SUPREME COURT OF QUEENSLAND

CITATION:	*Pivovarova v Michelsen* [2019] QCA 256
PARTIES:	**TATIANA PIVOVAROVA** (applicant) **v** **PETER B. MICHELSEN t/as PETER MICHELSEN BUILDING SERVICE** **ABN 84 003 506 297** (respondent)
FILE NO/S:	Appeal No 5730 of 2019 QCAT No 223 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Queensland Civil and Administrative Tribunal Act*
ORIGINATING COURT:	Queensland Civil and Administrative Appeals Tribunal at Brisbane – [2019] QCATA 54 (Daubney J)
DELIVERED ON:	19 November 2019
DELIVERED AT:	Brisbane
HEARING DATE:	25 September 2019
JUDGES:	Fraser JA and Boddice and Crow JJ
ORDER:	**Application for leave to appeal dismissed.**
CATCHWORDS:	ADMINISTRATIVE LAW – STATUTORY APPEALS FROM ADMINISTRATIVE AUTHORITIES TO COURTS – where applicant seeks leave to appeal a decision of the appeal tribunal of the Queensland Civil and Administrative Tribunal – where s 150(3)(a) of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) provides that an appeal may be made "only on a question of law" – whether the grounds of the proposed appeal raised by the applicant are limited to questions of law – whether the Court of Appeal lacks jurisdiction to hear and determine the proposed appeal *Administrative Appeals Tribunal Act* 1975 (Cth), s 44 *Domestic Building Contracts Act* 2000 (Qld), s 67 *Liquor Act* 1992 (Qld), s 35 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 142, s 149, s 150, s 153 UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations *Uniform Civil Procedure Rules* 1999 (Qld), r 765(1) *Bagumya v Kakwano* [2010] NSWSC 600, cited

Beale v Government Insurance Office of NSW (1997) 48 NSWLR 430, cited
Comcare v Etheridge (2006) 149 FCR 522; [2006] FCAFC 27, cited
Commissioner for Liquor and Gaming v Farquhar Corporation Pty Ltd [2018] QCA 202, cited
Commissioner of Police v Stehbens [2013] QCA 81, cited
Da Costa v The Queen (1968) 118 CLR 186; [1968] HCA 51, cited
Drew v Makita (Australia) Pty Ltd [2009] 2 Qd R 219; [2009] QCA 66, cited
Haritos v Commissioner of Taxation (2015) 233 FCR 315; [2015] FCAFC 92, cited
Hussain v Minister for Foreign Affairs (2008) 169 FCR 241; [2008] FCAFC 128, cited
In Vitro Technologies Pty Ltd v Taylor [2011] QCA 44, cited
Michelsen v Pivovarova [2017] QCAT 235, cited
Osland v Secretary to the Department of Justice [No 2] (2010) 241 CLR 320; [2010] HCA 24, cited
Owners Strata Plan No 68976 v Nicholls [2018] NSWSC 270, cited
Pivovarova v Peter B Michelsen t/as Peter Michelsen Building Service ABN 84003506297 [2019] QCATA 54, cited
Pivovarova v Michelsen [2015] QCATA 73, cited
Powell v Queensland University of Technology [2018] 2 Qd R 234; [2017] QCA 200, cited
Queensland Building and Construction Commission v Arthurs [2014] QCA 307, cited
Rintoul v State of Queensland & Ors [2018] QCA 20, cited
Robb v Tunio [2014] QCA 127, cited
Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247, cited
Thompson Residential Pty Ltd v Hart & Anor [2014] QDC 132, cited
TNT Skypak International (Aust) Pty Ltd v Federal Commissioner of Taxation (1988) 82 ALR 175; [1988] FCA 119, cited

COUNSEL: The applicant appeared on her own behalf
The respondent appeared on his own behalf

SOLICITORS: The applicant appeared on her own behalf
The respondent appeared on his own behalf

[1] **FRASER JA:** I have had the advantage of reading in draft the reasons of Crow J. I agree with the orders proposed by his Honour. Subject to what follows, which I think is generally consistent with his Honour's reasons, I agree with those reasons in all respects.

[2] The first point I will discuss concerns the nature of an appeal governed by s 150(3)(a) of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ("the QCAT Act"). The application before the Court is for leave to appeal from a final decision of the appeal tribunal of the Queensland Civil and Administrative Tribunal (QCAT) under s 150(2)(b) of the QCAT Act. By s 150(3)(a) of the QCAT

Act such an appeal "may be made only on a question of law". For the following reasons I agree with Crow J's conclusion that such a question does not comprehend a mixed question of fact and law.

[3] In *Commissioner for Liquor and Gaming v Farquhar Corporation Pty Ltd*[1] the Court had before it an appeal from a decision made by QCAT in a proceeding for a review of a decision of the Commissioner for Liquor and Gaming. That case is not on point here because s 35 of the *Liquor Act* 1992 (Qld) excluded any application of s 150 of the QCAT Act. Section 35(3) provided that a party to the proceeding may appeal to the Court of Appeal against QCAT's decision "only if the appeal is on a question of law". Jackson J, with whose reasons Gotterson JA and Boddice J agreed, referred to observations made by a five member bench of the Full Court of the Federal Court in *Haritos v Commissioner of Taxation*,[2] concerning an appeal to the Federal Court of Australia "on a question of law, from any decision of the tribunal" under s 44 of the *Administrative Appeals Tribunal Act* 1975 (Cth). The Full Court observed that the quoted expression "should not be read as if the words 'pure' or 'only' qualified 'question of law'" and that "[n]ot all so-called 'mixed questions of fact and law' stand outside an appeal on a 'question of law'."[3] After a lengthy analysis of many authorities upon the topic that Court, whilst accepting that the right of appeal under s 44 did not comprehend mixed questions of fact of law which required the Court positively to determine a question of fact, concluded that the right of appeal in it should not be read as meaning that it "may never extend to a mixed question of fact and law" or that it required a "pure" question of law.[4]

[4] In my view s 150(3)(a) of the QCAT Act should be read as if "pure" or "only" does qualify "question of law". The meaning of that provision is influenced by contextual matters which had no counterpart in the statutes considered in *Commissioner for Liquor and Gaming v Farquhar Corporation Pty Ltd* or *Haritos v Commissioner of Taxation*. Section 150 is in Division 2 of Part 8 of the QCAT Act, which concerns appeals to the Court of Appeal. It is significant that s 150(3)(a) applies only to appeals against decisions of the QCAT appeal tribunal, which will have considered and refused either an application for leave to appeal (s 150(1)) or an appeal (s 150(2)). That an applicant for leave to appeal to the Court of Appeal already has had one opportunity to challenge an adverse decision makes it seem more likely that the legislative intent was to narrowly confine the grounds of such an appeal.

[5] Furthermore:

(a) Section 149(1), which is also in Division 2, confers a right of appeal against a "cost-amount" decision by QCAT at first instance and s 149(2) confers a right of appeal against another first instance decision by QCAT if it was constituted by a judicial member, in both cases only by leave of the Court of Appeal under s 149(3). Significantly, s 149(3)(a) allows an appeal by leave under s 149(1) only on "a question of law" whereas s 149(3)(b) allows an appeal by leave under s 149(2) also on "a question of fact, or a question of mixed law and fact".

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1 [2018] QCA 202.

2 (2015) 233 FCR 315 (Allsop CJ, Kenny, Besanko, Robertson and Mortimer JJ).

3 (2015) 233 FCR 315 at [62] quoted in *Commissioner for Liquor and Gaming v Farquhar Corporation Pty Ltd* [2018] QCA 202 at [17](8).

4 (2015) 233 FCR 315 at [192]. The Court elaborated upon those conclusions at [193]-[202].

(b) In Division 1 of Part 8, which concerns appeals to the QCAT appeal tribunal from certain first instance QCAT decisions, s 142(3)(b) allows certain appeals by leave also "on a question of fact, or a question of mixed law and fact".

The contrast between the expressions "a question of law" and "a question of fact, or question of mixed law and fact" makes clear the legislative policy to confine the ambit of an appeal for which the Court of Appeal may give leave under s 150 to an appeal on a question of law which does not involve any question of fact or of mixed law and fact of the kind described in ss 149(3)(b) and 142(3)(b). In a similar statutory context, Rothman J held in *Bagumya v Kakwano*[5] that the expression "only on a question of law" must mean "on a question of law alone".

[6] That s 151(2)(a) of the QCAT Act provides that an application for leave to appeal or an appeal to the Court of Appeal must be made under the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") does not suggest any different view either of the ambit of the appeal or its nature as a strict appeal rather than an appeal by way of rehearing; as to the latter point, the provision in r 765(1) of the UCPR that an appeal to the Court of Appeal under Chapter 18 of the UCPR is an appeal by way of rehearing applies only to an appeal from the Supreme Court constituted by a single judge: UCPR r 745(2).

[7] The legislative policy is reinforced by the statement in s 153(1) of the QCAT Act that s 153 (which confers powers upon the Court of Appeal in deciding appeals) "applies to an appeal before the Court of Appeal against a decision of the tribunal **on a question of law only**". In that provision the word "only" qualifies "a question of law", whereas s 150(3)(a) allows an appeal to be made "only on a question of law". The latter expression, if considered in isolation from its context, is open to the construction that the only kind of appeal that may be made is an appeal "on a question of law", rather than a construction that the appeal is confined to "a question of law only" (which is a pure question of law). Because s 153 is plainly designed to comprehend an appeal under s 150, the implication is that, consistently with the statutory context already discussed and Rothman J's conclusion in *Bagumya v Kakwano*, an appeal under s 150 is confined to one made on a question of law only.

[8] The absence of any factual component in such an appeal is consistent with the contrast between the powers conferred on the Court by s 153 in an appeal on a question of law only and the powers given to the Court by s 154 in an appeal on a question of fact or mixed law and fact. As to the former, s 153(2) provides that in deciding the appeal the Court of Appeal may confirm or amend the decision, set aside the decision and substitute its own decision, set aside the decision and return the matter to QCAT for reconsideration (with or without the hearing of additional evidence and with other directions the Court considers appropriate), or make any other order it considers appropriate. The powers conferred by s 153 upon the Court in an appeal on a question of law only do not include any analogue of the power conferred by s 154(2) in relation to an appeal on a question of fact or a question of mixed law and fact that the appeal proceeds "with or without the hearing of additional evidence as decided by the Court of Appeal". The absence of such a

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5 [2010] NSWSC 600 at [21] – [28].

power in an appeal under s 153 is consistent with a legislative intent to confine appeals to the Court of Appeal to pure questions of law.

[9] The powers s 153 confers in an appeal on a question of law only should be given a construction that is consistent with their purpose of aiding in the exercise of the limited nature of the appeal; if, which it is not necessary to decide in this application, the Court of Appeal might itself be able to determine a matter of fact remaining to be determined as a consequence of an appeal being upheld on a question of law only (rather than remitting the matter to the appeal tribunal or to QCAT at first instance), that power may be exercised only by reference to uncontested evidence or primary facts already found by QCAT: see *Osland v Secretary to the Department of Justice [No 2]*[6] and *Powell v Queensland University of Technology*.[7]

[10] It is not necessary in this application to attempt a comprehensive description of what amounts to "a question of mixed law and fact" or an appeal made on a question of law only in the present context.[8] Upon any reasonable view each matter which Crow J concludes is not a "question of law" is not a pure question of law. The Court therefore lacks jurisdiction to hear and determine the questions the applicant seeks to agitate on appeal.

[11] The second point I will discuss concerns grounds 16(iv) and 19 of the applicant's proposed appeal. Ground 19 involves a question of law whether the doctrine of substantial performance is capable of any application in the context of a contract to which s 67 of the *Domestic Building Contracts Act* 2000 (Qld) applies. That question should be left for a case in which it is necessary to decide it. It is not necessary to decide it or any aspect of grounds 16(iv) and 19 in this matter. Those grounds contend that the appeal tribunal erred in law in relation to the finding at first instance, which was made only as an alternative to the finding that the respondent builder was entitled to recover upon the basis that the building works were practically complete, that the respondent could recover payment upon the basis of the doctrine of substantial performance. Crow J's conclusion, with which I agree, is that the applicant has not identified any error of law affecting the decision of the QCAT appeal tribunal affirming the finding that practical completion had been reached. Even assuming in the applicant's favour that the appeal tribunal's decision upon that point involved a question of law, the appeal would not be an appeal made on a question of law only. Such an appeal would be made on a question of mixed law and fact.[9] The Court would lack jurisdiction to hear it. Any appeal would necessarily proceed upon the basis of the finding in QCAT that the works were practically complete. Accordingly it is not relevant to consider the correctness of the appeal tribunal's affirmation of the alternative ground upon which it was also held at first instance that the respondent was entitled to recover.

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6 (2010) 241 CLR 320 at [19] – [20] (French CJ, Gummow and Bell JJ).

7 [2018] 2 Qd R 234 at [41] – [55] (Sofronoff P), [143] – [146] (McMurdo JA).

8 These questions are discussed in various contexts in a great many cases, including *Da Costa v The Queen* (1968) 118 CLR 186, 195 – 196 (Windeyer J), *Haritos v Commissioner of Taxation* (2015) 233 FCR 315 at [111] – [112], [163] – [202], *Robb v Tunio* [2014] QCA 127 at [22] – [23] and footnote 6 (Jackson J, Muir JA and Martin J agreeing); *Queensland Building and Construction Commission v Arthurs* [2014] QCA 307 at [35] – [37] (McMeekin J, Holmes J as the Chief Justice then was and myself concurring); *Bagumya v Kakwano* [2010] NSWSC 600 at [28] – [29], [32], [41], [43] – [45] (Rothman J); *Owners Strata Plan No 68976 v Nicholls* [2018] NSWSC 270 at [15] – [25] (Rothman J).

9 See also *Miller & Anor v Lida Build Pty Ltd* [2013] QCA 332 at [15] (Gotterson JA, Morrison JA and Henry J agreeing), in which this point was decided in the same way.

[12] Thirdly, I refer to Crow J's conclusion that a result of the applicant moving into the home before the issue of the Certificate of Practical Completion is that it cannot be doubted that the home was reasonably suitable for habitation. In my respectful opinion that question is outside the ambit of the proposed appeal because it is or involves a question of fact. The question is of no moment in circumstances in which the appeal tribunal's decision to affirm the decision at first instance that practical completion was achieved does not depend upon any question of law upon which the applicant could succeed in the proposed appeal.

[13] **BODDICE J:** I have had the advantage of reading the respective reasons for judgment of Fraser JA and Crow J.

[14] I agree, for the reasons given by Fraser JA and Crow J, that s 150(3)(a) of the QCAT Act comprehends an appeal only on a question of law, not a mixed question of fact and law.

[15] I agree, for the reasons given by Crow J, that no question of law is raised in the present appeal.

[16] Finally, for the reasons given by Fraser JA, I agree it is unnecessary to determine in this appeal whether the doctrine of substantial performance has application, and whether occupation of a residence is, in itself, determinative of the concept of reasonably suitable for habitation.

[17] I agree with the orders proposed by Crow J.

[18] **CROW J:** On 25 October 2011, the applicant and respondent entered into a Master Builder's contract for the construction of a double storey home for the applicant. The contract price was $330,000.[10]

[19] The contract provided for payments to be made to the respondent upon completion of each stage of work.[11] A dispute arose regarding entitlement of the respondent to be paid for the final payment claim for works reaching practical completion.

[20] The applicant had taken possession of the property on 7 April 2012.[12] On 5 July 2012, the respondent issued a practical completion stage notice (advising that practical completion was reached on 15 June 2012) and a practical completion stage claim for $49,500. The notice advised that the final inspection was to occur on 12 July 2012, and a Form 21 Final Inspection Certificate was attached to the notice.[13]

[21] A final inspection was held on 12 July 2012 at which time the applicant denied that the works had reached practical completion, refused to accept, complete or sign the defects document provided to her by the respondent, and otherwise refused to pay the final claim.[14]

[22] Clause 1 of the building contract defined the practical completion stage as follows:[15]

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10 Record Book 1 ("RB1") page 33.
11 RB1 page 37.
12 RB1 page 37.
13 RB1 page 37.
14 *Michelsen v Pivovarova* [2017] QCAT 235 [12].
15 RB1 page 38.

> "That stage of the Works when the Works are completed in accordance with the contract and all relevant statutory requirements, apart from minor omissions or minor defects, and the Works are reasonably suitable for habitation."

[23] Clause 17.7 of the contract provided:

> "17.7 On giving the defects document to the owner, and notwithstanding the Practical Completion Stage may have been reached with minor omissions or defects, the owner must pay the Practical Completion Stage Claim to the contractor in accordance with the contract."

First Tribunal Decision – 24 July 2013

[24] On 23 July 2012, the respondent commenced proceedings in QCAT seeking payment of the sum of $49,500.[16]

[25] On 24 July 2013, QCAT Member Dr Cullen **(First Tribunal)**, found that practical completion had been reached and the respondent was entitled to payment of $47,800 plus interest. Dr Cullen made several factual findings in respect of alleged defects and incomplete works, the effect of which was that the matters complained about did not preclude practical completion being reached.[17]

[26] On 8 August 2013, the applicant appealed the decision of Dr Cullen to the Appeal Tribunal of QCAT constituted by the President Justice Thomas and Member Deane.[18]

First Appeal Tribunal Decision – *Pivovarova v Michelsen* [2015] QCATA 73 – 10 June 2015

[27] On 10 June 2015,[19] the President and Member Deane **(First Appeal Tribunal)** found that there were six errors of law in the First Tribunal decision of Member Cullen:

1. An error of law in failing to provide adequate reasons for the finding of practical completion being reached on the basis of the applicant taking possession of the property.[20]
2. An error of law in failing to afford the parties an opportunity to make submissions on the doctrine of substantial performance in making her findings that practical completion had been reached.[21]
3. An error of law in failing to provide adequate reasons to address the issue of adjustment to the contract price.[22]

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16 RB1 page 29.
17 RB1 pages 21-28.
18 Supplementary Record Book ("SRB") 76.
19 *Pivovarova v Michelsen* [2015] QCATA 73.
20 *Pivovarova v Michelsen* [2015] QCATA 73 [12], [13], [15], [22] & [23].
21 *Pivovarova v Michelsen* [2015] QCATA 73 [53], [54].
22 *Pivovarova v Michelsen* [2015] QCATA 73 [65], [83] & [84].

4. An error of law in failing to provide adequate reasons for deducting $1,680 from the amount owing when no such claim was made and such a finding inferred the member accepted the doctrine of substantial performance applied.[23]

5. An error of law in finding that the practical completion stage notice was valid, which was consequent to the validity of the finding that practical completion had been reached.[24]

6. An error of law in failing to provide adequate reasons as to whether the contract was an entire contract and whether Mr Michelsen was entitled to payment.[25]

[28] As a result of the errors of law, the First Appeal Tribunal remitted the matter back to Member Cullen for redetermination. However, the First Appeal Tribunal expressly declined to set aside the finding of Member Cullen in respect "of the matters raised by Ms Pivovarova"[26] that:

1. "the defects, incomplete work and deviations from the contract, plans and specification were all minor in nature."[27]

2. "the reasonable costs of rectifying and completing minor defective and incomplete work was $1,680".[28]

[29] During a period of a little over two years, several interlocutory applications were filed, submissions made, and directions made by the tribunal leading to the second tribunal decision. Substantial performance was raised as an issue to be decided in the second tribunal decision.[29]

Second Tribunal Decision – *Michelsen v Pivovarova* [2017] QCAT 235 – 10 July 2017

[30] On 10 July 2017, Member Cullen **(Second Tribunal)** ordered the applicant pay the respondent the sum of $40,990 plus interest. On the Second Tribunal decision, Member Cullen made the following findings:

1. A defects document was provided by the respondent on 12 July 2012.[30]

2. Practical completion had been reached.[31]

3. That the minor deviations to the plans and specifications were "so trifling that they do not have any bearing on whether practical completion was reached".[32]

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23 *Pivovarova v Michelsen* [2015] QCATA 73 [85] – [88].
24 *Pivovarova v Michelsen* [2015] QCATA 73 [64], [30].
25 *Pivovarova v Michelsen* [2015] QCATA 73 [89] – [94].
26 *Pivovarova v Michelsen* [2015] QCATA 73 [41].
27 *Pivovarova v Michelsen* [2015] QCATA 73 [42].
28 *Pivovarova v Michelsen* [2015] QCATA 73 [87].
29 RB2 page 74.
30 *Michelsen v Pivovarova* [2017] QCAT 235 [12].
31 *Michelsen v Pivovarova* [2017] QCAT 235 [16].
32 *Michelsen v Pivovarova* [2017] QCAT 235 [18].

4. In the alternative to 3 above, Member Cullen found that the "contract was substantially performed by Mr [Michelsen], such that he is entitled to payment, less the reasonable costs of rectifying and completing minor defective and incomplete work."[33]

5. The sum of $6,830 should be deducted from the amount owing to the respondent for Prime Cost items supplied by the applicant and the further sum of $1,680 should be deducted for the costs to rectify and complete minor defective or incomplete work such that the sum owing to the respondent was $40,990 ($49,500 - $6,830 - $1,680) plus interest at 15% per annum.[34]

[31] The applicant appealed this Second Tribunal decision.

Second Appeal Tribunal Decision – *Pivovarova v Peter B Michelsen* [2019] QCATA 54 – 10 May 2019

[32] On 10 May 2019, President Justice Daubney and Member King-Scott **(Second Appeal Tribunal)** dismissed the second appeal entirely concluding:

1. Member Cullen had found Practical Completion had been reached.[35]

2. Member Cullen was entitled to do so as there had been no errors in her findings that the items complained of by the applicant as being defective or incomplete were "minor in nature".[36]

3. There was no error in the finding in relation to the alternative finding that the substantial performance was achieved and Member Cullen did not err in considering *Thompson Residential Pty Ltd v Hart & Anor* [2014] QDC 132.[37]

4. There was no evidence of Member Cullen failing to observe the requirements of natural justice or extend a proper opportunity to the applicant to present her case, nor was there any demonstrated bias by the learned member.[38]

[33] Desirous of appealing the Second Appeal Tribunal decision, the applicant has applied to this Court for leave to appeal the Second Appeal Tribunal decision.

Application for Leave to Appeal the Second Appeal Tribunal Decision

[34] Section 150(2) and (3) of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) provide as follows:

"**150 Party may appeal—decisions of appeal tribunal**

…

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33 *Michelsen v Pivovarova* [2017] QCAT 235 [18].
34 *Michelsen v Pivovarova* [2017] QCAT 235 [32].
35 *Pivovarova v Peter B Michelsen* [2019] QCATA 54 [43].
36 *Pivovarova v Peter B Michelsen* [2019] QCATA 54 [43].
37 *Pivovarova v Peter B Michelsen* [2019] QCATA 54 [71], [74].
38 *Pivovarova v Peter B Michelsen* [2019] QCATA 54 [69].

(2) A party to an appeal under division 1 may appeal to the Court of Appeal against the following decisions of the appeal tribunal in the appeal—

(a) a cost-amount decision;

(b) the final decision.

(3) However, an appeal under subsection (1) or (2) may be made—

(a) **only** on a question of law; and

(b) only if the party has obtained the court's leave to appeal.

[35] In *Commissioner for Liquor and Gaming v Farquhar Corporation Pty Ltd*[39] Jackson J, with whom Gotterson JA and Boddice J agreed, said of a similar provision as follows[40]:

"[15] The appeal to this court is one that a party to the proceeding for the decision of QCAT may bring, 'but only if the appeal is on a question of law': see s 35(3) of the Act.

[16] It follows that this appeal can only be maintained by the appellant on a question of law arising out of QCAT's decision dated 10 July 2018.

[17] In the present case, the appellant did not confine itself to grounds that would constitute an appeal on a question of law, as will be discussed. In *Haritos v Commissioner of Taxation*, in a cognate context, a five member bench of the Full Court of the Federal Court made the following useful observations:

'(1) The subject matter of the Court's jurisdiction under s 44 of the AAT Act is confined to a question or questions of law. The ambit of the appeal is confined to a question or questions of law.

(2) The statement of the question of law with sufficient precision is a matter of great importance to the efficient and effective hearing and determination of appeals from the Tribunal.

(3) The Court has jurisdiction to decide whether or not an appeal from the Tribunal is on a question of law. It also has power to grant a party leave to amend a notice of appeal from the Tribunal under s 44.

(4) Any requirements of drafting precision concerning the form of the question of law do not go to the existence of the jurisdiction conferred on the Court by s 44(3) to hear and determine appeals instituted in the Court in accordance with s 44(1), but to the exercise of that jurisdiction.

(5) In certain circumstances it may be preferable, as a matter of practice and procedure, to determine whether

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39 [2018] QCA 202.

40 [2018] QCA 202 at [15] – [18].

or not the appeal is on a question of law as part of the hearing of the appeal.

(6) Whether or not the appeal is on a question of law is to be approached as a matter of substance rather than form.

(7) A question of law within s 44 is not confined to jurisdictional error but extends to a non-jurisdictional question of law.

(8) The expression 'may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal' in s 44 should not be read as if the words 'pure' or 'only' qualified 'question of law'. Not all so-called 'mixed questions of fact and law' stand outside an appeal on a question of law.

…'

[18] Another useful statement appears in *Frugtniet v Australian Securities and Investments Commission*, as follows:

> 'In *Repatriation Commission v Hill* … the Full Court comprising Black CJ, Drummond and Ryan JJ said:
>
> > '[A] decision cannot be the subject of an appeal under s 44(1) of the Administrative Appeals Tribunal Act 1975 ("AAT Act"), unless, in making it, the Tribunal has acted otherwise than in accordance with the law. If a tribunal falls into an error of law 'which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers'… An error of law of this kind may support an appeal under s 44 of the AAT Act on a question of law…'
>
> As explained by the Full Court in *Collector of Customs v Pozzolanic Enterprises Pty Ltd*…, whose comments were subsequently adopted by the High Court in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*… the Court will not be concerned with looseness in the language of a tribunal nor with unhappy phrasing of a tribunal's thoughts. Further, the Court will not construe the reasons for the decision under review 'minutely and finely with an eye keenly attuned to the perception of error'." (citations omitted)

[36] It may further be observed that a mixed question of fact and law is not a "question of law"[41] and that s 150(3)(a) includes the word 'only' so that observation 8 in *Haritos v Commissioner of Taxation*[42] does not apply to s 150 appeals.

[37] It is plain that s 150 is not an appeal of right. In addition to the necessity for the appeal to be made "only on a question of law" and with the question of law defined precisely (and not a mixed question of fact and law) it is necessary pursuant to s 150(3)(b) to obtain the leave of the Court of Appeal. This Court has a general discretion in determining whether or not to grant leave to appeal.

[38] The application sets out thirteen alleged errors of law in paragraphs (a) to (l) (inclusive). The thirteen enumerated alleged errors of law contained in the application loosely align with the twenty-two enumerated grounds of appeal in the draft Notice of Appeal exhibited to the affidavit of the applicant.[43] It is necessary to examine each of the 22 grounds of appeal in order to determine whether they raise "only a question of law"[44] and if so, whether the Court ought to grant leave to appeal.[45] The general discretion to grant leave is to be exercised in accordance with orthodox principle, namely where it is shown that it ought to be granted as it "is necessary to correct a substantial injustice" and "there is a reasonable argument that there is an error [of law] to be corrected".[46]

Grounds 1 and 2

[39] Grounds 1 and 2 are as follows:

> "1. Determining that the Respondent was entitled to be paid pursuant to the Practical Completion including interest.
>
> 2. Determining that the Respondent was entitled to be paid pursuant to substantial performance including interest as an alternative to the Practical Completion [step]."

[40] As recorded in paragraph 22 above, practical completion is defined in clause 1 of the contract. Whether practical completion has been reached is a "practical question of fact".[47] Ground 2 is a determination raising a mixed question of fact and law. This is also well demonstrated by McGill SC DCJ in *Thompson Residential Pty Ltd v Hart & Anor*[48]. Leave ought not to be granted in respect of grounds 1 and 2 as they do not raise "only a question of law".

Grounds 3 and 4

[41] Grounds 3 and 4 are as follows:

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41 *Hussain v Minister for Foreign Affairs & Anor* (2008) 169 FCR 241, 254; *TNT Skypak International (Aust) Pty Ltd v Federal Commissioner of Taxation* [1988] FCA 119 [13]; *Comcare v Etheridge* [2006] FCAFC 27 [13] - [17].

42 (2015) 233 FCR 315, 341-342 [62].

43 Exhibit H to the Affidavit of Tatiana Pivovarova filed 30 May 2019.

44 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) s 150(3)(a).

45 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) s 150(3)(b).

46 *Rintoul v State of Queensland & Ors* [2018] QCA 20 [10].

47 *Thompson Residential Pty Ltd & Anor* [2014] QDC 132 [69] – [72].

48 [2014] QDC 132 at [69] – [72].

> "3. Failing to find that the learned Member at first instance did not take into account relevant undisputed evidence and consideration (sic) in construing the definitions of the 'Practical Completion' and the 'Works' in the contract and s 67 of the *Domestic Building Contracts Act* 2000.
>
> 4. Failing to find that the learned Member at first instance did not take into account relevant undisputed evidence and consideration in construing the contract as a whole to determine the meaning of the word 'minor'."

[42] It may be accepted that a failure by a tribunal to take into account relevant undisputed evidence will amount to an error of law. In order to determine whether a tribunal did fail to take into account relevant undisputed evidence or whether there has been a substantial injustice, let alone to determine whether there is a reasonable argument that there is an error of law to be corrected, it is necessary to identify the evidence said to be relevant and undisputed that was not taken into account. The relevant undisputed evidence is not identified in ground 3, nor in the application, nor in the applicant's written submissions. The respondent likewise could not identify what was being referred to as the "relevant and undisputed evidence".[49]

[43] There is one reference to undisputed evidence contained in the Second Appeal Tribunal decision at paragraph 37 dealing with ground 17. The Appeal Tribunal records ground 17 as "[h]aving acknowledged the undisputed evidence that the Respondent had not completed the works in accordance with the contract, the Member failed to find that the Respondent was in breach of the contract, that the Practical Completion stage had not been reached and the Respondent was not entitled to final payment with interest pursuant to his Form 26 application."[50] That ground was dismissed by the Appeal Tribunal.[51]

[44] Assuming the applicant is seeking to re-argue ground 17 in respect of the "undisputed evidence", the undisputed evidence that the applicant is referring to is the evidence that the "respondent had not completed the works in accordance with the contract" which, of its nature, raises mixed questions of fact and law. Further, leave cannot be granted in respect of ground 3 as it is drafted with insufficient specificity to enable any consideration of the necessary requirements for leave being granted pursuant to s 150(3)(a) or (b) of the Act.

Grounds 5, 6, 12, 13, 15(iii) and 21 – Inadequate Reasons

[45] The applicant alleges that the Second Appeal Tribunal erred in law:

> "5. By failing to find that the learned Member at first instance did not provide adequate reasons, including reference to appropriate law, sufficient evidence and lawful findings, for the Respondent to be paid pursuant to the Practical Completion and, as an alternative, for the respondent to be paid pursuant to the substantial performance including payment for the

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49 Paragraph 24 of the respondent's written submissions.

50 *Pivovarova v Peter B Michelsen t/as Peter Michelsen Building Service ABN 84003506297* [2019] QCATA 54 [37].

51 *Pivovarova v Peter B Michelsen t/as Peter Michelsen Building Service ABN 84003506297* [2019] QCATA 54 [65].

substantial performance, interest, date for the substantial performance, actual work completed under the contract, deductions, etc.

6. By failing to provide adequate reasons, including reference to appropriate law, sufficient evidence and lawful findings, for the Respondent to be paid pursuant to the Practical Completion and, as an alternative, for the Respondent to be paid pursuant to the substantial performance.

…

12. In failing to provide adequate reasons that the Appellant filed submissions in relation to the doctrine of substantial performance.

13. In finding that the Appellant made submissions in relation to the doctrine of substantial performance, when

    (i) in fact, the Appellant did not lodge any submissions as a part of her defence in relation to the doctrine of substantial performance as the Respondent failed to file and disclose such a claim including evidence, materials, submissions, etc.;

    (ii) the Appellant's application for miscellaneous matter dated 20 September 2015 including filed submissions/materials to amend her original response and lodge further evidence was rejected by the learned Member at first instance and accordingly, cannot be deemed as a part of the Appellant's defence in the proceedings pursuant to substantial performance;

    (iii) the Appellant's submissions referred to Paragraph [68] were related to miscellaneous matter to amend her original response and lodge further evidence ONLY, not part of her submissions pursuant to substantial performance;

    (iv) the Appellant was an Applicant in the application for miscellaneous matter, which was required the Appellant (sic) to lodge her submissions first, and was a Respondent in the original case, which was required to prepare and lodge her submissions as a part of her defence only after the Respondent's submissions in relation to the substantial performance (if any).

…

15. In failing to find that the learned Member at first instance:

…

    (iii) failed to provide adequate reasons in relation to the awarded payments to the Respondent.

> 21. In failing to find that the learned Member based her decision on a guess due to the Respondent's failure to provide any sufficient evidence."

[46] It is uncontroversial that a failure to give adequate reasons constitutes an error of law.[52]

[47] In *In Vitro Technologies Pty Ltd v Taylor*[53] Fraser JA (with whom Muir and Chesterman JJA agreed) observed:

> "[19] This Court has held in many decisions that the failure of a trial court from which an appeal lies to give adequate reasons amounts to an error of law. What is adequate must depend upon the circumstances of the particular case, including the nature and significance of the issues in question. In a passage to which Muir JA referred in *Drew v Makita (Australia) Pty Ltd*, Meagher JA observed in *Beale v Government Insurance Office of New South Wales* that whilst the trial judge should set out findings as to how the judge came to accept one set of evidence over a conflicting set of significant evidence, 'that is not to say that a judge must make explicit findings on each disputed piece of evidence, especially if the inference as to what is found is appropriately clear'."

[48] Ground 5, as drafted, is not a complaint that the Second Appeal Tribunal failed to provide adequate reasons, but rather that the Second Appeal Tribunal failed to find that the learned member in the first instance failed to provide adequate reasons. The applicant had, before the Second Appeal Tribunal, argued that the learned member had failed to provide adequate reasons in respect of interest,[54] calculation of prime cost items,[55] and determining practical completion stage had been met,[56] the latter submission being repeated orally.[57] The applicant did not attempt to engage the tests as set out in *In Vitro* (supra). The Second Appeal Tribunal did not accept that the learned member failed to provide adequate reasons in respect of interest[58] and prime cost items[59] and the alleged failure to provide adequate reasons with respect to practical completion.[60] There is no merit in this ground. Adequate reasons were

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52 *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 per Kirby P (as he then was) at 257-259; followed by this Court in *Commissioner of Police v Stehbens* [2013] QCA 81 at [6] per Margaret Wilson J (with whom Gotterson JA and Douglas J agreed); see also *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 per Meagher JA at 441 and 444 and *Drew v Makita (Australia) Pty Ltd* [2009] 2 Qd R 219 per Muir JA at [59] – [66].

53 [2011] QCA 44 [19].

54 *Pivovarova v Peter B Michelsen t/as Peter Michelsen Building Service ABN 84003506297* [2019] QCATA 54 [26].

55 *Pivovarova v Peter B Michelsen t/as Peter Michelsen Building Service ABN 84003506297* [2019] QCATA 54 [26].

56 *Pivovarova v Peter B Michelsen t/as Peter Michelsen Building Service ABN 84003506297* [2019] QCATA 54 [26].

57 *Pivovarova v Peter B Michelsen t/as Peter Michelsen Building Service ABN 84003506297* [2019] QCATA 54 [40](c).

58 *Pivovarova v Peter B Michelsen t/as Peter Michelsen Building Service ABN 84003506297* [2019] QCATA 54 [50].

59 *Pivovarova v Peter B Michelsen t/as Peter Michelsen Building Service ABN 84003506297* [2019] QCATA 54 [51] – [54].

60 *Pivovarova v Peter B Michelsen t/as Peter Michelsen Building Service ABN 84003506297* [2019] QCATA 54 [55] – [56].

provided. No error of law has been demonstrated. Accordingly leave to appeal should be refused.

Ground 7 – Practical Completion

[49] The applicant argues that the Second Appeal Tribunal erred in law:

> "7. By failing to find that s.67 of the *Domestic Building Contracts Act* 2000 has not been complied with for the Respondent to be paid."

[50] Section 67 of the *Domestic Building Contracts Act* 2000 (Qld) ("**DBCA**") relevantly provides:

> "**67 Completion payments**
>
> …
>
> (2) The building contractor under a regulated contract must not demand all or part of the completion payment unless the practical completion stage has been reached.
>
> …
>
> (6) In this section—
>
> ***completion payment***, for a regulated contract, means a payment required to be made under the contract by the building owner to the building contractor for the practical completion stage.
>
> ***practical completion stage***, for a regulated contract, means the stage when—
>
> (a) the subject work has been completed in accordance with the contract and all relevant statutory requirements, either—
>
> (i) without any omissions or defects; or
>
> (ii) apart from minor omissions or minor defects; and
>
> (b) the detached dwelling or home is reasonably suitable for habitation."

[51] In order to determine whether the practical completion stage has been met, a factual enquiry is undertaken. It is a question of fact whether work has been completed in accordance with the contract and all relevant statutory requirements apart from minor omissions or defects, and whether the detached dwelling or home is reasonably suitable for habitation. Given the applicant moved into the home prior to the issue of the certificate of practical completion, it cannot be doubted that the home was reasonably suitable for habitation.

[52] The factual question then required for determination is whether the work had been completed "apart from minor omission or defects". That is a factual enquiry which

was determined against the applicant,[61] not a question of law, and accordingly not a matter of appeal pursuant to s 150(3)(a) of the Act.

Grounds 8 – 11, 14, 16(i) to (iii), (v) to (viii), 17 and 20 – Various Procedural Complaints

[53] It is convenient to examine grounds 8 to 11, 14, 16(i) – (iii), (v) – (viii), 17 and 20 as they each relate to procedural complaints. The grounds are that the Second Appeal Tribunal erred in law:

> "8. By failing to find that the date for the directions hearing was not fixed in breach of the order 8 in *Pivovarova v Michelsen* [2015] QCATA 73 delivered on 10 June 2015 by the Appeal Tribunal.
>
> 9. By failing to find that the date for a further hearing was not fixed in breach of the order 9 in *Pivovarova v Michelsen* [2015] QCATA 73 delivered on 10 June 2015 by the Appeal Tribunal.
>
> 10. By failing to find that the Appellant was not provided with a notice of a hearing in breach of Section 92 of the QCAT Act 2009;
>
> 11. By failing to find that the Tribunal mislead [sic] the Appellant in writing on 16 September 2015 that a hearing will be listed at a time and date to be advised, when in fact the Appellant was not advised by the Tribunal of the time and date for the hearing.
>
> …
>
> 14. In finding that the Respondent is entitled to be paid pursuant to substantial performance, when the Respondent did not lodge any application in relation to the substantial performance nor the subject of the evidence and nor the subject of the Appellant's damages/losses .
>
> …
>
> 16. In finding that there has been no denial of natural justice and errors in law and failing to find that:
>
> (i) The learned Member at first instance awarded the funds to the Respondent on the ground of substantial performance doctrine, when the originated claim Form 26 lodged by the Respondent was related to the final payment pursuant to the practical completion stage, not the entitlement pursuant to the substantial performance;
>
> (ii) The Appellant lodged her response/counter application Form 36 based on the information/reasons/arguments disclosed by the Respondent in his application Form 26;

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61 *Pivovarova v Peter B Michelsen t/as Peter Michelsen Building Service ABN 84003506297* [2019] QCATA 54 [43].

(iii) The Appellant was denied a fair hearing due to the breach of Section 92 of the QCAT Act 2009 by the principal registrar, when natural justice allows a person to claim the right to adequate notification of the date, time and place of the hearing as well as detailed notification of the case to be met. This information allows the person adequate time to effectively prepare his or her case and to answer the case against him or her;

…

(v) The Respondent failed to take any responsibility for the preparation, lodging and disclosing any application, materials, arguments, reasons, evidence, submissions, etc. in support of the applicability of the substantial performance doctrine and his entitlement pursuant to this doctrine including interest, and accordingly, the Appellant was unable to defend herself on the substantial performance doctrine;

(vi) The learned Member at first instance failed to ensure that all relevant material, in particular the Respondent's entitlement to be paid pursuant to the Practical Completion and the applicability of the substantial performance, is disclosed to the tribunal to enable the Member to decide the proceeding with all the relevant facts, which is breach of Section 28(e) of the QCAT Act 2009;

(vii) The learned Member at first instance is in breach of Section 28(a) of the QCAT Act 2009 by failing to observe the rules of natural justice;

(viii) The learned Member at first instance did not allow the Appellant to cross-examine the witness, the BSA inspection (sic), in relation to the Practical Completion, and at the same time allowed the Respondent to cross-examine the BSA inspector in relation to the Practical Completion.

17. In failing to find that the Respondent mislead (sic) the Appellant and the Tribunal in relation to the nature of his claim and his original application Form 26 during the proceeding, which is breach of Section 216 of the QCAT Act 2009 and accordingly, prevented the Appellant from fair and just opportunity to defend herself. Misleading and deceptive conduct by the Respondent heavily contributed towards injustice against the Appellant.

…

20. In failing to find that the learned Member predominantly based her decision on the evidence and cross-examination of the BSA inspector and the Respondent, which were related to the practical completion stage only, when the Appellant was not afforded any cross-examination of the witnesses in regards to

> the substantial performance due to misleading conduct of the Respondent during the proceeding."

[54] Grounds 8 and 9 raise procedural issues, referrable to the First Appeal Tribunal decision[62] delivered 10 June 2015, and not the subject of the Second Tribunal decision nor the Second Appeal Tribunal decision, and accordingly cannot be raised in the current appeal. Furthermore, they are not errors of law as required by s 150(3)(a).

[55] Grounds 10 and 11 also relate to procedural issues which were not the subject of any of the nineteen grounds of appeal dealt with in the Second Appeal Tribunal decision. They appear to be afterthoughts. They cannot constitute errors of law as is required by s 150(3)(a) and accordingly cannot be considered.

[56] Ground 16(i) – (iii) and (v) – (viii) are grounds particularising alleged denial of natural justice, thus leading to an error of law. The eight particulars of the alleged denial of natural justice in ground 16(i) – (iii) and (v) – (viii) loosely align with the allegations of denial of natural justice dealt with by the Second Appeal Tribunal in grounds 1, 3, 4, 5, 10 and 13 and repeated orally.[63]

[57] Whilst it is plain that a denial of natural justice is an error of law, it is equally plain that leave ought not to be granted as the applicant has no prospects of success in arguing that there has been a denial of natural justice. This and related issues are dealt with succinctly in the Second Appeal Tribunal's reasons:[64]

> "[68] It is clear from the filed material and directions that Ground 1 is not made out as the Applicant and Respondent made submissions in relation to the doctrine of substantial performance.
>
> [69] The applicant was given ample opportunity to present her case to the Member, albeit in writing, and did so. We consider that there is no basis whatsoever for a finding that the Member exercised any bias or denied the Applicant natural justice or treated her in an unjust or unfair manner. Ground 2 is not made out.
>
> [70] The doctrine of substantial performance was raised in the first Appeal Tribunal. The Applicant well understood the issues at the time of making submissions to the Member. It was not necessary that the Respondent amend his Form 26 application for the issue to be considered by the Member. The Form 26 application clearly set out his claim for monies due under the contract as Practical Completion had been reached.
>
> [71] The Respondent had submitted in the first appeal that he was entitled to be paid for the works completed less any claim for defective or incomplete work. However, the Member, although making findings consistent with the doctrine of substantial performance, did not afford the parties an opportunity to make submissions on the doctrine. It was clearly an issue before the

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62 *Pivovarova v Michelsen* [2015] QCATA 73.

63 *Pivovarova v Peter B Michelsen t/as Peter Michelsen Building Service ABN 84003506297* [2019] QCATA 54 [40](a).

64 *Pivovarova v Peter B Michelsen t/as Peter Michelsen Building Service ABN 84003506297* [2019] QCATA 54 [68] – [71].

> Appeal Tribunal and, subsequently, before the Member. It was an alternative basis for the claim. The Applicant made submissions and was not disadvantaged. She was not denied natural justice. Grounds 3, 4, and 5 are not made out." (footnotes omitted)

[58] Ground 17 is best interpreted as a similar complaint, namely an allegation the respondent misled the applicant and the Tribunal in relation to the nature of the claim because it did not originally contain a claim for substantial performance. For the same reasons (paragraphs 68 to 71 of the Second Appeal Tribunal's decision) this ground has no merit.

[59] A difficulty with ground 20 is that it relates to the conduct of the hearing of the First Tribunal decision not raised in the First Appeal Tribunal decision, which is not the subject of the Second Tribunal decision, nor the Second Appeal Tribunal decision and accordingly cannot be the subject of a ground of appeal against the Second Appeal Tribunal's decision.

[60] In any event, the respondent was in fact permitted to cross-examine Mr Trohear extensively, the cross-examination being recorded in 65 pages of transcript.[65] It is not clear where in the 65 pages of transcript it is said that the applicant's cross-examination of Mr Trohear was curtailed by Member Cullen. It is important to record that this alleged transgression of the applicant's rights was not raised in the First Appeal Tribunal. As is recorded in paragraph 71 of the Second Appeal Tribunal's decision (paragraph 41 above) the respondent was afforded opportunity to make submissions about substantial performance before the First Appeal Tribunal and in the Second Tribunal hearing.

[61] Furthermore, section 3(b) of the Act states that the objects of the Act include "(b) to have the tribunal deal with matters in a way that is accessible, fair, just, economical, informal and quick." Pursuant to section 4(c), the tribunal has a duty to "(c) ensure proceedings are conducted in an informal way that minimises costs to parties, and is as quick as is consistent with achieving justice". There is nothing improper with the Member's repeated attempts to guide the applicant towards relevant questions.

Grounds 16(iv) and 19 – Substantial Performance

[62] By grounds 16(iv) and 19, the applicant alleges that the Second Appeal Tribunal erred in law:

> "16. In finding that there has been no denial of natural justice and errors in law and failing to find that:
>
> …
>
> (iv) The learned Member at first instance, as an alternative, based her decision to award the funds including interests (sic) to the Respondent pursuant to the substantial performance doctrine on the evidence, cross-examinations of the witnesses, materials, etc. which were related to the Practical Completion stage only;

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65 RB1 pages 272 - 347.

> 19. In failing to find that by awarding the payment to the Respondent pursuant to the substantial performance, the learned Member automatically rejected any payment to the Respondent pursuant to the Practical Completion due to two claims, being substantial performance and practical completion, cannot apply at the same time and with the same circumstances in accordance with the contract, the *Domestic Building Contracts Act* 2000 and the doctrine of the substantial performance."

[63] Whilst it may be accepted by grounds 16(iv) and 19 that an error of law is alleged, the difficulty, again, for the applicant, is that she needs the leave of the Court of Appeal to appeal these grounds of appeal. These grounds of appeal have no prospects of success because the Member made findings on the applicability of the doctrine of substantial performance as an alternative to the finding that practical completion works had been reached. This was an orthodox and prudent finding of the Member.

[64] If the Second Appeal Tribunal had accepted the applicant's argument that the respondent was not entitled to payment on the basis of practical completion then the respondent may have succeeded on the basis of the doctrine of substantial performance. Absent the later conclusion, it would have been necessary for a further hearing before the tribunal if the respondent had failed on the practical completion issue.

[65] Sections 3 and 4 of the Act require efficiency in the conduct of tribunal proceedings and the Member's alternative findings on the basis of the doctrine of substantial performance are therefore entirely appropriate.

Ground 18 – Alleged Bias

[66] If actual or apprehended bias is established, then it is plain that any judgment of the tribunal will be set aside as constituting a fundamental error of law. An allegation of bias against any tribunal is a serious matter and ought not to be brought without particulars. Simply because a party's arguments are not accepted and their case is rejected does not establish bias.

[67] Ground 18 is devoid of any particulars. It is a bare and unhelpful allegation of bias. The applicant attempts to argue the ground of bias in paragraphs 35 to 38 of her written outline. At paragraph 35 the applicant alleges:

> "35. The Tribunal as a whole failed to comply with article 14 [of] the ICCPR by refusing the Applicant the entitlement to a fair hearing by a competent, independent and impartial tribunal established by law as follows:
>
> (e) the Tribunal demonstrated bias, misleading and unfair conduct during the proceedings by misleading the Applicant during the originating proceedings as of the nature of the Respondent's case as detailed at ground 1 of error in law 2 of the Applicant's submissions dated 27 August 2017 and then used this misleading conduct to make the decision in favour of the Respondent against the Applicant on a totally different made up claim for

the Respondent and this conduct was upheld by the learned appeal tribunal;

(f) the Tribunal misled the Applicant in their directions dated 16 September 2015 as detailed at [31] and [32] above and then used this misleading conduct to make a decision in favour of the Respondent against the Applicant without fair hearing;

(g) the Tribunal allowed the Respondent to misled the Applicant as to the nature of his claim and then used this misleading conduct in favour of the Respondent against the Applicant;

(h) the Tribunal allowed the Respondent and did not allow the Applicant to cross-examine the witness, then mislead the Applicant during the cross-examination of the witness as detailed at error in law 4 of the Applicant's submissions dated 27 August 2017 and used this misleading conduct in favour of the Respondent against the Applicant in her decision;

(i) the unprecedented amount of errors in law which was made by the Tribunal in favour of only one party of the proceedings, being the Respondent, clear demonstrates the bias conduct by the Tribunal;

(j) the Tribunal clearly demonstrated that the members involved in these proceedings are not competent, including failure to maintain specialist knowledge, expertise and experience and/or failure to ensure the appropriate use of the knowledge, expertise and experience in relation to the proper application of authority cases, natural justice rules, the QCAT Act, the Act, terms and conditions of the Contract and common law, which is required by s 4(f) and (g) of the QCAT Act."

[68] It is unnecessary to cite paragraphs 33 to 34 and 36 to 38 inclusive of the applicant's written submission as they consist of vague, unhelpful and inaccurate statements, none of which seek to particularise any instances of bias.

[69] The reference to article 14 of the ICCPR is a reference to article 14 of the *International Covenant on Civil and Political Rights*. The relevance of the *International Covenant on Civil and Political Rights* is not apparent, particularly when s 28 of the QCAT Act requires natural justice to be afforded to the parties.

[70] Section 28 of the QCAT Act provides:

"**28 Conducting proceedings generally**

(1) The procedure for a proceeding is at the discretion of the tribunal, subject to this Act, an enabling Act and the rules.

(2) In all proceedings, the tribunal must act fairly and according to the substantial merits of the case.

> (3) In conducting a proceeding, the tribunal—
>
> (a) must observe the rules of natural justice; and
>
> (b) is not bound by the rules of evidence, or any practices or procedures applying to courts of record, other than to the extent the tribunal adopts the rules, practices or procedures; and
>
> (c) may inform itself in any way it considers appropriate; and
>
> (d) must act with as little formality and technicality and with as much speed as the requirements of this Act, an enabling Act or the rules and a proper consideration of the matters before the tribunal permit; and
>
> (e) must ensure, so far as is practicable, that all relevant material is disclosed to the tribunal to enable it to decide the proceeding with all the relevant facts.
>
> (4) Without limiting subsection (3)(b), the tribunal may admit into evidence the contents of any document despite the noncompliance with any time limit or other requirement under this Act, an enabling Act or the rules relating to the document or the service of it.

[71] Given the specific direction in s 28 that the tribunal is not bound by the rules of evidence, but must observe the rules of natural justice, it is difficult to understand why or how article 14 of the ICCPR assists the applicant. Nonetheless, as the rules of natural justice apply, it is plain that the applicant is entitled to a hearing by a fair and impartial tribunal.

[72] The allegations in paragraph 35(e) are almost incomprehensible. The allegation of bias during the originating proceedings can only be interpreted as a reference to proceedings leading to the First Tribunal decision of 24 July 2013 which is the subject of the First Appeal Tribunal decision of 10 June 2015, and accordingly cannot be the subject of any application for leave to appeal the Second Appeal Tribunal decision, nor the Second Tribunal decision.

[73] Similarly, paragraph 35(f) refers to directions of 16 September 2015 that relate to directions prior to the decision of the Second Tribunal decision.[66] That allegation of bias is the subject of grounds 2 and 13 of the appeal to the Second Appeal Tribunal.[67] In respect of ground 2 of the Second Appeal Tribunal decision, the Appeal Tribunal said:

> "[46] There is nothing in the transcript or the conduct of the matter to suggest that the Applicant was treated unfairly. She was given the opportunity to present her case and to make submissions to the Tribunal about the doctrine of substantial performance and did so."

[74] On the application for leave to appeal, the applicant did not identify what portion of the transcript she relied upon in support of any allegation she made in respect of

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66 [2019] QCATA 54.

67 [2019] QCATA 54 [20] and [33].

bias. I have been unable to locate any. The Second Appeal Tribunal therefore is correct in its conclusion in paragraph 46 and accordingly leave should be refused in respect of ground 18 as it has no prospect of success.

Ground 22 – Costs

[75] The applicant alleges that the Second Appeal Tribunal erred in law:

> "22. In failing to award the cost of the appeal to the Appellant in accordance with the QCAT Act."

[76] This perhaps is the most unusual ground of appeal. Firstly the applicant failed in her second appeal, so it is difficult to see how it is that she may suggest that she ought to have been awarded her costs of the second appeal. Secondly, the Second Appeal Tribunal decision simply dismisses the appeal, it says nothing of any costs. Thirdly, there is nothing to suggest that the applicant had applied to the Second Appeal Tribunal for an order for costs in her favour after having lost the second appeal. Assuming, in the applicants favour, that the applicant is appealing against the costs decision of the First Appeal Tribunal decision, then the difficulty facing the applicant is that there is no decision about costs. The decision on costs of the First Appeal Tribunal decision was deferred[68] and then adjourned until after the second appeal.[69] Leave cannot be granted in respect of this ground of appeal, as there is no decision to appeal.

Conclusion

[77] I would dismiss the application.

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68 Supplementary RB pages 7-17.
69 Supplementary RB page 18.