SUPREME COURT OF QUEENSLAND

CITATION:	*Miller & Anor v Lida Build Pty Ltd* [2013] QCA 332
PARTIES:	**SUSAN MARY MILLER** (first applicant) **PETER JOHN FRANCIS MILLER** (second applicant) **v** **LIDA BUILD PTY LTD** (respondent)
FILE NO/S:	Appeal No 4760 of 2013 QCAT No 123 of 2012 QCAT No 146 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Queensland Civil and Administrative Tribunal Act*
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal at Brisbane
DELIVERED ON:	5 November 2013
DELIVERED AT:	Brisbane
HEARING DATE:	4 October 2013
JUDGES:	Gotterson and Morrison JJA and Henry J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal refused.** **2. Applicants to pay the respondent's costs of and incidental to the application on the standard basis until 7 August 2013 and thereafter on the indemnity basis.**
CATCHWORDS:	PROCEDURE – INFERIOR COURTS – QUEENSLAND – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – where the respondent contracted to construct a pool house for the applicants – where litigation ensued in the Queensland Civil and Administrative Tribunal (QCAT) – where the applicants were ordered by a decision on 26 March 2012 to pay the respondent $11,820.34 by 23 April 2012 – where the respondent appealed to the appeal tribunal of QCAT which set aside the tribunal's decision and ordered the applicants to pay the respondent $25,795.78 by 30 May 2013 – where the appeal tribunal in those proceedings remitted the determination of one legal issue to the tribunal which remains to be determined – where the applicants wish to appeal to this Court against the whole of the decision of the appeal tribunal

– where the applicants contend that the QCAT appeal tribunal erred in remitting part of the appeal back to the tribunal for determination in accordance with the decisions and orders made in the appeal decision, that the learned member erred in allowing the respondent to adduce new evidence, that the learned member erred by ignoring contract terms and erred by not correcting award summaries – whether the QCAT appeal tribunal erred in law in their findings on those issues

Queensland Building Services Authority Act 1991 (Qld), s 77(1)(c)
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 150(2)(b), s 150(3)

Chapman v State of Queensland [2012] QCA 134, cited
McEvoy and Anor v The Body Corporate for No 9 Port Douglas Road [2013] QCA 168, cited
Underwood v Queensland Department of Communities (State of Queensland) [2013] 1 Qd R 252; [2012] QCA 158, cited

COUNSEL: The second applicant appeared on his own behalf and on behalf of the first applicant
S N McNeil for the respondent

SOLICITORS: The second applicant appeared on his own behalf and on behalf of the first applicant
No appearance for the respondent

[1] **GOTTERSON JA:** Susan Mary Miller and Peter John Francis Miller have applied for leave to appeal to this Court from a decision of the appeal tribunal of the Queensland Civil and Administrative Tribunal ("QCAT") given on 30 April 2013. The respondent to their application is Lida Build Pty Ltd. The decision is the most recent of many that have been given by the tribunal and the appeal tribunal in proceedings that were initiated in QCAT's predecessor, the Commercial and Consumer Tribunal, on 6 July 2009 by Lida Build Pty Ltd. Since the parties have, at various times in those proceedings, been applicants or applicants for leave to appeal or respondents, it is convenient to refer to the applicants for leave here as "the Millers" and the respondent as "Lida".

The proceedings

[2] The proceedings arise out of a building contract dated 7 October 2008 pursuant to which Lida contracted to construct a pool house for the Millers at their residential property at Bridgeman Downs. It is unnecessary to detail the history of the proceedings. It suffices to note that the decision under appeal to the appeal tribunal had been given on 26 March 2012. By it, the Millers had been ordered to pay Lida the sum of $11,820.34 by 4 pm on 23 April 2012. That figure was a net sum arrived at after deducting from claim items totalling $58,792.03 allowed by the tribunal to Lida, claim items totalling $46,971.69 allowed by the tribunal to the Millers.

[3] The claim items allowed to Lida by the tribunal included the following:

- An amount for a contract-based claim to interest on an unpaid fixing stage claim $7,954.65

- An amount for a contract-based claim for costs of debt recovery $2,487.02

On the other hand, the claimed items allowed by the tribunal to the Millers included:

- An amount for the costs of rectification of a departure from the contractual standard for the roof pitch $37,638.98

[4] Lida appealed to the appeal tribunal of QCAT. It set aside the tribunal's decision and ordered the Millers to pay Lida $25,795.78 by 4 pm on 31 May 2013. That sum was arrived at by substituting for interest and debt recovery costs the sums of $16,587.03[1] and $7,830.68 respectively, and remitting to the tribunal the tasks of determining, in accordance with its reasons, the appropriate legal basis for compensating the Millers for the roof pitch issue and of quantifying the damages accordingly.

[5] The remitter was ordered because the appeal tribunal was of the opinion that the tribunal had erred in law in awarding costs of rectification to the Millers in the amount of $37,638.98.[2] That award was set aside. In consequence of the appeal tribunal's determinations on all of these issues, the net amount payable by the Millers to Lida was adjusted to $63,434.76. The amount ordered to be paid by 31 May 2013 is that amount less the $37,638.98. It may be that a further amount would be ordered by the tribunal to be paid to Lida depending upon the outcome of the remitter.

The application for leave to appeal

[6] Section 150(2)(b) of the *Queensland Civil and Administrative Tribunal Act* 2009 ("QCAT Act") permits an appeal to this Court against a final decision of the appeal tribunal of QCAT. Relevantly, a final decision is defined to mean "the tribunal's decision that finally decides the matters the subject of the proceeding".[3] The appeal is not unconditional and is not as of right. It may be made only on a question of law and only if the party who wishes to appeal has obtained the leave of this Court to do so.[4]

[7] The Millers wish to appeal to this Court against the whole of the decision of the appeal tribunal. Hence their application for leave to appeal.[5] The application is supported by an affidavit of Mr Miller who has at all times represented the Millers before QCAT and in this Court. Paragraph 17 thereof sets out four proposed grounds of appeal.[6] They relate to the remitter (a), the direction that upon remitter Lida may adduce cost of rectification evidence (b), the construction of contractual

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1 This amount is comprised of the $7,954.65 to which a further $1,156.84 was added to update the interest on the unpaid fixing stage claim and a further amount of $7,475.54 for interest on the unpaid practical completion claim to which reference is made in the discussion of Ground (c).

2 The remitter also required the tribunal to give consideration to rectification of the fascia. The appeal tribunal was prepared to award the Millers $1,850 for this item but held that they could not recover both that amount and the amount of $37,638.98 for rectification of the roof pitch on the footing that work required to rectify it would also rectify the fascia.

3 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), Schedule 3.

4 Section 150(3).

5 AB 935.

6 The proposed Notice of Appeal is Exhibit "PM-05" to the affidavit. It merely states the grounds of appeal to be: "The Tribunal, in reaching its Decision, has made errors of law".

terms concerning practical completion and payment of the practical completion claim with consequences for interest and debt recovery costs (c), and award summaries errors (d).

[8] It is open to question whether the appeal tribunal's decision is a final decision and hence appealable under s 150. On one view, it is not a final decision because the remitter has the consequence that the total amount that the Millers may have to pay to Lida has not been finally determined and the further consequence that the decision has not finally decided all matters between the parties. Lida has not pressed an argument that the application is wholly incompetent on that account. It may have refrained from doing so in deference to a different view, namely, that to the extent that the appeal tribunal's decision has finally decided certain individual heads of claim made by a party, that is to say, a certain number of the matters between the parties, it is a final decision. To my mind, this is the view to be preferred. The definition of "final decision" is sufficiently flexible as to permit that part of a decision of an appeal tribunal as finally decides a matter or matters between the parties to be characterised as a final decision for the purposes of s 150, notwithstanding that it may not have finally decided every one of the matters between them.

[9] It is well settled by a course of decisions of this Court, that leave to appeal ought to be granted only where there is a reasonable argument that the appeal tribunal has erred on a question of law and that, in consequence, a substantial injustice requiring correction has occurred.[7] With that in mind, I now turn to consider the Millers proposed grounds of appeal. It is convenient to consider grounds (a) and (b) together.

Grounds (a) and (b)

[10] It will be apparent from the preceding remarks with respect to a final decision, that neither the remitter direction nor the direction concerning further cost of rectification evidence are final decisions. They do not finally decide any head of claim, and in particular, the claim advanced by the Millers with respect to the roof pitch. For that reason alone, I would refuse leave to appeal with respect to each of them.

[11] I do, however, take the opportunity to state that, in my view, the Millers have not demonstrated any error of law on the part of the appeal tribunal with respect to either direction. The appeal tribunal was correct in finding that the tribunal member had erred in principle in the process he undertook in determining the loss for which the Millers ought to be compensated by Lida for its failure to construct the roof pitch to the contractual standard of 25°. The error was, as the appeal tribunal identified,[8] in failing to consider whether it was unreasonable to adopt the cost of reconstruction of the roof pitch to the contractual standard (which, in these proceedings, has been called cost of rectification) as the measure of damages, having regard to the diminution in value of the Millers' property resulting from that failure. The error was compounded by the tribunal member's failure to have any regard to the valuation of Mr Poulos[9] that no diminution in value has been caused by it, in any consideration of that issue.

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7 For example, *Chapman v State of Queensland* [2012] QCA 134 at [32] and [35]; *Underwood v Queensland Department of Communities (State of Queensland)* [2012] QCA 158 at [68]; *McEvoy and Anor v The Body Corporate for No 9 Port Douglas Road* [2013] QCA 168 at [3].

8 Reasons [24]-[26].

9 Exhibit 9: AB 153-161.

[12] Section 146 permits the appeal tribunal to return the matter to the tribunal for reconsideration with or without the hearing of additional evidence as it directs and with other directions that the appeal tribunal considers appropriate: paragraph (c). It was clearly within the jurisdiction of the appeal tribunal to make direction 5. In directing the tribunal to carry out its determination "in accordance with this decision", the appeal tribunal has not directed the tribunal that it is to adopt either one of the two alternative measures of damages. That falls to the tribunal to decide on the evidence before it. The appeal tribunal's direction with respect to further cost of rectification evidence illustrates that that is the case.

[13] I would add that it was open to the appeal tribunal to find[10] that the tribunal failed to give Lida an opportunity to adduce evidence with respect to the cost of constructing the roof pitched to the contractual standard. Its direction to that effect is not a product of legal error.

Ground (c)

[14] Clause 33.1 of the contract provides that if the owner does not pay any amount owing to the contractor in full by the due date, then the owner must pay default interest on such amount as is unpaid from time to time.[11] As noted in footnote 1 to these reasons, the appeal tribunal allowed Lida default interest of $9,111.49[12] on its fixing stage claim and of $7,475.54[13] on its practical completion claim, in total $16,587.03. The interest on the practical completion claim was calculated at the contractually defined default rate from 24 June 2009. The appeal tribunal did so having adopted the tribunal's findings that the date for practical completion was 20 January 2009; that practical completion had been reached by 19 June 2009; and that payment for this stage became a debt payable on 24 June 2009.[14]

[15] The finding that practical completion had been reached by 19 June 2009 is, at its highest for the Millers, a mixed finding of fact and law. As such, it is not appealable under s 150 unless infected by an error of law.

[16] The Millers contend that the appeal tribunal erred in awarding default interest on the practical completion claim. They submit that its finding that 24 June 2009 was the date from which the practical completion claim was payable was erroneous and that it made an error in failing to offset against the amount of the progress claim, the entitlement the Millers have to liquidated damages for late completion (as allowed by the appeal tribunal) and the as yet unquantified amount of damages sustained by them as a result of Lida's failure to construct the roof pitch to the contractual standard. They attribute both errors to misinterpretation of the contract by the appeal tribunal.

[17] Although they did not refer to it before the appeal tribunal, the Millers seek to rely on the definition of "practical completion" in Schedule 2 to the contract for an argument that practical completion has never been reached because the roof pitch was not built to the contractual standard. Thus, they say, the practical completion claim has never become payable pursuant to the terms of the contract.[15] Hence, default interest has never become payable on that claim under clause 33.1.

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10 Reasons [37].

11 AB 89.

12 AB 929 [47].

13 AB Ibid [48].

14 Reasons [44], adopting the tribunal's reasons at [25], [46], [71] and [75].

15 They do concede that Lida may be entitled to payment for work covered by the practical completion claim, or some of it, on a quasi-contractual basis.

[18] The Millers' submission quite overlooks how clause 25 of the contract, the practical completion clause, operates. On reaching practical completion, the contractor must give the owner a notice of practical completion stating the contractor's opinion of practical completion and the final claim: clause 25.2. That occurred here. Lida gave the Millers such a notice.[16] It was dated, and given to the Millers on, 19 June 2009. At that time, Lida also gave the Millers a final claim dated 19 June 2009.[17] In these reasons, this claim is referred to as "the practical completion claim".

[19] Clause 25.5 of the contract permits an owner who believes that practical completion has not been reached to give to the contractor, within five working days of receipt of the notice, a written notice stating its requirements for the work to reach practical completion. Furthermore, clause 25.9 provides that unless the owner within five days disputes in writing the practical completion date stated in the last notice of practical completion, that date is deemed to be the date of practical completion. It is common ground that the Millers did not give a clause 25.5 notice within five working days of 19 June 2009. They did not, by that avenue, put in issue that practical completion had been attained and trigger the operation of further provisions in clause 25 which might have had the consequence of superseding the notice of practical completion that they had been given on 19 June. Nor did they give a timely written notice under clause 25.9.

[20] Clause 25.3 specifically states that, subject to clause 25.4, the owner must within five working days of receiving the final claim pay the amount of it to the contractor. It is not in dispute that there was compliance on the part of Lida with clause 25.4.[18] The words of clause 25.3 are unambiguous. They required that the amount of the practical completion claim be paid within five working days of 19 June 2009. That day was a Friday. Thus, the fifth working day after that date was Friday, 26 June 2009. The practical completion claim was therefore payable on or before that day.[19]

[21] The obligation under clause 25.3 is to pay the amount of the final claim to the contractor within the specified period. The Millers contend that notwithstanding these clear words, they were required to pay only such part of the final claim as would have remained after deduction by way of setoff any entitlement to liquidated or other damages to which they were entitled. Support for this contention is sought by them to be drawn from clause 4.8 in clause 4 of the contract which deals with progress payments.

[22] Clause 4.8 states that other than in relation to the final claim, payment of a progress claim is on account only and the owner has no right of setoff. The Millers argue that this clause is to be understood as affirming that in relation to the final claim, there is a right to setoff and that clause 25.3 is to be interpreted accordingly.

[23] I am unable to accept this argument. Clause 4.8 is expressly concerned with claims other than the final claim. It does not purport to apply to the final claim. There is no justification in its language, or that of clause 4 overall, for an inference that clause 4.8 is intended, impliedly, to regulate payment of the final claim in any way, let alone in a way which would qualify substantially the clear words of clause 25.3 which require payment of the **amount** of the final claim within the stipulated period of time.

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16 Exhibit 1: Certificate of Practical Completion tendered at the hearing of this application.

17 Part of Exhibit 1.

18 See the Certificate of Practical Completion.

19 No issue has been taken by the Millers with the appeal tribunal's adoption of 24 June 2009 rather than 26 June 2009 as the due date for payment of that claim.

[24] The appeal tribunal was correct in awarding default interest on the unpaid practical completion claim without setoff. The Millers contention to the contrary lacks a sound legal foundation. The appeal tribunal's award of interest is not flawed by legal error on this account. It remains to note that s 77(1)(c) of the *Queensland Building Services Authority Act* 1991 would empower QCAT to award the Millers interest on damages at the prescribed rate were it sought.

[25] For similar reasons, especially those relating to setoff, the Millers have also failed to advance a reasonable argument that the appeal tribunal erred in law in its award of debt recovery costs. Accordingly, I would refuse leave to appeal on this ground.

Ground (d)

[26] The Millers contend that the appeal tribunal did not correct award summaries with the consequence that the amount to be paid by them to Lida has been incorrectly calculated. They point to two amounts which they say ought to have been deducted in the calculation of what they are to pay.

[27] One is an amount of $2,950 for liquidated damages for late completion under clause 32 of the contract. This is an amount to which the tribunal found the Millers were entitled for the period from 20 January 2009 to 20 March 2009.[20] Quite separately, the tribunal found that they were also entitled to liquidated damages of $4,200 for late completion. A perusal of the tribunal's reasons reveal that this was for a 12 week period **from** 23 June 2009 during which, in the tribunal's opinion, the Millers could have had the roof pitch rectified to the contractual standard.[21] Notwithstanding, the tribunal, in its decision of 26 March 2012, awarded only the amount of $4,200 for liquidated damages.

[28] Lida appealed the award but the appeal tribunal upheld it. The Millers did not appeal the omission; however, in their written submissions to the appeal tribunal, they contended that both amounts should have been awarded.[22] Lida has not sought leave to appeal the appeal tribunal's decision to award the amount of $4,200.

[29] It would appear that both the tribunal and the appeal tribunal erred in awarding damages for late completion for any period of time after 19 June 2009. It is difficult to reconcile such an award with a finding that practical completion had occurred by that date. Overall, the Millers would seem to be ahead despite not having been awarded the amount of $2,950. They do have the award of $4,200 and that award stands. No substantial injustice has been done to them in consequence of these errors.

[30] The other amount is in respect of the fascia, the cost of rectification of which the appeal tribunal assessed at $1,850. Direction 6 made by the appeal tribunal is that in considering the question remitted by direction 5, the tribunal must give consideration to any amount to be allowed for rectification of the fascia. Evidently, the appeal tribunal has not finally determined what award, if any, is to be made on this account. That issue, quite sensibly, is to abide the determination required by the remitter direction.

[31] For these reasons, I would refuse leave to appeal on this ground also.

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20 Reasons [49].

21 Paragraph [65], [69].

22 AB 710 para 36; AB 713 para 52.

Disposition

[32] Consistently with these reasons, the application for leave to appeal to this Court must be refused.

[33] Lida has submitted that it should be awarded costs on an indemnity basis on the footing that solicitors engaged by it wrote twice to the Millers on 17 and 26 June 2013 respectively, inviting them to withdraw the application on the basis that it had no real prospect of succeeding on any of the proposed grounds of appeal. The purpose of the correspondence was to avoid unnecessary costs. The Millers have had the benefit of Lida's comprehensive written submissions since early August 2013. In my view, a just order in the circumstances, is that they pay Lida's costs of the application on the standard basis until 7 August 2013 and thereafter on the indemnity basis.

Orders

[34] I would propose the following orders:

1. Application for leave to appeal refused.
2. Applicants to pay the respondent's costs of and incidental to the application on the standard basis until 7 August 2013 and thereafter on the indemnity basis.

[35] **MORRISON JA:** I have had the advantage of reading the draft reasons of Gotterson JA. I am in agreement with those reasons and wish only to add some short observations.

[36] Ground (c) of the grounds of appeal[23] concerns the construction of contractual terms in relation to practical completion, and the payment of the practical completion claim with consequences for interest and debt recovery costs.[24] The Millers contended that notwithstanding the words of clause 25.3 of the contract, they were required to pay only such part of the final claim as would have remained after deduction (by way of set-off) of any entitlement for liquidated or other damages. That was said to flow from the terms of clause 4.8 which forms part of clause 4 dealing with progress payments.

[37] Table 1 of Schedule 2 makes it clear that the final claim which is lodged on practical completion is, nonetheless, a progress claim. However, unlike "progress payment" the term "final claim" has a defined meaning:[25]

> "'*final claim*' means the claim by the *contractor* for payment of the balance of the unpaid *contract price*, adjusted by any additions or deductions made under this *contract*, plus all other moneys owing under this *contract*".

[38] Clause 4.8 provides that "[o]ther than in relation to the *final claim*", payment of a progress claim is on account only, and the owner has no right of set-off. That, together with clause 4.5, which obligates the owner to pay a progress claim within five working days of receiving it, reflects a contractual intention that there be an unimpeded flow of progress claims whilst the contract is on foot. Thus, the payment of a progress claim does not prevent either the owner or the contractor

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23 Identified in paragraph 17 of the Affidavit of Mr Miller; AB 940.

24 See Alteration, Addition and Renovation Contract ("Contract"); AB 52-113.

25 Contract, cl 38.1 (emphasis in original); AR 92.

from later contending that there was some circumstance calling for an adjustment, e.g. a defect in the work or some aspect requiring greater payment than was claimed in the progress claim. That is why such payment is "on account only".

[39] The contract price can alter under various provisions which include clauses 9[26], 10[27], 11[28], 13[29], 15[30], 16[31], 19[32], 20[33], 21[34] and 23.[35] Adjustments made under those clauses could be reflected in the "final claim" because they were additions or deductions, or other monies owing, "under this contract".

[40] Clause 25.3 deals with the final claim which must be lodged on reaching practical completion. It provides:

> "25.3 Subject to subclause 25.4, the *owner* must, within 5 *working days* of receiving the *final claim*, pay the amount of the *final claim* to the *contractor*."[36]

[41] I agree with Gotterson JA that the clear words of clause 25.3 require the owner to pay the **amount** of the final claim within the stipulated period. The only exception to that obligation is if the contractor does not give a defects notice under clause 25.4, or the owner disputes that practical completion has been reached under clause 25.5. Neither are relevant here.

[42] That is not to say that the owner is denied the right to claim for items that might classically be referred to as a "set-off". However, any such right arises at common law, and not under the contract. So much is made clear by the definition of "*final claim*", referred to above, which stipulates that it is a claim "adjusted by any additions or deductions made under this *contract*, plus all other moneys owing under this *contract*". In other words, the only additions or deductions are in respect of sums which arise **under the contract**. A damages claim would not be an addition or deduction made "under this contract", nor monies owing "under this contract". Any such right arises at common law for breach of contract.

[43] Thus I agree with Gotterson JA that there is no contractual right to set-off in respect of the final claim, and the clear obligation on the owner was to pay the amount of the final claim within five working days.

[44] The Millers' claim concerns the Appeal Tribunal's awarding of default interest on the unpaid practical completion claim (the final claim) without set-off. I agree with Gotterson JA that the Appeal Tribunal's award does not involve legal error.

[45] I agree with the orders proposed by Gotterson JA.

[46] **HENRY J:** I have read the reasons of Gotterson JA. I agree with those reasons and the orders proposed.

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26 Variation for a survey.
27 Variation in respect of access.
28 Variation in respect of compliance with local authorities.
29 Variation in relation to documentary errors and discrepancies.
30 Variation for unforeseen circumstances.
31 Delay damages payable as a debt.
32 Contractors' right to claim costs of suspending and recommencing works.
33 Agreed variations.
34 Adjustment for provisional sums.
35 Additions due to statutory or other authorities increasing charges.
36 Emphasis in original.