

**SUPREME COURT OF QUEENSLAND**

**File No 5207 of 2002**

BETWEEN:

**DIMITRI & CHERYL CAPLYGIN**

Plaintiff

AND:

**MARTIN FIEBIG HOMES PTY LTD**

First Defendant

AND

**BORDER-TECH (a firm)**

Second Defendant

AND

**GEOFFREY ALEC WRIGHT**

**MOYNIHAN SJA – REASONS FOR JUDGMENT**

CITATION: *Martin Fiebig Homes Pty Ltd v Caplygin & Ors* [2003] QSC  
382

PARTIES: **Martin Fiebig Homes Pty Ltd**  
(Applicant)

**v**

**Dimitri & Cheryl Caplygin**

(First Respondent)

**Border-Tech (a firm)**

(Second Respondent)

**Geoffrey Alec Wright**

(Third Respondent)

FILE NO/S: SC5207/02

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court

DELIVERED ON: 7 November 2003

DELIVERED AT: Brisbane

HEARING DATE: 14 August 2003

JUDGE: Moynihan SJA

ORDER: **1. Plaintiff ordered to commence proceedings again before the Tribunal.**

**2. Plaintiff to pay the Defendant's costs of the application to be assessed on a standard basis. The costs of the action would be costs in the proceedings before the Tribunal**

CATCHWORDS: PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – Where Applicant has applied to have proceedings transferred to the Commercial and Consumer Tribunal or that proceedings be reinstated before the Tribunal – whether s40 of the *Commercial and Consumer Tribunal Act 2003* (Qld) applies to proceedings within the jurisdiction of the Tribunal instituted prior to the commencement of the Act

#### **Legislation Cited**

*Acts Interpretation Act 1954* (Qld)

*Commercial and Consumer Tribunal Act 2003* (Qld)

*Domestic Building Contracts Act 2000* (Qld)

*Queensland Building Services Authority Act 2003* (Qld)

*Queensland Building Tribunal Act 1975* (Qld)

*Uniform Civil Procedure Rules 1999* (Qld)

#### **Cases Cited**

*Yrttiaho v Public Curator (Qld)* (1971) 125 CLR 228

COUNSEL: Mr D O'Donnell for the Applicant

Mr RS Jones for the First Respondents

SOLICITORS: Dibbs Barker Gosling for the Applicant

Lambert & Ho for the First Respondents

- [1] This is an application by the First Defendant to have the proceedings transferred to the Commercial and Consumer Tribunal or for a direction that they be reinstated before that Tribunal. The Second and Third Defendants consent to the proceedings going to the Tribunal, the Plaintiffs oppose it.
- [2] The Plaintiffs own land at Hope Island resort. They contracted with the First Defendant, a licensed builder, to construct a detached dwelling on the land. The Second Defendant carried out geotechnical investigations and provided a report on site conditions. The Third Defendant is a consulting engineer who prepared substructure and footing plans for the construction of the dwelling and certified that footings and ground slab were to a satisfactory standard.
- [3] On 7 June 2002 the Plaintiff sued the Defendants in this court for damages for breach of contract or negligence in respect of the construction of the detached dwelling.
- [4] The *Commercial and Consumer Tribunal Act 2003* (the Act) became law on 1 July 2003. Section 6 of the Act established the Commercial and Consumer Tribunal (The Tribunal) with jurisdiction to deal with matters it is empowered to deal with under the Act or another empowering Act; s8.
- [5] Section 157 of the Act abolished, relevantly for present purposes, the Queensland Building Tribunal and s158 directed that proceedings started but not finished before that Tribunal before 1 July 2003 were to continue under the Act.
- [6] Section 40(1) of the Act provides that if a proceeding which could have been heard by the Tribunal is started in a court the court must order “the entity” which started the proceeding to start it again before the Tribunal.
- [7] I do not understand it to be in issue that the Tribunal has jurisdiction to hear the dispute the subject of this proceedings. It is therefore unnecessary to undertake a detailed analysis of the legislation.
- [8] I note however the combined effect of sections 8 and 113 of the Act together with the *Queensland Building Tribunal Act 2000* (Qld). Schedule 2 of the Act defines “empowering Act” to include the *Queensland Building Services Authority Act 2003*, s77 of which confers jurisdiction on the Tribunal to hear a domestic building dispute. Schedules 1 and 2 of the Act respectively define “reviewable domestic work” and “domestic building dispute” so as to encompass the subject matter of this action. See also s8 of the *Domestic Building Contracts Act 2000*, s8 (1) (a) which

includes the erection or construction of a detached dwelling in domestic building work.

- [9] It may be noted that, pursuant to s113 of the Act and s77(2) of the *Queensland Building Services Authority Act*, the Tribunal has power to award damages and interest, to order rectification or completion of defective or incomplete work and to award costs. Section 76 of the Act restricts representation by lawyers but empowers the Tribunal to direct representation in the circumstances set out in s76 (2).
- [10] The issue here is whether s40 of the Act applies to proceedings within the jurisdiction of the Tribunal instituted prior to the commencement of the Act. The First Defendant (the Applicant) contends that it does; the Plaintiffs contend that it does not.
- [11] Prior to the abolishment of the Queensland Building Tribunal by the Act s117 (1) of the *Queensland Building Tribunal Act* had provided: “If a proceeding is brought in a Court and the proceeding can be heard by the Tribunal under this Act the Court must, on the application of a party, order that the proceedings be removed to the Tribunal”.
- [12] It follows that from the commencement of these proceedings to 1 July 2003 on the application of a party the court would have been obliged to order that the proceedings be removed to the Queensland Building Tribunal.
- [13] Section 4 of the Act provides that the object of the Act is to establish a Tribunal to deal with matters within its jurisdiction in a way that is just, fair, informal, cost efficient and speedy. Subsection (2) goes on to deal with the achievement of the objectives by a system of dispute resolution which is set out in the Act.
- [14] The Plaintiff submits that s40 (1) only applies to proceedings started in a court after the commencement of the Act. It is submitted that otherwise s40 (1) would have to be construed as materially having the same effect as s158 and that the natural and ordinary meaning of s140 (1) would prevent such a construction. Further, it was a simple matter to expressly provide as the first defendant contended.
- [15] Section 158 was necessary because of the abolition of Tribunal before which proceedings were current, it has no application to the situation here.
- [16] Section 40 is the latest in a chain of provisions intended to have disputes of the kind in issue here resolved by a tribunal under a dispute resolution regime set up by statute. The applicant had the right under the repealed Act to pursue the same application as it now pursues. It seems to me improbable that the legislature intended a gap in the operation of those provisions by reason of the repeal.

- [17] This argument is supported by section 14A of the *Acts Interpretation Act 1954* (Qld) which requires the court to adopt an interpretation which will best achieve the purpose of s40 which, of course, is referable to s4 among other provisions.
- [18] Moreover, it seems to me that s40 (1) is procedural. It does not affect the plaintiff's substantive rights but directs that they be pursued before the Tribunal rather than the court; see *Yrttiah v Public Curator (Qld)* (1971) 125 CLR 228 at 240. On the other hand, if construed as the plaintiffs contend, it extinguished the First Defendant's rights to remove the matter to the abolished Tribunal rather than substitute a right to pursue the matter beyond the newly constituted replacement.
- [19] It seems to me that s40 (1) of the Act applies. The plaintiffs must be ordered to start the proceedings again before the Tribunal. It is a matter for the Tribunal and the parties whether the procedural steps already taken in the action pursuant to the *Uniform Civil Procedure Rules* can be taken up in the Tribunal proceedings so as to avoid duplication and minimum costs.
- [20] The plaintiffs should pay the first defendant's costs of the application to be assessed on a standard basis. The costs of the action would be costs in the proceedings before the Tribunal.