SUPREME COURT OF QUEENSLAND

CITATION:	*John Urquhart t/as Hart Renovations v Partington & Anor* [2016] QCA 87
PARTIES:	**JOHN URQUHART T/AS HART RENOVATIONS** (applicant) **v** **PHILIP PARTINGTON** **EVELYN PARTINGTON** (respondents)
FILE NO/S:	Appeal No 6079 of 2015 QCATA No 131 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Queensland Civil and Administrative Tribunal Act*
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal at Brisbane – [2015] QCATA 67
DELIVERED ON:	8 April 2016
DELIVERED AT:	Brisbane
HEARING DATE:	6 November 2015
JUDGES:	Margaret McMurdo P and Morrison JA and Henry J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application for leave to appeal is granted.** **2. The appeal is allowed.** **3. The order of the Appeal Tribunal is set aside.** **4. The matter is returned to the Appeal Tribunal for determination according to law.** **5. Failing written notice within 14 days to the Registrar by the parties of agreement as to costs:** **(a) the applicant will file and serve written submissions as to costs not exceeding three pages within 21 days;** **(b) the respondent will file and serve written submissions as to costs not exceeding three pages within 28 days; and** **(c) the applicant will file and serve any written submissions as to costs in reply not exceeding one page within 35 days.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – where the applicant seeks leave to appeal under s 150(3) of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) against a decision of the Appeal Tribunal of the Queensland Civil and Administrative Tribunal (QCAT) which set aside the decision of a Tribunal Member – whether the interests of justice warrant the Court's intervention

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – PROGRESS PAYMENTS – where the applicant performed domestic building work on the residence of the respondents – where a dispute arose in connection with the respondents' failure to pay the applicant's progress claim – where the respondents assert the works had not reached the enclosed stage and there were defects – where in first instance the Queensland Civil and Administrative Tribunal Member concluded the enclosed stage had been reached and the respondents' failure to pay the progress claim put them in substantial breach of the contract – where the Appeal Tribunal of the Queensland Civil and Administrative Tribunal concluded the Member had erred in finding the enclosed stage had been reached – whether the Appeal Tribunal erred in its interpretation of "structural flooring" and its conclusion on the topic of whether the enclosed stage of the building works had been reached

Domestic Building Contracts Act 2000 (Qld), Sch 2
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 142, s 150(3)

Nichols v Earth Spirit Home Pty Ltd [2015] QCA 219, considered

COUNSEL: S B Whitten for the applicant
S McNeil for the respondent

SOLICITORS: Saal & Associates for the applicant
Blue Fox Legal for the respondent

[1] **MARGARET McMURDO P:** I agree with Henry J's orders granting leave to appeal, allowing the appeal, setting aside the order of the appeal tribunal of the Queensland Civil and Administrative Tribunal (QCAT) and returning the matter to the appeal tribunal for determination according to law. I also agree with his Honour's reasons for those orders, although I have some brief additional observations.

[2] There is no doubt that the respondents to this application (the owners) had notice from 20 April 2009 that the present applicant (the builder) was claiming the progress payment due under the contract when the building work had reached the Enclosed stage.[1] As

[1] See the definition of 'Enclosed stage' in the contract and in the *Domestic Building Contracts Act* 2000 (Qld) (repealed) set out in Henry J's reasons at [16].

of 20 April 2009, the front door was not installed and nor was the doorway temporarily enclosed. This meant that the external doors were not fixed, even temporarily so that, under the definition, the Enclosed stage of the building work had not been reached and the builder was not entitled to the relevant progress payment. The appeal tribunal found that the owners installed the front door at some time prior to 8 July 2009 and that the owners were required to supply but not to install the door under the terms of the contract.[2] The QCAT senior member who originally heard the case allowed the owners $200 for installing the front door, as a defect requiring rectification, and set off this amount against the amount he ordered the owners to pay the builder.[3] Those findings have not been challenged in this application.

[3] In unchallenged evidence before the senior member, the builder said that he could have fixed a temporary piece of ply to the front doorway to comply with the requirements of the contractual definition of Enclosed stage. He did not as this would have necessitated drilling holes into, and damaging, the aluminium door frame which would then need replacement. He also said that he explained this to the owners.[4]

[4] The senior member accepted the owners' evidence that they did not receive the builder's progress payment claim for the Enclosed stage until the builder sent it to them with the Notice to Remedy Breach in January 2010.[5] The senior member, however, found it made no difference to the outcome because the owners had notice of the builder's progress payment claim for the Enclosed stage when this was discussed at a site meeting on 13 August 2009 between the builder, the owners and representatives from the Queensland Building Services Authority.[6] Those findings were also uncontentious in this application. It follows that at least by 13 August 2009, by which time the front door was installed, the owners had notice that the builder was claiming the progress payment for the Enclosed stage. In those circumstances, the fact that the owners, rather than the builder, installed the front door did not preclude the builder from an entitlement to the progress payment for the Enclosed stage in January 2010, when he gave a copy of his progress payment claim to the owners.

[5] I agree with Henry J's analysis as to the meaning in this case of the phrase "the structural flooring is laid", contained in the definition of "Enclosed stage" in the contract and in the *Domestic Building Contracts Act*.

[6] I note that, remarkably, the transcript of the proceedings before the appeal tribunal was not included in the appeal record book in this application. Neither party sought to refer this Court to any passages of that transcript or made submissions about them. Both parties agreed that the appeal tribunal did not deal with a number of matters raised by the owners, as identified by Henry J in [86] and [87] of his reasons.

[7] I agree with the orders proposed by Henry J.

[8] **MORRISON JA:** I have read the reasons of Henry J and agree with those reasons and the orders his Honour proposes.

[9] **HENRY J:** The applicant ("the builder") performed domestic building work on the residence of the respondents ("the owners"). A dispute arose in connection with the

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2 *Partington & Anor v Urquhart* [2015] QCATA 67, [53].
3 *Urguhart* [sic] *v Partington* [2013] QCAT 133, [71(f)].
4 T 149, lines 15-25.
5 Above, [57].
6 Above, [57].

owners' failure to pay the builder's progress claim for building to the enclosed stage of the work.

[10] The builder was largely successful in the first instance hearing of the dispute before the Queensland Civil and Administrative Tribunal ("QCAT") but the owners' appeal to QCAT's Appeal Tribunal resulted in the matter being returned to QCAT for re-hearing. The builder seeks this court's leave to appeal that decision.

[11] The Appeal Tribunal's decision largely turned upon whether the absence of a front door and a complete layer of fixed flooring on the upstairs level meant the work had met the definition of the "enclosed stage". It is that question of interpretation with which this application is principally concerned.

Background

[12] On 4 August 2008 the builder entered into a contract with the owners to perform construction works to "raise, build in under and renovate" a domestic dwelling in suburban Sherwood for a price of $483,742.00.

[13] The owners negotiated that price by assuming certain obligations under the contract, including supplying materials such as windows and doors.[7]

[14] Schedule 2 of the contract made provision for progress payments to be made under either its part A or part B. Part A effectively adopted the payment tables prescribed by s 66 of the now repealed *Domestic Building Contracts Act* 2000 (Qld) as well relevant definitions in that Act of stages nominated in the tables. The tables in part A were struck through and part B was completed, indicating the part B progress payments table applied to the contract.

[15] The table in part B[8] was to this effect:

	STAGE	PERCENTAGE	AMOUNT
1	Deposit	5%	$ 24,187
2	Raise House	10%	$ 48,374
3	Base	10%	$ 48,374
4	Frame	15%	$ 72,561
5	Enclosed	30%	$145,122
6	Fixing	15%	$ 72,561
7	Practical completion	15%	$ 72,563
	TOTAL:	100%	$483,742

[16] Of those named stages, stages 3 to 7 inclusive were defined in the part A definitions. Part B provided that the names of stages from part A, if used in part B, would have the same meaning as given in part A. The definition of stage 5, the "enclosed stage",

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7 AR Vol 2 P598.
8 AR Vol 2 P597.

as it appeared both in the contract and the *Domestic Building Contracts Act* 2000 (Qld), was:

> "***enclosed stage***, for a building, means the stage when–
> (a) the external wall cladding is fixed; and
> (b) the roof covering is fixed, but without–
> (i) soffit linings necessarily having been fixed; or
> (ii) for a tile roof–pointing necessarily having been done; or
> (iii) for a metal roof–scribing and final screwing off necessarily having been done; and
> (c) the structural flooring is laid; and
> (d) the external doors are fixed (even if only temporarily), but, if a lockable door separating the garage from the rest of the building has been fixed, without the garage doors necessarily having been fixed; and
> (e) the external windows are fixed (even if only temporarily)."

[17] The builder issued progress claim invoices for stages 1, 2, 3 and 4 from August to December 2008. The owners paid those invoices.[9]

[18] On 20 April 2009 the builder issued progress claim invoice 449 for $151,669.41 ("the first enclosed stage invoice"), comprising $145,122.00 for stage 5, the enclosed stage, and $6,547.41 for variation works. The owners did not pay the invoice and a dispute developed.

[19] The owners assert the works had not reached the enclosed stage and there were defects in some of the works. It appears their real justification for non-payment at that stage was their desire to have defects remedied prior to payment, rather than waiting for the builder to tend to those concerns as building continued. There is no evidence to suggest that they, in that era, relied upon the absence of a front door and a complete layer of flooring to justify their non-payment for the "enclosed stage".

[20] The owners claim they raised their concerns about defects with the builder on about 23 April 2009 and he agreed to undertake certain rectification works before the enclosed stage payment would become payable. However, the notion that liability to pay the progress claim was agreed to be conditional on completion of rectification works was disputed by the builder,[10] was inconsistent with the documentary and other evidence adduced and was rejected at first instance.

[21] By May 2009 the owners relented and authorised their bank to pay the progress claim. About the same time the builder, apparently unaware of this breakthrough and not being prepared to work unpaid, stopped working at the property. On becoming aware of this the owners then cancelled their authority to pay the claim. Having come within a whisker of resolving, the dispute drifted on.

[22] The owners made a complaint to the Queensland Building Services Authority[11] ("QBSA") on 8 August 2009. The parties and their representatives met on site with the local resolution services branch of the QBSA on 13 August 2009. On the same date the QBSA issued a letter to the owners, with a copy to the builder, stating the QBSA could not intervene because the contract was still active. The letter noted it

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9 The sum of $6,611 was withheld from the stage 2 payment – AR Vol 2 P800 [17].
10 AR Vol 2 P405 [70].
11 Now the Queensland Building & Construction Commission.

had been agreed between the parties there was to be a work schedule completed in respect of defective works but also expressed the opinion the works which had been completed fulfilled the definition of enclosed stage.[12]

[23] On 25 August 2009 the builder issued a further progress claim invoice number 468 ("the second enclosed stage invoice"), for $159,669.99, again comprising $145,122.00 for the enclosed stage as well as $9,569.21 for additional works and $4,978.78 for work completed since the issue of the first enclosed stage invoice. The owners assert they did not receive this invoice at that time. They also deny agreeing to the performance of the additional variation works for which they were invoiced. The invoice was not paid.

[24] On 29 January 2010 the builder issued the owners a notice to remedy breach pursuant to cl 28 of the contract. That notice annexed a copy of the second enclosed stage invoice.[13] The ultimate position of the owners at first instance was they did receive that copy of the second enclosed stage invoice.[14]

[25] Still no payment was forthcoming and the builder terminated the contract pursuant to cl 28 on 18 February 2010.

The Tribunal hearing

[26] On 19 March 2010 the builder filed an application in respect of the domestic building dispute before QCAT seeking $243,116.98 damages plus interest. On 24 May 2010 the owners filed a response and counter application seeking late completion damages totalling $4,410.00 and the cost of rectification of defective works. The applications were heard on 27, 28, 29 and 30 August 2012.

[27] By the time of the hearing the owners relied on two shortcomings in the state of the building in support of their argument that the "enclosed stage" had not been reached. Those shortcomings were that:

(a) the front door had not been installed; and
(b) the upstairs flooring had not been completely installed.

The owners also alleged that the presence of defects in workmanship meant the enclosed stage had not been reached.

[28] As to the front door, the builder acknowledges it was not installed by the time he issued the first enclosed stage invoice. The owners were contractually obliged to supply the door. They had not done so by the time the first enclosed stage invoice was issued on 20 April 2009. They had ordered it by then, apparently in March,[15] but it did not arrive until early May.[16] The owners assert they were not informed when the builder wanted the front door to be supplied.[17]

[29] The builder deposed to asking the owners for the door but not to when he did so.[18] At one point in his evidence he asserted he had told the owners he required the supply

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12 AR Vol 2 P566.
13 AR Vol 2 P808 [57].
14 AR Vol 1 PP110-111, AR Vol 1 P379 L18.
15 AR Vol 1 P354 L38.
16 AR Vol 1 P355 L19.
17 AR Vol 2 P459 [128].
18 AR Vol 2 P505 [143].

of doors and windows by Christmas 2008.[19] However, he did not answer responsively when specifically asked at what point he had asked for the front door to be supplied.[20]

[30] After the builder ceased work at the site one of the owners fixed the front door to the premises.[21] Despite some variation in evidence at first instance as to when this occurred it was conceded by the owners in the course of that proceeding that they had installed the door by the time of the site meeting of 13 August 2009.[22]

[31] As to the section of upstairs floorboard, the evidence disclosed that the bearers and joists for the upstairs storey were in place but, particularly in the upstairs bedroom,[23] such ply floor boarding as was atop the bearers and joists was not affixed and there were some gaps where no such floor boarding had been laid.[24]

[32] It is unnecessary to here enumerate the various defects of which the owners complained. The Member at first instance impliedly concluded that such defects as did exist were a separate issue and did not bear upon whether the works had reached the enclosed stage.

[33] After receiving further submissions the Member delivered his decision, publishing his reasons on 19 February 2013. The Member concluded the enclosed stage had been reached.

[34] In reasoning to that conclusion the learned Member referred briefly to the issue of the front door, saying:

> "[36] It is common ground that at the time the progress claim was made the front door had not been affixed by the applicant. It is also common ground that the Partingtons were to supply the front door. It had not been supplied at the time the progress claim was given to the Partingtons. Interestingly there was no mention of the front door in any of the emails passing between the parties nor was it listed in any of the list of defects.
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> [37] Mr [Urquhart] did not return to site, Mr Partington fixed the front door to the premises, the progress claim was not paid and the parties fell into dispute."[25]

[35] The learned Member subsequently reviewed the evidence of various experts in the course of which he alluded to an argument by the owners that the definition of the enclosed stage was not satisfied because the flooring for the upstairs was not complete[26] and the fact the front door had not been installed initially.[27]

[36] The Member's conclusion followed the consensus opinion of industry experts who attended the August 2009 site meeting that at that time the enclosed stage had been reached. The Member said of that evidence:

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19 AR Vol 1 P77 L14.
20 AR Vol 1 P149 L33.
21 AR Vol 2 P804 [37].
22 AR Vol 1 P126 L32, AR Vol 1 P238 L1, AR Vol 1 P373 L4.
23 AR Vol 1 P293 L1.
24 Eg AR Vol 1 P256, P293.
25 AR Vol 2 P804.
26 AR Vol 2 P805 [39].
27 AR Vol 2 P806 [43].

> "In the face of this evidence I have no alternative but to make a finding consistent with this evidence that the works had reached the enclosed stage."[28]

[37] The wording of that finding conveys the impression the Member felt bound to follow the predominant expert opinion rather than arrive at his own view. The Member did not specifically articulate his own view as to why the initial absence of the front door and the absence of a section of upstairs floor boarding did not compel an opposite conclusion. Nor did he express his own view as to what was actually meant by the term "structural flooring" in the definition of the enclosed stage – a matter which was for him, not experts, to determine and apply. It is implicit in his reasons he thought the initial absence of the door was irrelevant because it was the owners' responsibility to supply the door and because in any event the door had been installed prior to the issue of the second enclosed stage invoice. It also appears to be implicit in his reasons he favoured the view, also expressed by a number of experts, that "the structural flooring related to the slab and not the upper floor which did not add anything structural to the house".[29]

[38] The Member found the owners' failure to pay the progress claim put them in substantial breach and the builder's termination of the contract was lawful. He did not specifically indicate whether that failure to pay related to the first or second issued invoice for the enclosed stage but by implication it related to the second.

[39] The Member allowed only part of the counter application, accepting the builder was liable for some of the costs of rectification and defects and calculating those damages at $62,500.00. The Member offset those damages against the larger damages sum he found owing to the builder so that in the upshot the owners were ordered to pay the builder $214,946.00.

[40] That award included a component of default interest. While the Member concluded each party should bear their own costs, he did order the owners to pay the builder's costs thrown away as a result of an earlier adjournment of the hearing.

The Appeal Tribunal hearing

[41] The owners filed their application for appeal and leave to appeal pursuant to s 142 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ("the *QCAT Act*") on around 23 March 2013. The grounds of appeal were:

> "1. The Tribunal erred in law in determining that the building had reached the enclosed stage.
> 2. The Tribunal erred in law in determining the extent of the defects and the cost of rectifying defects in the building work undertaken by Mr Urquhart.
> 3. The Tribunal erred in ordering the Respondent/Applicant for leave to pay default interest.
> 4. The Tribunal erred in law in ordering the Respondent/Applicant for leave to pay costs.
> 5. The Respondent/Applicant for leave was denied natural justice and procedural fairness."[30]

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28 AR Vol 2 P806 [48].

29 AR Vol 2 P805 [40].

30 AR Vol 2 P826. A sixth ground reserved the right to add further grounds on legal advice but that did not occur. There appears to have been argument before the Appeal Tribunal to the effect that the builder was in substantial breach by reason of the absence of a notice of extension of works and an absence of notice of suspension of works (AR Vol 2 PP840-1 [67]) but that did not attract a ground of appeal.

[42] The Appeal Tribunal eventually heard the matter on 15 September 2014 and its decision was delivered on 19 May 2015.

[43] The Appeal Tribunal's decision only went to the issue of whether the enclosed stage had been reached. It concluded the Member had erred at first instance in finding the enclosed stage was reached.

[44] The Appeal Tribunal eschewed the reliance placed at first instance upon expert evidence in determining whether the enclosed stage had been reached, indicating it is "a matter of applying the facts to the definition".[31] Its reasons continued:

> "[103] If the external doors were not fixed then, as a matter of law, the building had not reached the '*enclosed stage*' and the builder was not entitled to make the '*enclosed stage*' progress claim. In my view the learned Senior Member erred in law when he decided otherwise.
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> [104] The definition of '*enclosed stage*' does not refer to flooring other than as '*structural flooring*'. It does not limit structural flooring to a '*slab*'. If structural flooring on the second level was not laid then the '*enclosed stage*' had not been reached. In my view the learned Senior Member erred in law when based on a number of opinions given in evidence he decided otherwise.
>
> [105] In my view the learned Senior Member has not decided the factual matters necessary to decide whether the definition of '*enclosed stage*' was met and to decide that the '*enclosed stage*' was reached in those circumstances was also an error of law.
>
> [106] I agree with McGill SC DCJ in *Thompson Residential Pty Ltd v Hart & Anor* that where the term '*enclosed stage*' is defined, '*it is not a question of whether the building is enclosed in a practical sense*'. The contract means what it says.
>
> [107] Further, the interpretation of the term does not in my view depend on some industry practice. The definition spells out the relevant facts to be determined for the decision as to whether the stage is reached.
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> [108] In my view the term '*structural flooring*' can be any flooring that is structural. The nature of the second level flooring as described in the evidence has a structural element. It includes bearers and joists and the flooring attached to bear a load. In my view the word '*laid*' requires the affixing of the flooring to bearers and joists that are connected to structural components of the building. If that was not done then the enclosed stage has not been reached."[32] (citations omitted)

[45] Having reached the above conclusions, the Appeal Tribunal did not, as it may have done to avoid potential cost and inconvenience in the event of error, dispose of the balance of the material issues before it. It did not deal with the balance of ground 1, which went to whether defective works precluded the enclosed stage from being met.

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31 AR Vol 2 P845 [102].
32 AR Vol 2 PP845, 846.

Nor did it consider any of the remaining grounds, namely grounds 2, 3 and 4 (ground 5 does not appear to have been the focus of separate argument). It instead ordered that the claim and cross-claim be returned to the Tribunal for rehearing according to law.[33]

[46] Even if the balance of ground 1 and grounds 3 and 4 may, by implication, have fallen away as irrelevant in light of the conclusion as to part of ground 1, it is not apparent why the Appeal Tribunal did not at least go on to determine appeal ground 2. Ground 2 went to alleged errors in determining the extent and cost of rectifying defects in the building work. That component of the matter was not rendered irrelevant by the Appeal Tribunal's conclusion about whether or not the enclosed stage had been reached. It was a separate aspect of the matter, arising from the owners' cross-application. Its only connection with the "enclosed stage" aspect of the case relates to the extent of the eventual offsetting of the damages. Having already been argued and determined at first instance and already argued on appeal, the issues relating to ground 2 should have been considered and determined on appeal.

[47] For that reason alone it is inevitable, if leave is granted here, that this court should return the matter to the Appeal Tribunal for it to determine that ground of appeal. As will be seen, there are other reasons to return the matter.

The application to this court

[48] The builder seeks the leave of this court to appeal against the decision of the Appeal Tribunal. Pursuant to s 150(3) of the *QCAT Act* such an appeal may be made:

> "(a) only on a question of law; and
> (b) only if the party has obtained the court's leave to appeal."

[49] This court's discretion to grant leave is not fettered, however it will ordinarily only be granted where the interests of justice warrant the court's intervention.[34] In this case the court heard submissions both as to leave and as to the merits of the proposed grounds of appeal.

[50] The proposed grounds of appeal are very lengthy.[35] In summary they complain that the Appeal Tribunal erred in its conclusions on the topic of whether the enclosed stage of building works had been reached.

[51] On that topic it is necessary to consider:

> (a) what "structural flooring" means and whether it had been laid ("the structural flooring issue"); and
> (b) the significance in this case of the front door not having been fixed initially and of it having been fixed subsequently ("the front door issue").

[52] While they are the main issues for consideration there are other issues which will require consideration in determining the eventual disposition of this matter ("disposition issues").

The structural flooring issue

[53] The Appeal Tribunal's reasoning, if applied to the known facts, suggests that structural flooring in this case included the flooring for both the ground and upper levels, whereas the Member at first instance concluded it only included the ground flooring.

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33 AR Vol 2 P846 [110].
34 *Nichols v Earth Spirit Home Pty Ltd* [2015] QCA 219.
35 AR Vol 2 PP856-857.

[54] In considering what is meant by the term "the structural flooring is laid" the Appeal Tribunal alluded to the role played by the word "laid" in the definition of "enclosed stage". The Appeal Tribunal reasoned:

> "In my view the word '*laid*' requires the affixing of the flooring to bearers and joists that are connected to structural components of the building. If that was not done then the enclosed stage has not been reached."[36]

[55] Implicit in that reasoning is the view that bearers and joists are not of themselves structural flooring, notwithstanding that they may provide structural support to the building and or the floor surface to be affixed to it. The view that the structure supporting the laid flooring is not itself structural flooring is sound for two reasons.

[56] Firstly, bearers and joists are inconsistent with the ordinary meaning of "flooring". The Sixth Edition of the Macquarie Dictionary relevantly defines floor as, "That part of a room or the like which forms its lower enclosing surface, and upon which one walks." In *Tate v Swan Hunter & Wigham Richardson Ltd*[37] Lord Denning observed, "The ordinary and natural meaning of a floor is something within walls, indoors, on which people walk or stand". It follows that in the case of a ground floor slab, the upper surface of the slab internal to the building perimeter would come within the ordinary meaning of flooring. In the case of an upper level, where there are underlying bearers and joists, it is the continuous surface that is laid above and affixed to the bearers and joists that would come within the ordinary meaning of flooring.

[57] Secondly, it would be a novel use of language to speak of the bearers and joists that have been installed as having been "laid". It is an ordinary use of the English language to speak of flooring as being laid. The use of the word "laid" suggests that the adjective "structural" is not intended to alter the ordinary meaning of flooring. Rather it is intended to qualify the nature of the flooring, referring to flooring of a particular purpose; a purpose that the adjective is intended to describe.

[58] The interpretative challenge here is whether that purpose relates to the structural contribution of the floor in its own right in supporting loads upon it or to the floor's structural contribution to the building.

[59] The Appeal Tribunal appears on analysis to have favoured the former role. It may at first blush seem otherwise, given the Appeal Tribunal's reasoning that the word "laid" requires affixing of the flooring to bearers and joists "that are connected to structural components of the building". However, the notion of connection to structural components of a building is an illusory qualification. All bearers and joists will be "connected" to a greater or lesser degree to "structural" components of the building. The Appeal Tribunal's reasoning effectively has the consequence that the first layer of flooring affixed - that is, the base or initial layer of flooring ("primary flooring") - on all levels of a building is structural flooring.

[60] But if "structural flooring" is a reference to all primary flooring for the building, what work is done by the adjective "structural" in the term "structural flooring"?

[61] The answer on the Appeal Tribunal's reasoning is that "structural" refers to the structural support the primary flooring will provide to "bear a load".[38] That load might be an

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36 AR Vol 2 P846 [108].
37 [1958] 1 All ER 150, 152.
38 AR Vol 2 P846 [108].

additional layer of flooring laid over it and or any other downward or gravitational loads, such as furniture and human beings, placed or moved upon it. Thus, under what I will refer to as the primary flooring interpretation, the adjective "structural" emphasises the structural support the primary flooring provides to loads placed upon it. In that way it would distinguish primary flooring from additional and or cosmetic layers, if any, laid over it, such as such as carpet, tiles or linoleum.

[62] Such an intended emphasis is unremarkable if the words "structural flooring has been laid" are divorced from the context in which they appear. However, the words appear as part of the definition of "enclosed stage", itself part of a series of definitions for payment stages, in both the contract and the now repealed *Domestic Building Contracts Act*. Whether applying the principles of interpretation of contracts or of statutory interpretation it is a fundamental requirement in the interpretation of an instrument that "every passage in a document must be read, not as if it were entirely divorced from its context, but as part of the whole instrument".[39]

[63] If the words "structural flooring is laid" are considered in the context of the definition of "enclosed stage", the adjective "structural" informs the meaning of the term "structural flooring" in a quite different way than contemplated by the primary flooring interpretation. Instead of the emphasis being upon the structural contribution of the flooring in supporting loads upon it, the emphasis is on the structural contribution the flooring provides to the enclosure of the building.

[64] It will be recalled the definition of "enclosed stage" has five elements, of which the requirement that structural flooring is laid is only one. The other four elements require the fixing of the external wall cladding, the roof covering, the external doors and the external windows. All of those four elements clearly go to the enclosure of the building, consistently with the name of the stage they are intended to define - the "enclosed stage". That the words "structural flooring is laid" appear in that context compels the conclusion those words refer to the laying of flooring that provides a structural contribution to the enclosure of the building ("the structural enclosure interpretation").

[65] That conclusion is fortified by testing the alternative interpretation, the primary flooring interpretation, in the context of the definition of enclosed stage. If the words "structural flooring is laid" mean all base or initial layers of flooring that will support loads are laid, there would be an obvious disconnect between such an interpretation and the balance of the definition of enclosed stage. It would have the consequence that the entirety of the primary flooring for a house would need to be laid, even though some of that flooring makes no structural contribution whatsoever to the obvious target of the defined stage, the enclosure of the building.

[66] The multitude of variations in building design and construction methods means that the location or locations of flooring that is structural flooring, under the structural enclosure interpretation, may vary. However, in the case of ordinary two storey dwellings it seems unlikely, where the primary flooring of the upper level is laid on bearers and joists, that such flooring will be structural flooring. Conversely, the ground primary floor of such dwellings, absent potential exceptions such as dwellings atop basements, will inevitably be structural flooring because as part of the building's envelopment it makes a direct structural contribution to the enclosure of the dwelling.

[67] This conclusion rests comfortably with the other definitions of the progress claim stages, for instance the earlier base stage.

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39 *Metropolitan Gas Co v Federated Gas Employees' Industrial Union* (1925) 35 CLR 449, 455.

[68] The base stage was defined in the contract and the *Domestic Building Contracts Act* as follows:

> "***base stage*** means–
>
> (a) for a building with a timber floor with base brickwork–the stage when–
>
> (i) the concrete footings for the building's floor are poured; and
>
> (ii) the building's base brickwork is built to floor level; and
>
> (iii) the bearers and joists for the building are installed; or
>
> (b) for a building with a timber floor without base brickwork–the stage when–
>
> (i) the building's stumps, piers or columns are finished; and
>
> (ii) the bearers and joists for the building are installed; or
>
> (c) for a building with a suspended concrete slab floor–the stage when:
>
> (i) the building's concrete footings are poured; and
>
> (ii) the formwork and reinforcing for the suspended slab are installed; or
>
> (d) for a building with a concrete floor, other than a suspended concrete slab floor–the stage when the building's floor is finished."

[69] The scenario in (d) is not particularly illustrative because it involves a building built directly onto a concrete slab, in which case the finishing of the slab surface will fulfil both the base stage and the meaning of structural flooring, however it might be defined. The other scenarios in the definition of base stage are more illustrative. Each of them involves the building of the structural support elements of an above ground floor at the base of the building but not the laying of the floor itself. Thus to comply with the base stage definition for an above ground timber floor the floor need not be laid and for an above ground suspended concrete slab floor the floor need not be laid. That is unremarkable in that the laying of flooring is not essential to the base on which the building will be constructed. However, such flooring, being part of the building's overall enclosure, will when laid make a structural contribution to the enclosure of the dwelling. Thus it will be structural flooring and must be laid by the enclosure stage.

[70] This is not a matter in which other interpretive devices need be deployed to resolve ambiguity as between interpretations or to give preference to the interpretation that will best achieve the purpose of the Act, as required by s 14A(1) *Acts Interpretation Act* 1954 (Qld). For reasons already explained, when the words in issue are read in the context of the definition of enclosed stage it can be seen the primary flooring interpretation is actually inconsistent with that context. There is no other interpretation realistically competing for preference to the structural enclosure interpretation.[40] The structural enclosure interpretation is consistent with the language defining the other stages of building and, more determinatively, is the interpretation compelled by the context of the definition in which those words appear. The Appeal Tribunal erred in adopting a different interpretation.

[71] At first instance there was no evidence to suggest there was anything exceptional about the intended layer of upstairs primary flooring such that, contrary to ordinary dwellings, it needed to be laid to provide a structural contribution to the enclosure of

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[40] Even if there did remain realistically competing interpretations the purpose of the *Domestic Building Contracts Act* as expressed at s 3 was too general to assist. Further the purpose implicit in the Act, of allowing builders to recover payments progressively as building progresses through certain stages, sheds no particular light on the minutiae of what work is to be performed in each stage of building as defined.

the building. For this dwelling it was the ground primary floor that was the only structural flooring required by the definition of the enclosed stage. It follows the requirement for the enclosed stage, that structural flooring was laid, had been complied with by the builder by the time he issued the first enclosed stage invoice.

The front door issue

[72] At the time of the issue of the first invoice for the enclosed stage the front door had not been fixed to the house. It was an express requirement of the definition of enclosed stage that the external doors be fixed. The absence of the front door was clearly contrary to that express requirement.

[73] The builder submitted the failure was excusable on the basis there had been satisfactory and effective performance, the failure allegedly being trivial.[41] The builder's submissions in this context also relied upon the owners' then lack of apparent concern about the absence of the front door, and for that matter about the upstairs flooring. However, that lack of apparent temporal concern provides no answer to the question whether the works required for the enclosed stage as defined had been completed. They had not been. The front door had not been fixed. The omission of something expressly required for and so fundamental to the enclosure of a residential building was not trivial.

[74] The absence of an affixed front door at the time of the issue of the first enclosed stage invoice meant the enclosed stage had not then been reached.

[75] What though of the fact that the owners were responsible for supplying the door and had not by then done so and the fact that the door had been affixed by the time of the second enclosed stage invoice? The significance of those facts was argued for the builder before the Appeal Tribunal. The builder contended firstly, that the owners' conduct in not supplying the door obviated the need for the door to be fixed to comply with the requirements of the enclosed stage and, secondly, that those requirements had been met by the time of the second enclosed stage because the door had been fixed in the meantime.[42]

[76] Unfortunately those arguments were not addressed in the reasoning of the Appeal Tribunal when it concluded the Member below erred in law when he decided the building had reached the enclosed stage.[43]

[77] Even if those two arguments had been addressed, the first argument could not have succeeded because it lacked evidentiary support. That argument, as it was articulated before this court, drew upon the so-called prevention principle, contending the owners were in breach of their implied obligation to co-operate under a contract by not supplying the door in time and thus ought be prevented from taking advantage of their breach. That principle's usual attempted application in the construction setting is to prevent an owner from deducting liquidated damages where a builder's failure to complete is caused by the owner.[44] The state of the evidence makes it unnecessary to consider the contention the principle's premise could extend beyond protection of

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41 Another argument of the builder, that the first progress claim was not void by reason of it being premature, so that it was enforceable once the door was fixed, was not pressed at the hearing (T1-59 L6).

42 AR Vol 2 P844 [92] - P845 [94].

43 AR Vol 2 P845 [103].

44 J Coggins, *The Application of the Prevention Principle in Australia* (2009) 21 (3&4) ACLB 30 & 21 (5) ACLB 45.

the builder to positively removing the need to complete a required element of a building stage. The Member at first instance did not express any concluded view as to whether, contrary to the evidence adduced by the owners, the builder had specifically requested the owners to deliver the front door and that they had failed to meet the request on time. The builder's evidence on this aspect was imprecise; referring without any documentary corroboration to a general request he had made for supply of the windows and doors. The contract did not stipulate when the owners were to supply the windows or doors. In the absence of a finding at first instance that the builder had requested the owners to supply the front door and that the owners had not supplied it by the time requested, the bare fact the front door had not been supplied by the owners by the time of issue of the first enclosed stage invoice is a neutral fact. It is not evidence of a breach of an implied obligation to co-operate.

[78] In contrast to the first argument, the second argument could and should have been favourably considered by the Appeal Tribunal. It was common ground the door had been fixed by the time of the site inspection of 13 August 2009 and thus by the time of the second enclosed stage invoice. At first instance the Member clearly accepted the enclosed stage had been reached by the time of the site inspection. He went on to hold:

> "As a consequence of not paying the progress claim, the applicant was entitled to terminate so I therefore find his termination was lawful."[45]

[79] Based on his preceding reasons[46] it is apparent the Member was there referring to the failure to pay the second enclosed stage invoice, a copy of which had been issued with the notice to remedy breach.

[80] The Appeal Tribunal's conclusion of error on the front door issue was premised on the absence of a fixed front door but that was only a shortcoming at the time of issue of the first enclosed stage. The Appeal Tribunal should have gone on to consider the significance of the front door having been affixed by the time the second enclosed stage invoice was issued, as the Member below did. It erred in not doing so. Had it done so it could not have concluded there had been any error in the Member's ultimate conclusion on this aspect of the case.

[81] In summary, consistently with the conclusion reached at first instance, the absence of a front door precluded a finding the enclosed stage had been reached by the time the first enclosed stage invoice was issued but not by the time the second enclosed stage invoice was issued, because it had been affixed in the interim.

Disposition issues

[82] In light of the above conclusions as to error on an important point of interpretation and the main reason for interference by the Appeal Tribunal, it is in the interests of justice that leave be granted and inevitable that the appeal be allowed.

[83] There are some other aspects of the approach of the Appeal Tribunal which potentially bear upon the disposition of the appeal and should therefore be considered.

[84] The Appeal Tribunal's reasons concluded the Member below had erred in adopting the consensus of expert opinion rather than applying the facts to the definition as he interpreted it in determining whether the enclosed stage had been reached. It is

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45 AR Vol 2 P808 [59].
46 AR Vol 2 P808 [57], [58].

undoubtedly correct that determining the meaning of the "enclosed stage" and deciding whether it was reached was a matter for the Member at first instance. Accepting the Appeal Tribunal was correct in concluding the Member below erred in adopting the consensus of expert opinion in arriving at his ultimate conclusion, that did not preclude the Appeal Tribunal from considering whether the ultimate conclusion, that the enclosed stage had been reached, was correct. It transpires for the reasons given above that conclusion was correct, at least by the time the second enclosed stage invoice was issued. Thus, to the extent the Member at first instance did err in adopting the consensus of expert opinion as to whether the enclosed stage had been reached, that error is academic to the disposition of this matter.

[85] The Appeal Tribunal's reasons also considered the Member below had "not decided the factual matters necessary to decide whether the definition of 'enclosed stage' was met".[47] It is not clear what decision about factual matters the Appeal Tribunal had in mind. The relevant facts about structural flooring and the front door were readily apparent from the record and there was ultimately no material evidentiary conflict[48] about them to be resolved. The absence of express findings as to those facts at first instance did not preclude the Appeal Tribunal from acting on the evidentiary record and reaching a conclusion based on the correct meaning of the definition of enclosed stage.

[86] A more material issue affecting the disposition of this matter is the combination of matters argued before the Appeal Tribunal that were not determined by it. Grounds 2 to 4 before the Appeal Tribunal were argued but the Appeal Tribunal did not determine them.

[87] As to ground 1 the above reasons demonstrate the Appeal Tribunal erred and that the conclusions reached by the Member at first instance in respect of the front door and structural flooring issues were correct. However, they were not the only issues the owners argued on ground 1 before the Appeal Tribunal bearing upon whether the enclosed stage was reached. The Appeal Tribunal's summary of the arguments advanced before it show that two other arguments were advanced in support of ground 1, namely:

> "c) the building work undertaken was not in accordance with the plans and specifications; and
>
> d) the building work undertaken was of such low standard that a significant portion of the work would have to be undone and redone."[49]

[88] Those arguments were not the subject of any determination by the Appeal Tribunal.

[89] The orders this court may make in granting leave and allowing the appeal are identified in 153(2) of the *QCAT Act*:

> "In deciding the appeal, the Court of Appeal may—

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47 AR Vol 2 P846 [105].

48 The unresolved issue in the evidence as to whether the builder actually requested the owners to supply the front door within a time they did not meet (see [69]) is not material in circumstances where the finding in the builder's favour at first instance was founded upon the enclosed stage having been completed by the time of the second invoice.

49 AR Vol 2 P839 [60]. The owners advanced an argument in the written submissions before this court to the effect there had been a premature suspension of works which could not have been cured by the issue of the second enclosed stage invoice (Respondent's Amended Outline of Argument [38]). The argument, which was not developed or abandoned in oral submissions and does not need to be considered in the proceeding before this court, does not appear to come within the bounds of appeal/application for leave to appeal ground 1 or indeed any other ground advanced but not considered below.

(a) confirm or amend the decision; or
(b) set aside the decision and substitute its own decision; or
(c) set aside the decision and return the matter to the tribunal for reconsideration—
    (i) with or without the hearing of additional evidence as directed by the court; and
    (ii) with the other directions the court considers appropriate; or
(d) make any other order it considers appropriate, whether or not in combination with an order made under paragraph (a), (b) or (c)."

[90] The Appeal Tribunal's decision must be set aside. However, in the circumstances of this case it is not appropriate for this court to purport to substitute its own decision in respect of matters which were argued before but are yet to be decided by the Appeal Tribunal, namely the third and fourth arguments advanced in support of ground 1 and grounds 2 to 4 inclusive. It also remains for the Appeal Tribunal in determining those arguments to decide pursuant to s 142 *QCAT Act* whether leave to appeal is required and if so whether it should be given.

[91] It may be misleading to order the matter be returned "for reconsideration" lest the order be understood as requiring yet further argument before the Appeal Tribunal. The hearing of further argument should not be required. Although it would be preferable for both members of the Appeal Tribunal to finish their task, if one or both are unavailable the parties' written submissions on the matters that remain live and a transcript of the hearing before the Appeal Tribunal will be available. The Appeal Tribunal can now make a determination of those matters, consistently with this court's reasons and without the parties having to incur any further costs. The more appropriate order therefore is that the matter be returned to the Appeal Tribunal for determination according to law.

[92] While costs would ordinarily follow the event the return of this matter to the Appeal Tribunal was inevitable, regardless of this court's decision on the main two issues, because of the non-determination at the very least of ground 2. The parties should therefore have an opportunity to be heard by way of written submission as to costs absent agreement as to costs by them.

Orders

[93] I would order:

1. The application for leave to appeal is granted.
2. The appeal is allowed.
3. The order of the Appeal Tribunal is set aside.
4. The matter is returned to the Appeal Tribunal for determination according to law.
5. Failing written notice within 14 days to the Registrar by the parties of agreement as to costs:
    (a) the applicant will file and serve written submissions as to costs not exceeding three pages within 21 days;
    (b) the respondent will file and serve written submissions as to costs not exceeding three pages within 28 days; and
    (c) the applicant will file and serve any written submissions as to costs in reply not exceeding one page within 35 days.