputes. Such a dispute is relevantly defined in the *Act* (section 4) as:

- a claim or dispute between a consumer and a building contractor in relation to performance of domestic building work or a contract for such work;
- a claim or dispute arising between two or more building contractors in relation to the performance of domestic building work or a contract for such work; or
- a claim or dispute in negligence, nuisance or trespass related to the performance of domestic building work.

The QBT may make such orders and directions as may be just to:

- resolve the dispute and any other matters at issue between the parties (section 95(1)); and
- order that a supplier, subcontractor or another person be joined as a party to a proceeding and make such orders and directions against a party so joined as may be just. Section 95(3).

Proceedings before the QBT are within the discretion of the Tribunal and are to be conducted with as little formality and technicality and with as much speed as the requirements of the *Act* and a proper consideration of the matters before the Tribunal permit. The QBT is not bound by the rules of evidence and may inform itself in any way that it considers appropriate (section 87(3)).

The Tribunal has very wide powers under section 95(4) of the *Act*, including power to avoid any unjust contractual term, vary a contract or order rectification of defective or incomplete building work.

There are numerous authorities which indicate that a statutory grant of jurisdiction should not receive a narrow construction and that a statutory tribunal is taken to have all the powers that are necessary to permit it to act effectively within the jurisdiction conferred: *Proprietors of Strata Plan 20754 v Hawksbury City Council* (1991) 73 LGRA 199.

Decisions of the Supreme Court and the Federal Court also confirm the wide power of the Tribunal. For instance, in *Ex parte: Longo* (unreported, Federal Court of Queensland, 104/95, 23 June 1995) Cooper J said:

> "*a broad construction of both the jurisdiction and the powers of the Tribunal ought to be taken. It is not the intention of Parliament to fragment the proceedings by having part only of the dispute transferred to the Tribunal. Rather, the jurisdiction and powers are framed in broad and flexible terms to give the Tribunal a scope to finally resolve all matters in issue between the parties.*"

Williams J in *Watpac Australia Pty Ltd v K-Crete Industries Pty Ltd* (unreported, Supreme Court of Queensland, 17 October 1995) said:

> "*the intention of the statute is that the Tribunal should have primary jurisdiction with respect to 'domestic building disputes'. The philosophy is that such a dispute can be cheaply and speedily resolved by the Tribunal and the Court should not be in a position to constitute an impediment or interfere in any way.*"

Not surprisingly then, in its formative years, the members of the Tribunal (and for that matter some of the

Superior Courts) held that the jurisdiction of the Tribunal was wide enough to resolve the myriad of matters that may be in issue between the parties (and others) to a domestic building dispute.

For instance, it was held that the Tribunal had jurisdiction to hear disputes involving:

- defective building materials, such as tiles used in building construction: per Hoath DCJ in *Chard Roberts Constructions v Johnson Tiles Pty Ltd* (unreported, District Court of Appeal, 51/93);
- the construction of swimming pools: per Wylie QC DCJ in *Precision Pools Pty Ltd v Berteaux* (unreported, District Court, Brisbane, 18 February 1994);
- landscaping such as pergolas, paving, boulder walls and earthworks: *Lickeen Pty Ltd v Barber* (unreported, QBT, 11 November 1993);
- the construction of over 20 individual dwellings under one contract for an aboriginal council: per Demack J in *Woorabinda Aboriginal Council v Ealerose Pty Ltd* (unreported, Supreme Court, Rockhampton, 22 November 1993);

and power to resolve all issues and make orders:

- that a licensed builder rectify defective or incomplete work and that engineers who drew a defective design pay for the cost of that rectification: *D & L Homes Pty Ltd v Queensland Building Services Authority* (unreported, QBT, 15 April 1994);
- for the joinder of architects, civil engineers and geotechnical engineers to proceedings in the Tribunal: *Paradise Homes Pty Ltd v Green* (unreported, QBT, 23 August 1994) and the *Force 10 Home Construction Company Pty Ltd v Queensland Building Services Authority* (unreported, QBT, 22 November 1994).

No Joinder in Certain Circumstances nor Third Party Proceedings

In *Brisbane City Council v Spicer and Tuesley & Ors* (unreported, District Court, Brisbane, 6 November 1995), Wylie QC, DCJ allowed an appeal against a decision of the Tribunal joining the Brisbane City Council to a proceeding in the Tribunal. His Honour found that:

- The *Act* does not expressly deal with third party proceedings and no rules have been made under section 115 with respect to matters of practice and procedure of this nature.
- Parliament intended the words "*or another person*" in section 95(3) to mean a person against whom or which a "*domestic building dispute*" is shown to exist on the face of the application whether in its original form or as amended by the claimant to mean one who should properly be a party to the claim or dispute in order to avoid non-joinder of a necessary party.
- The section authorises the joinder of a person as "*a party to a processing*" under that section which refers only to domestic building disputes as defined.
- Third party proceedings are independent proceedings. There is not the slightest indication that the *Act* contemplates an applicant being subject to the time consuming complications which may ensue if, by one device or another, a respondent is permitted to join issue with a third party and litigate the issue or issues raised in the same proceedings as the claim itself.
- There is no suggestion in the *Act* of intervening interlocutory procedures as a right of the parties.
- Accordingly, section 95(3) is not intended to provide a procedure by which third party claims may be raised in a domestic building dispute.

No Architects or Engineers

For some years, the Tribunal also heard actions against architects and engineers whether as direct parties or as parties joined under section 95(3). However, recent decisions of the Tribunal and the District Court have now made it clear that a proceeding against an architect or engineer is not a domestic building dispute and the Tribunal has no jurisdiction to hear such a proceeding.

In *Ryan v Frame* (unreported, QBT, 2 October 1996), Tribunal Member Miss Burke said:

> *"the Applicants' claim arises as a result of design and supervisory work alleged to have been carried out by the Respondents, who are structural engineers, in relation to a driveway and retaining walls at the Applicants' residence at 7 Milaparinka Terrace Ashmore ('the site').*
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> *I have formed the view that the dispute between the parties is not a domestic building dispute because the work carried out by the Respondents was not domestic building work as defined in the Act. I am further of the view that the dispute does not relate to the types of dispute categorised in the definition of 'domestic building dispute' in s.4 of the Act.*
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> *The Applicants' claim or dispute does not arise between a consumer and a building contractor or between two or more building contractors as required in s.4(a) and (b) of the definition of domestic building dispute. The terms 'consumer' and 'building contractor' are defined in s.4 of the Act. The Respondents are not a building contractor.*

Clause (c) of the definition of 'domestic building dispute' includes a claim or dispute in negligence, nuisance or trespass related to the performance of domestic building work.

I am not satisfied that the Applicants' claim, as it is presently formed, is a claim in negligence, nuisance or trespass."

In *King ex parte: McIntyre & Associates Pty Ltd* (unreported, District Court, Brisbane, 29 August 1997), Forde DCJ said:

"*The exclusion from 'domestic building work' of work of a local government led into the conclusion that negligence by a statutory authority such as a council was specifically excluded. Similarly, the exclusion under Regulation 3A(1)(e) excludes from the purview of the Act 'design work performed or supervisory services provided by an engineer in the engineer's practice'. Local Governments are in the same category as engineers and architects.*

(a) Finally in relation to paragraph (c) [of the definition of Domestic Building Dispute] I accede to the submission of the engineer's counsel:

'The role of paragraph (c) is to permit a person who is not a consumer or a building contractor to bring an action in the Tribunal as an applicant in reliance on the principles of the torts of negligence, nuisance or trespass where that applicant suffers loss and damage occasioned as a more or less direct result of the physical conduct of 'domestic building work'. In that sense it supplements the jurisdiction which arises under (a) and (b). In as much as those paragraphs look to the specific identity of the applicant and respondent as consumer or building contractor, paragraph (c) looks to the cause of action and its necessary nexus with the performance of the building work in question, without in any way limiting the identity of the applicant.'

(b) The original 1991 Act defined exempt building work 'as including design work carried out by an engineer'. By amendment being Act 20/1994 effective on 5 August 1994, that definition was omitted. The amendment to the Regulations of 1994 excluded from the ambit of 'building work' design work, etc performed by an engineer. Therefore, the member was incorrect in saying that the Tribunal had jurisdiction to entertain actions against engineers from 1 July 1992 until the regulations were changed on 5 August 1994.

(c) The Queensland Building Tribunal has no jurisdiction to entertain actions against an engineer for defective design under s.95 of the Queensland Building Services Authority Act 1991."

Subcontracts

Where a claim is based on alleged negligence related to the performance of obligations under a subcontract, rather than the performance of domestic building work, then it is not a claim for negligence in relation to a contract for the performance of domestic building work. Sub-paragraph (c) is unlike sub-paragraphs (a) and (b) in that whilst the definition includes a claim for negligence related to the performance of domestic building work, it does not include a claim for negligence in relation to a contract for the performance of that work. The emphasis in sub-paragraph (c) is on the performance of the work. A claim of negligence is intended by the legislation to bear the same sort of relation to the performance of domestic building work as a claim in nuisance or trespass: per McLauchlan QC, DCJ in *Murgia v Sablewell Pty Ltd* [1995] 16 Qld Lawyer Reps 46.