SUPREME COURT OF QUEENSLAND

CITATION:	*McNab Constructions Australia P/L v Queensland Building Services Authority* [2010] QCA 380
PARTIES:	**McNAB CONSTRUCTIONS AUSTRALIA PTY LTD** ACN 102 840 906 (applicant/cross-respondent) **v** **QUEENSLAND BUILDING SERVICES AUTHORITY** (respondent/cross-appellant)
FILE NO/S:	Appeal No 4096 of 2010 DC No 2699 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Miscellaneous Application – Civil
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	23 December 2010
DELIVERED AT:	Brisbane
HEARING DATE:	6 September 2010
JUDGES:	Margaret McMurdo P, Holmes and Chesterman JJA Separate reasons for judgment of each member of the Court, Margaret McMurdo P and Holmes JJA concurring as to the orders made, Chesterman JA dissenting
ORDERS:	**1. The application for leave to appeal and the application to cross-appeal are granted.** **2. The appeal is dismissed and the cross-appeal allowed.** **3. The orders of the District Court are set aside.** **4. The matter is remitted to the Queensland Civil and Administrative Tribunal for hearing in accordance with these reasons.** **5. The appellant is to pay the respondent cross-appellant's costs of the appeal and cross-appeal and of the District Court proceeding.**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – GENERAL APPROACHES TO INTERPRETATION – TO GIVE OPERATION AND EFFECT TO THE ACT – where the applicant contracted with the principal to manage the construction of a residential apartment building – where the respondent issued

15 directions under s 72 of the *Queensland Building Services Authority Act* 1991 (Qld) to the applicant to rectify defects in the construction – where the Act was amended with effect from 21 December 2007 – where the first direction was made prior to the amendments and all other directions made after the amendments – where the Tribunal found against the applicant – where trial judge found the respondent lacked the power to issue the first direction but had the power to issue the subsequent directions – whether the applicant was a person who "carried out the building work" under s 72 before and after the amendments

Commercial and Consumer Tribunal Act 2003 (Qld), s 100(1), s 104
District Court of Queensland Act 1967 (Qld), s 118(3)
Queensland Building Services Authority Act 1991 (Qld), s 3(1)(i), s 3(a)(ii), s 3(b), s 3(c), s 30A, s 30B, s 42, s 42(1), s 42(2)(b), s 43B, s 43C, s 72, s 72(5)(f), s 72(10), s 72(11)(b), s 72(14), sch 2

Baulderstone Hornibrook Pty Ltd v Beneficial Finance Corporation Limited (1999) ANZ ConvR 634; [1998] QCA 351, cited
Baulderstone Hornibrook Pty Ltd v Beneficial Finance Corporation Limited [1998] QCA 430, cited
Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd (1976) 135 CLR 616; [1976] HCA 62, cited
George Hudson Ltd v Australian Timber Workers' Union (1923) 32 CLR 413; [1923] HCA 38, cited
Re a Solicitor's Clerk [1957] 1 WLR 1219; [1957] 3 All ER 617, cited
Puerto Galera Pty Ltd v JM Kelly (Project Builders) Pty Ltd [2008] QSC 356, considered
R v His Honour Judge Given, ex parte Builders' Registration Board of Queensland [1985] 2 Qd R 32, cited

COUNSEL: D B Fraser QC, with B Codd, for the applicant/cross-respondent
J K Bond SC, with M H Hindman, for the respondent/cross-appellant

SOLICITORS: Lenz Moreton for the applicant/cross-respondent
HWL Ebsworth Lawyers for the respondent/cross-appellant

[1] **McMURDO P**: The applicant, McNab Constructions Australia Pty Ltd, a licensed builder,[1] carried out the construction management of the W4 apartments in Skyring Terrace, Teneriffe. Under the terms of its contract with the principal, Advanced Traders Pty Ltd, McNab Constructions was required to carry out and complete its construction services "free from any defect or omission".[2] Between 3 October 2007 and 15 January 2009, the respondent, the Queensland Building Services Authority

1 See statutory declaration of Michael McNab, 15 October 2008, ex MJM 1, AB 167-173.
2 Contract, cl 2.1 annexure, pt D.

(QBSA), issued 15 directions to McNab Constructions to rectify building work in respect of the construction of the apartments under s 72 *Queensland Building Services Authority Act* 1991 (Qld) (QBSA Act). The first direction was issued before amendments to s 72 and other provisions of the QBSA Act took effect on 21 December 2007.[3] The remaining 14 directions were issued after these amendments took effect. McNab Constructions filed review applications in the Commercial and Consumer Tribunal in respect of all 15 directions. The role of the Tribunal has now been subsumed by the Queensland Civil and Administrative Tribunal (QCAT) which commenced operation on 1 December 2009: see s 243 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld).

[2] In determining a preliminary question of law, the Tribunal concluded that it was open to the QBSA prior to the 2007 amendments to the QBSA Act to direct McNab Constructions to rectify building work under s 72. This was because McNab Constructions was both before and after the 2007 amendments a "person who carried out the building work" under s 72.[4]

[3] McNab Constructions sought leave to appeal to the District Court under s 100(1) *Commercial and Consumer Tribunal Act* 2003 (Qld) on a question of law. The District Court judge granted leave to appeal. His Honour concluded that, at the time of the first direction, McNab Constructions was not a "person who carried out the building work" under s 72. But his Honour found the effect of the 2007 amendments to the QBSA Act was that the remaining 14 directions could be lawfully given under s 72; in respect of them, McNab Constructions was "a person who carried out building work" under s 72. The judge made orders remitting the matter to the Tribunal for further hearing according to the law determined in that appeal. The judge also ordered that QBSA pay 25 per cent of McNab Constructions' costs of the appeal.[5] McNab Constructions has applied for leave to appeal and QBSA for leave to cross appeal from those orders under s 118(3) *District Court of Queensland Act* 1967 (Qld).

[4] I agree with my colleagues that this application raises a question of law of some importance, namely, the construction of s 72 QBSA Act. For that reason leave to appeal and cross appeal should be granted. In my opinion, the appeal can be disposed of on the first point raised in the cross appeal: McNab Constructions was, both before and after the 2007 amendments to the QBSA Act, "the person who carried out the building work" under s 72 QBSA Act. These are my reasons for reaching that conclusion.

The relevant provisions of QBSA Act before the 2007 amendments[6]

[5] The objects of the QBSA Act are to regulate the building industry to ensure it maintains proper standards;[7] to achieve a reasonable balance between the interests of building contractors and consumers;[8] to provide remedies for defective building work;[9] and to provide support, education and advice both for those who undertake

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3 The relevant amendments to the QBSA Act are set out in Chesterman JA's reasons [32]-[36].

4 *McNab Constructions Australia Pty Ltd v Queensland Building Services Authority* [2009] CCT QR 023-08, QR 024-08 and QR 197-07, Brisbane, 26 August 2009, Mr P Lohrisch.

5 *McNab Constructions Australia Pty Ltd v Queensland Building Services Authority* BD 2699 of 2009, 15 March 2010, Dorney QC DCJ, 24 March 2010 and 7 April 2010.

6 It is common ground that the relevant reprint is Reprint No 8B.

7 QBSA Act, s 3(a)(i).

8 Above, s 3(a)(ii).

9 Above, s 3(b).

building work and for consumers.[10] Part 1 of the Act deals with preliminary matters; pt 2 with the QBSA; pt 3 with licensing of builders; pt 3A with excluded and permitted individuals and excluded companies; pt 3B with permanently excluded individuals; pt 3C with convicted company officers; pt 3D with banned individuals; pt 3E with disqualified individuals; pt 4A with building contracts other than domestic building contracts; pt 5 with the statutory insurance scheme; pt 6 with rectification of building work; pt 7 with the jurisdiction of the Queensland Building Tribunal; pt 9 with inspectors and pt 10 with miscellaneous provisions.

[6] Section 42 is contained in pt 3 **Licensing**, div 7 **Requirement to be licensed**, and relevantly provides:

> "**42 Unlawful carrying out of building work**
> (1) A person must not carry out, or undertake to carry out, building work unless that person holds a contractor's licence of the appropriate class under this Act.
> (2) For the purposes of this section –
> …
> (b) a person is taken to carry out building work if that person provides advisory services, administration services, management services or supervisory services in relation to the building work;
> … ."

[7] Section 72 is contained in pt 6 **Rectification of building work**, and relevantly provides:

> "**72 Power to require rectification of building work**
> (1) If the authority[11] is of the opinion that building work is defective or incomplete, the authority may direct the person who carried out the building work to rectify the building work within the period stated in the direction.
> (2) In deciding whether to give a direction under subsection (1), the authority may take into consideration all the circumstances it considers are reasonably relevant, and in particular, is not limited to a consideration of the terms of, including the terms of any warranties included in, the contract for carrying out the building work.
> …
> (5) For subsection (1), the person who carried out the building work is taken to include—
> …
> (c) a building contractor by whom the building work was carried out; and
> (d) a person who, for profit or reward, carried out the building work;
> …
> (10) A person who fails to rectify building work as required by a direction under this section is guilty of an offence.
> Maximum penalty—80 penalty units.
> (11) For the purposes of subsection (5)(c) and (d)—
> (a) a person carries out building work whether the person—
> (i) carries it out personally; or
> (ii) directly or indirectly causes it to be carried out; and

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10 Above, s 3(c).

11 The authority is the QBSA.

> (b) a person is taken to carry out building work if the person provides advisory services, administration services, management services or supervisory services for the work.
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> …
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> (14) The authority is not required to give a direction under this section to a person who carried out building work for the rectification of the building work if the authority is satisfied that, in the circumstances, it would be unfair to the person to give the direction.
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> *Example for subsection (14)—*
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> The authority might decide not to give a direction for the rectification of building work because of the amount payable but unpaid under the contract for carrying out the building work.
>
> (15) A direction given under this section need not be complied with if –
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> (a) a proceeding for a review of the authority's decision is started in the tribunal; and
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> (b) the tribunal orders a stay of the decision."

[8] It is common ground that the definition of "building work" in sch 2 of the dictionary to the QBSA Act before the 2007 amendments[12] does not in its terms encompass the work done by McNab Constructions under its contract with the principal.[13]

The construction of s 72 QBSA Act before the 2007 amendments

[9] McNab Constructions contends that the meaning of the phrase "the person who carries out the building work" in s 72, despite the terms of s 72(5)(d) and s 72(11), is informed by the construction of s 42(2)(b) adopted in *Puerto Galera Pty Ltd v JM Kelly (Project Builders) Pty Ltd*.[14] It does not include the provision of services of the kind listed in s 72(11)(b) unless the provider of these services also personally carried out or caused to be carried out building work of the kind defined in the sch 2 dictionary to the QBSA Act before the 2007 amendments.

[10] QBSA contends that the construction of s 72 should not be informed by the construction of s 42(2)(b) and that the work undertaken by McNab Constructions under its contract with the principal came within the terms of s 72 as expanded by s 72(5)(d) and s 72(11).

[11] In *Puerto Galera*, Chesterman J (as his Honour then was) sitting as a judge of the Trial Division of this Court, found that "building work" in s 42(2)(b) should be narrowly construed and only applied:

> "to cases in which a person is erecting or designing a structure and in relation to that work provides advisory services, administration services, management services or supervisory services. The subsection does not apply to the provision of such services by someone who is not himself erecting or designing the structure (or causing it to be erected or designed)."[15]

[12] Were that construction of "building work" to be applied to s 72(11), McNab Constructions would not be "a person who for profit or reward carried out the

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12 Relevantly set out in [30] of Chesterman JA's reasons.

13 Relevantly set out in [50]-[54] of Chesterman JA's reasons.

14 [2008] QSC 356.

15 Above, [54].

building work" under s 72(5)(d) or "the person who carried out the building work" under s 72(1) and QBSA could not give it directions under s 72. It is unnecessary to express a view in this case as to the correctness of the narrow construction of "building work" in s 42(2)(b) taken in *Puerto Galera*. That is because, despite the similarity in language in s 42(2)(b) and s 72(11), I do not consider that the construction of "building work" in s 42 informs the construction of "building work" in s 72. Section 72 has a very different purpose from s 42 which prohibits persons from carrying out certain building work without a licence. By contrast, s 72 ensures that those who have carried out building work which is defective or incomplete can, at the discretion of the QBSA (see s 72(2) and (14)), be required to rectify it. So much was recognised by Pincus JA, with whom Thomas JA agreed, in *Baulderstone Hornibrook Pty Ltd v Beneficial Finance Corporation Limited*.[16]

[13] In interpreting a provision of an Act, the interpretation that will best achieve the purpose of the Act is preferred: s 14A *Acts Interpretation Act* 1954 (Qld). As I have noted, the work McNab Constructions performed for the principal under their contract was not "building work" as defined in the sch 2 dictionary of the QBSA Act before the 2007 amendments. But that definition was specifically and unequivocally widened by the plain language of s 72(5)(c) and (d) and s 72(11). The terms of s 72 should be construed according to their ordinary meaning, at least where, as here, that construction appears sensible and entirely consistent with the objects of the QBSA Act,[17] the clearest statement of legislative intention and purpose. Despite the use of "and" at the end of s 72(11)(a), I consider s 72(11)(b) operates independently of s 72(11)(a). If a person comes within either s 72(11)(a) or s 72(11)(b), the person is carrying out building work for the purposes of s 72(5)(c) and (d). This is self-evident from the format of s 72(11). In my opinion, the work carried out by McNab Constructions under its contract with the principal was "building work" within the terms of s 72(5)(d) as explained in s 72(11) and therefore "building work" under s 72(1).

[14] The construction of s 72 which I favour, although much broader than the construction of "building work" adopted in respect of the comparably worded s 42(2)(b) in *Puerto Galera*, does not result in an impossibly wide definition of "building work" in s 72. The broadened meaning of "building work" which I consider is required by the unambiguous terms of s 72(11) applies only for the purposes of s 72(5)(c) and (d). It is therefore necessary that it only applies to the QBSA's power under s 72 in respect of work carried out by building contractors (s 72(5)(c)) or for profit or reward (s 72(5)(d)). Further, under s 72(11)(b) the services there referred to must be "for the work". This phrase requires that there is some real and substantial connection between the carrying out of the building work of the type defined in the dictionary to sch 2 of the QBSA Act, and the services provided under s 72(11)(b).

[15] In my opinion, it is unnecessary to resort to the explanatory notes to the 2007 Bill amending s 72[18] to construe s 72 prior to its 2007 amendment. That is because the ordinary meaning of the terms of s 72 was not ambiguous, obscure or manifestly absurd: see s 14B(1)(a) and (b) *Acts Interpretation Act* 1954 (Qld). Further, explanatory notes to legislation post-dating the enactment of a provision being construed are not normally in that category of extrinsic material considered helpful

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16 (1999) ANZ ConvR 634; [1998] QCA 351, [13].

17 See QBSA Act, s 3.

18 See Queensland Building Services Authority and Other Legislation Amendment Bill 2007 (Qld).

in construing an earlier provision: see s 14B(3) *Acts Interpretation Act*. But if the explanatory notes to the 2007 Bill amending s 72 are considered in construing s 72 prior to its 2007 amendment, they do provide support for the construction I have taken. Under the heading "Reason for the Bill", the explanatory notes include the following statement: "The fine tuning of other provisions [of the QBSA Act] will clarify the original intent of the legislation". And under the heading "Review of QBSA Act and DBC Act[19]" the explanatory notes include the statement: "… amendments are also necessary to better articulate and provide guidance to building contractors, nominees, construction managers, owner-builders and consumers as to their rights and responsibilities". These aspects of the explanatory notes suggest that the legislative intent in the 2007 amendments was to clarify the already existing position pursuant to s 72, not to create a new and previously non-existent category of persons who might be subject to directions to rectify under the QBSA Act.

[16] For these reasons, and for the reasons of Holmes JA with which I agree, QBSA was able to give all 15 directions to McNab Constructions to rectify building work in respect of the construction of the apartments under s 72 QBSA Act as it stood before the 2007 amendments. This conclusion disposes of QBSA's cross appeal and McNab Construction's appeal. Of course, the merits of McNab Construction's review applications before QCAT remain to be determined.

[17] I propose the following orders:

1. The application for leave to appeal and the application to cross-appeal are granted.

2. The appeal is dismissed and the cross appeal allowed.

3. The orders of the District Court are set aside.

4. The matter is remitted to the Queensland Civil and Administrative Tribunal for hearing in accordance with these reasons.

5. The appellant is to pay the respondent cross appellant's costs of the appeal and cross-appeal and of the District Court proceeding.

[18] **HOLMES JA**: I adopt with gratitude Chesterman JA's setting out of the subject matter of this appeal and cross-appeal and the relevant statutory provisions. With respect, however, I have come to the conclusion that the respondent's cross-appeal should succeed on the ground that the applicant was a person who carried out building work within the meaning of s 72 of the *Queensland Building Services Authority Act* 1991 (Qld) as it stood when the building contract was entered, having, for reward, provided services for the work which fell within the compass of s 72(11)(b).

[19] As Chesterman JA explains, having analysed the terms of the contract, the services provided by the applicant fit the description of "administration services, management services or supervisory services" in s 72(11)(b) of the Act; but the issue is whether those services were provided "for the work". His Honour has concluded, by application of the reasoning in *Puerto Galera Pty Ltd v JM Kelly (Project Builders) Pty Ltd*,[20] that they were not: that s 72(11)(b) applies only where

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19 *Domestic Building Contracts Act* 2000 (Qld).

20 [2008] QSC 356.

the relevant services are provided by someone who is himself or herself erecting or designing the building. His Honour's application of the *Puerto Galera* reasoning is based on the premise that s 72 is not relevantly distinguishable from s 42 of the Act, which was under consideration in that case.

[20] With respect, I disagree with that proposition. As the respondent pointed out, the provisions have very different purposes. Section 42 is concerned with the consequences of performing building work unlicensed, s 72 with rectification of defects by persons licensed or unlicensed. The ambit of the offence provision in s 42(1) (which makes it an offence for an unlicensed person to carry out building work) depends directly on the width given to the expression "carry out building work". Section 72 contains no equivalent offence turning on whether the individual carries on building work. Concerned with rectification of building work, the only offence it creates is one of non-compliance with a direction to rectify.[21] There is not the direct relation identified in *Puerto Galera*[22] between the construction given to "carry out building work" and the criminalisation of conduct.

[21] And, too, under s 72 a person who is not a licensed contractor or building contractor can be caught by the section only if he or she carried out the building work "for profit or reward". There is no such qualification in s 42. Accordingly, the concern that the helpful bystander who advises of a defect (assuming such advice constituted providing "advisory services") would commit an offence does not apply in relation to s 72. The other example given in *Puerto Galera,* of a bank paying a cheque drawn to satisfy a builder's claim might be in a different class, because that is work done for a fee. Even in that case there is, I think, still a question about whether that act could amount to provision of administration or management services and whether it could be said to be "for the work", in the sense of having any real connection with it.

[22] In *Puerto Galera*, Chesterman JA (then Chesterman J) explained that the narrow construction he adopted of s 42(2)(b) did not render the subsection inutile, because it eliminated the prospect of an unlicensed builder, disentitled to payment for erection of the building, seeking instead to claim his services in advising, supervising, managing or administering on the basis that they did not constitute building work. The applicant sought to argue in support of its similarly narrow construction of s 72(11)(b) that the subsection served to extend the concept of building work in relation to which a rectification direction could be given under s 72(1). Otherwise, it would not be possible to direct the rectification of work where the necessary rectification might consist of supervision, management, administration or advice. I do not think, however, that the argument holds water. The power of the authority in s 72(1) is to direct rectification of the building work, whatever that may entail. There is no warrant for supposing some limitation as to the activities involved in rectification which would require or make useful the reading of s 72(11)(b) for which the applicant contends.

[23] To limit the class of persons providing advisory, administration, management or supervisory services in s 72(11)(b) to those who are also erecting or designing the building would, in my respectful view, render that sub-section otiose. Since a person erecting or designing the building is by definition[23] a person carrying out

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21 Section 72(10).

22 At [50].

23 The definition of "building work" in sch 2 to the Act includes "erection or construction of a building".

building work, the fact that he or she also provided one or more of the services described in s 72(11)(b) would add nothing. The sub-section should be given its literal meaning, without that implied restriction.

[24] Section 72(11)(b) (in its original form) does not capture all those who provide advisory services, administration services, management services or supervisory services to builders. It is limited to those who provide such services "for the [building] work". That connection must be established before the service provider is liable to a direction to rectify. It is not, for the purposes of this case, necessary to attempt to describe in what proportions and with what regularity a person would have to perform advisory, administrative, management or supervisory work before he or she could be said to "[provide] … services" of the relevant kind, or how immediate the connection between those services and the building work must be. It is sufficient to say that the work here was the provision over some two years of supervisory, management and administration activities performed directly for the purpose of having the building constructed.

[25] It is relevant to note that one of the objects of the Act is "to provide remedies for defective building work".[24] It seems to me counter to that object to limit the class of persons to whom a rectification direction may be given to those erecting or designing the building. I agree with the respondent's submission that the answer to the proposition that the wider construction might cause hardship lies in s 72(2), which requires the Authority to take into account all reasonably relevant circumstances, and s 72(14), which absolves it from giving a direction if it is satisfied that in the circumstances it would be unfair. Where its discretion is exercised unfavourably, the person affected has, of course, rights of review.

[26] On the view I have taken, s 72(11)(b) is not sufficiently ambiguous to warrant resort to extrinsic materials to aid in its interpretation. But I should add that in my respectful view, the amendments made to s 72 by the *Queensland Building Services Authority and Other Legislation Amendment Act* 2007 do not compel the conclusion that construction managers were not previously within its compass. The sub-paragraphs added to s 72(5) by the amending Act were:

> …
>
> (f) a construction manager engaged under a construction management contract to provide building work services for the building work; and
> (g) a principal who was the contracting party for a building contract for building work for a building, or part of a building, intended for sale if…
> [certain conditions follow]
> (h) a person who was the nominee for a licensed contractor that is a company, for work carried out by the company while the person was the company's nominee.

The explanatory memorandum for the relevant Bill makes it clear that the purpose of the amendment was not to add to the existing classes of persons regarded as carrying out building work but rather to elaborate on the circumstances in which the three classes dealt with in those sub-paragraphs come within the embrace of s 72:

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[24] Section 3(b).

> "Clause 51 amends section 72 (*Power to require rectification of building work*) to expressly state the circumstances when a construction manager, a developer or a nominee is taken to have carried out building work for section 72(1)."

[27] I would give leave for the appeal and the cross-appeal, dismiss the appeal and allow the cross-appeal. I would set aside the orders of the District Court and remit the proceeding to the Queensland Civil and Administrative Tribunal for hearing in accordance with these reasons. The respondent should have its costs of the appeal and cross-appeal and of the District Court proceeding.

[28] **CHESTERMAN JA**: By a contract dated 22 December 2004 ("the contract") the applicant agreed with Advanced Traders Pty Ltd ("the principal") to manage the construction of a residential apartment building at Skyring Terrace Teneriffe. The actual construction of the building, and the fitting out and finishing of the apartments were performed by a number of separate trade contractors each of whom was engaged by the principal. The building and its apartments were accepted as practically complete on 30 November 2006. Following disagreements between the applicant and the principal the contract between them was terminated on or about 29 November 2007.

[29] On 22 August 2007 the Body Corporate for the development complained to the respondent ("QBSA") of a defect in the common property. On 3 October 2007 the QBSA issued a direction to the applicant to rectify the defect. Subsequently a number of apartment owners complained of defective construction or finishes. Between 21 December 2007 and 15 January 2009 the respondent served on the applicant directions calling on it to rectify specified defects in each of the 14 apartments.

[30] The *Queensland Building Services Authority Act* 1991 ("the Act") as it was when the applicant made its contract with the principal, and when the first rectification direction was given, provided:

> "**72 Power to require rectification of building work**
>
> (1) If the authority is of the opinion that building work is defective or incomplete, the authority may direct the person who carried out the building work to rectify the building work within the period stated in the direction.
>
> In deciding whether to give a direction … the authority may take into consideration all the circumstances it considers … relevant … .
>
> …
>
> (5) For subsection (1), the person who carried out the building work is taken to include –
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> …
>
> (c) a building contractor by whom the building work was carried out; and
>
> (d) a person who, for profit or reward, carried out the building work;
>
> …

(10) A person who fails to rectify building work as required by a direction under this section is guilty of an offence.

Maximum penalty – 80 penalty units.

(11) For the purposes of subsection (5)(c) and (d) –

(a) a person carries out building work whether the person –

(i) carries it out personally; or
(ii) directly or indirectly causes it to be carried out; and

(b) a person is taken to carry out building work if the person provides advisory services, administration services, management services or supervisory services for the work.

…

(14) The authority is not required to give a direction under this section to a person who carried out building work … if the authority is satisfied that, in the circumstances, it would be unfair to the person to give the direction."

"The authority" is the QBSA.

[31] Schedule 2 to the Act contains the Dictionary. "Building work" was defined as meaning:

"(a) the erection or construction of a building; or

(b) the renovation, alteration, extension, improvement or repair of a building; or

(c) the provision of lighting, heating, ventilation, airconditioning, water supply, sewerage or drainage in connection with a building; or

(e) any site work (including the construction of retaining structures) relating to work of a kind referred to above; or

(f) the preparation of plans or specifications for the performance of building work; or

(fa) contract administration carried out by a person in relation to the construction of a building designed by the person; or

…"

[32] Section 72(11)(b) is the provision of particular relevance to the appeal. The Dictionary did not define "advisory services", "administration services", "management services", or "supervisory services". It did define "contract administration" in terms which include much of what the applicant was to perform under the contract. However, contract administration was only building work, as defined in the Dictionary, if carried out by a person in relation to the construction of a building designed by the person. The applicant did not design the development at Skyring Terrace.

[33] The Act was amended by the *Queensland Building Services Authority and Other Legislation Amendment Act* 2007 with effect from 21 December 2007. The date is significant. There was an important change to s 72(5). Paragraph (f) was added so that the subsection read:

> "For subsection (1), the person who carried out the building work is taken to include –
>
> …
>
> (f) a construction manager engaged under a construction management contract to provide building work services for the building work; … ."

[34] The Dictionary in schedule 2 was also amended to include new definitions. "Carry out", for building work was defined to mean:

> "(a) carry out the work personally;
> (b) directly or indirectly cause the work to be carried out;
> (c) provide building work services for the work."

A "construction management contract" was defined to mean:

> "… a contract under which a principal engages a construction manager to provide building work services for building work carried out for the principal under construction management trade contracts."

"Building work services" were in turn defined to mean:

> "… 1 or more of the following for building work –
>
> (a) administration services;
> (b) advisory services;
> (c) management services;
> (d) supervisory services."

[35] "Administration services" as newly defined included:

> "(a) preparing tender documentation and calling and selecting tenders;
> (b) arranging and conducting on-site meetings and inspections;
> (c) arranging payments of subcontractors;
> (d) arranging for certificates … to be issued;
> (e) administration for the work usually carried out by –
> (i) a construction manager; or
> (ii) a project manager … ;
> (f) other administration for the work usually carried out by a licensed contractor … ."

[36] Advisory services were also given a particular meaning but are not relevant to the appeal. "Management services" were defined to include:

> "(a) coordinating the scheduling of the work by building contractors including as agent for another person; and
> (b) management for the work usually carried out by -
> (i) a construction manager; …
> (c) other management for the work usually carried out by a licensed contractor … ."

[37] "Supervisory services" were defined to include:

> "(a) the development, implementation and management of a system for the supervision of the work; and
> (b) the coordination or management of persons undertaking the supervision of the work; and
> (c) the personal supervision of the work; and
> (d) any other supervision of building work under this Act."

[38] After these amendments a construction manager, performing a construction management contract, and who was thereby providing building work services "for the work", was carrying out building work. These concepts were absent from the Act as it stood prior to 21 December 2007.

[39] Included in the amendments were sections imposing new obligations on construction mangers so as to ensure that building work was properly supervised. Section 43B provided:

> "(1) This section applies if a construction manager provides building work services … under a construction management contract for the carrying out of building work.
>
> (2) For a construction manager that is a company, the company … must … ensure that building work carried out by licensed contractors … is personally supervised by –
>
> (a) the company's nominee; or
> (b) an officer or employee … who holds 1 of the following licences … –
> (i) a nominee supervisor's licence;
> (ii) a site supervisor's licence; …
> (iii) …
> (iv) …
>
> (3) For a construction manager that is an individual, the construction manager must ensure that building work carried out by license contractors … is personally supervised by –
> (a) the construction manager; or
> (b) an employee … who holds 1 of the following licences … -
> (i) a nominee supervisor's licence;
> (ii) a site supervisor's licence;
> … ."

[40] Section 43C applies if:

> "a construction manager provides building work services … under a construction management contract for the carrying out of building work."

The section goes on to provide:

> "(2) For a construction manager that is a company, the company … must … ensure that the building work carried out by licensed contractors … is adequately supervised."

[41] Two further sections, inserted by the amending Act, should be noted. Section 30A provided for the issue of a nominee supervisor's licence. This authorises an

individual to provide supervisory services for building work and to perform the functions required of a nominee under the Act. Section 30B allows for the issue of a site supervisor's licence, authorising the licensee to personally supervise building work.

[42] The amendments also effected a change to s 42. Subsection 2 was omitted. It had provided, relevantly:

> "(2) For the purposes of this section –
>
> …
>
> (b) a person is taken to carry out building work if that person provides advisory services, administration services, management services or supervisory services in relation to the building work … ."

[16] Section 42(1) of the Act prohibits any person from carrying out building work "unless that person holds a contractor's licence of the appropriate class … ." Until the Act was amended in 2007 there was no class of licence appropriate to advisory, administration, management or supervisory services. The prohibition contained in s 42(1), after the Act was amended to provide *inter alia* for the issue of a supervisor's licence, had the consequence that a construction manager performing a construction management contract had to engage a licensed supervisor.

[43] Between 31 October 2007 and 3 February 2009 the applicant challenged each of QBSA's decisions to issue the directions by 15 review applications filed in the Commercial and Consumer Tribunal ("Tribunal", whose abolition and replacement by the Queensland Commercial and Administrative Tribunal may be ignored for the purposes of the appeal). On 20 March 2009 the applicant filed a further application in the Tribunal seeking the consolidation of the 15 proceedings and an order, in the nature of summary judgment, setting aside all decisions to issue the directions on a point of law, that the applicant was not a person to whom QBSA could address such directions, because it had not carried out building work. The summary determination, if made, would have avoided rehearing the merits of the decisions.

[44] By s 86 of the Act, the Tribunal may review the following decisions of QBSA:

> "(e) a decision to direct … rectification … of … work … ."

By s 104 of the *Commercial and Consumer Tribunal Act* 2003 the Tribunal could:

> "(1) …
>
> (a) confirm the decision being reviewed; or
>
> (b) set aside the decision and substitute another decision; or
>
> (c) set aside the decision and return the matter to the … agency that made the decision … .
>
> (2) In substituting another decision, the tribunal has the same powers as the … agency that originally made the decision."

[45] On 26 August 2009 the Tribunal made an order consolidating the proceedings but decided the application for summary relief in favour of QBSA. The result was that the 15 applications would proceed to a full hearing of the merits.

[46] An appeal by the applicant to the District Court succeeded with respect to the first direction issued on 3 October 2007 but failed with respect to those issued on and after 21 December 2007. The primary judge found that:

> "as a matter of law, under the … Act as it existed at the time of the first direction to rectify, (QBSA) did not have power to issue a direction to rectify the relevant building work to the applicant … ."

His Honour however thought that after the amendments there was such a power.

[47] On 24 March 2010 the learned judge published reasons but made no orders. On 7 April 2010, having received further written submissions, his Honour:

(a) Gave the applicant leave to appeal and gave QBSA leave to file a Notice of Contention;

(c) Confirmed the Tribunal's decision to dismiss the applicant's application for summary determination filed 20 March 2009;

(d) Remitted proceedings to the Tribunal for further hearing "in accordance with the law determined in this appeal";

(e) Ordered QBSA to pay 25 per cent of the applicant's costs of the appeal;

(f) Remitted the question of costs of an interlocutory application to the Tribunal.

[48] The applicant seeks leave to appeal from those orders pursuant to s 118(3) of the *District Court of Queensland Act* 1967. QBSA similarly seeks leave to cross-appeal from the judgment that would see the first direction set aside. Each accepts that leave should be given to the other. The point raised by the proposed appeal and cross-appeal will determine the effect of the December 2007 amendments to s 72 of the Act and, more particularly, their effect on the powers of QBSA to direct rectification of defective building work. The point is of general importance and the controversy should be settled authoritatively. It is an appropriate case in which to grant leave to appeal to both the applicant and QBSA.

[49] Should it succeed the applicant asks that the orders made in the District Court on 7 April 2010 be set aside and that the following orders be made instead:

(a) The decision of the Tribunal made on 26 August 2009 dismissing the applicant's application of 20 March 2009 be set aside;

(b) The decisions of QBSA to issue the directions to rectify be set aside;

(c) QBSA pay the applicant's costs of the proceedings in the Tribunal and in the District Court.

[50] By its cross-appeal QBSA seeks an order that the applicant's application for leave to appeal to the District Court, or the appeal to that court, be dismissed with costs, thereby leaving the Tribunal's decision of 26 August 2009 in force.

[51] The contract between the applicant and the principal was:

"for the construction management of the W4 Apartments Project at Lot 8 Skyring Terrace, Teneriffe … as detailed in the documents comprising the Contract."

In those documents the applicant was designated "Construction Manager". One of them, Annexure Part B, set out a "task list" which identified whether the principal or the applicant had responsibility for each specified task. Relevantly the following tasks were assigned to the applicant as construction manager:

"G **QUALITY ASSURANCE**

1. Develop a quality assurance strategy for the Principal's approval
2. Manage quality assurance issues to the approved strategy
3. Advise on all matters relating to quality assurance …
4. Ensure that the contractors' quality assurance policies and procedures are appropriate
5. Co-ordinate contractors' and site procedures so that any quality assurance matters on the project may be fully monitored and influenced

H **SITE MANAGEMENT**

…

9. Secure the prompt remedying of all defects by contractors in accordance with their contracts
10. Secure the prompt remedying of all defects discovered at practical completion of the project and at the end of the relevant defects liability period

…

J **CONSTRUCTION PHASE**

…

6. Management systems for quality, health, safety and environment
7. Compliance of work
8. Contract administration

…

10. Manage contractors' performance

…

23. Progressive work inspections and tests

…

33. Make regular visits to the work places of the contractors and suppliers to inspect quality, progress and delivery in relation to the detailed construction program

…

35. Progressive completion of the works:

…

(d) Quality

...

K **CONSTRUCTION MONITORING AND CONTROL**

1. Manage construction program

…

3. Establish and implement construction monitoring and reporting system
4. Liaise with Principal on progress and quality".

[52] The principal agreed to pay the applicant $1,650,000 for performing the contract together with the cost of what were called "Preliminaries" which appeared to be expenses incurred in establishing the building site. The agreed figure for Preliminaries was $3,888,332.

[53] By Clause 2.1 of the contract the applicant agreed to:

> "carry out and complete *the Services* free from any defect or omission in accordance with the *Contract* and *directions* authorised by the *Contract*."

[54] "Services" were defined to mean the tasks identified in Annexure Part B. The contract also defined "construction manager" to mean "the person bound to carry out and complete *the Services*" i.e. the applicant. "Contractor" was defined to mean a consultant or trade contractor "of the *Principal* for any part of the *project*."

[55] The contract incorporated the Australian Standard Construction Management General Conditions, in two editions. Other relevant clauses in the Standard were:

> "**7.2 Engagement**
>
> Where *the Services* require the *Construction Manager* to engage a *contractor* on behalf of the *Principal*, the *Construction Manager* shall disclose that fact. The *Principal* shall meet all its obligations to the *contractors* so engaged.
>
> If the *Principal* has included an invitation to tender a list of … contractors … the *Construction Manager* shall, as agent for the *Principal* contract that particular part of the *project* to one of those contractors and thereupon give the *Principal* written notice of that *contractor's* name.
>
> If no contractor on the *Principal's* list will contract to carry out the particular part of the *project* the *Construction Manager* shall provide a list for the written approval of the *Principal*.
>
> **7.3 Project account**
>
> Where *the Services* require the *Construction Manager* to make payments to *contractors* on behalf of the *Principal*, the *Principal* shall maintain a *project account* with sufficient funds from which the *Construction Manager* shall pay *project* debts when due and payable.
>
> **7.4 Contract administration**
>
> Except where the *Contract* otherwise provides, where *the Services* include contract administration on behalf of the *Principal*, the *Construction Manager* acts as the *Principal's* agent to the exclusion of the *Principal* and not as superintendent.
>
> …

17.1 Construction Manager's representative

The *Construction Manager* shall manage *the Services* personally or by a competent representative. …

20 Construction Manager

The *Principal* shall ensure that:

a) at all times there is a *Construction Manager* … (who) fulfils all aspects of its roles and functions; … .

Except where the *Contract* otherwise provides, the *Construction Manager*:

a) acts as the *Principal's* agent in the roles and functions to the exclusion of the *Principal*; and … .

…

29.3 Defective Work

If the *Construction Manager* becomes aware of *work* done … by the *Trade Contractor* which does not comply with the *Contract*, the *Construction Manager* shall as soon as practicable give the *Trade Contractor* written details thereof. If the subject *work* has not been rectified, the *Construction Manager* may direct the *Trade Contractor* to do any one or more of the following (including times for commencement and completion):

…

If:

a) the *Trade Contractor* fails to comply with such a *direction*; and

b) that failure has not been made good within 8 days after the *Trade Contractor* receives written notice from the *Construction Manager* that the *Principal* intends to have the subject *work* rectified by others,

the *Principal* may have that *work* so rectified and the *Construction Manager* shall certify the cost incurred as moneys due from the *Trade Contractor* to the *Principal*.

…

30.1 Tests

At any time before the expiry of the last *defects liability period*, the *Construction Manager* may direct that any (work under contract) be tested. … .

…

35 Defects liability

…

During the *defects liability period*, the *Construction Manager* may give the *Trade Contractor* a *direction* to rectify a *defect* which:

> a) shall identify the *defect* and the date for completion of its rectification; and
> b) may state a date for commencement of the rectification …
>
> If the rectification is not commenced or completed by the stated dates, the *Principal* may have the rectification carried out by others but without prejudice to any other rights and remedies the *Principal* may have. The cost thereby incurred shall be certified by the *Construction Manager* as moneys due and payable to the *Principal*."

[56] According to the engineer who appears to have been the applicant's representative for the project it involved the renovation of an existing wool store and the construction of a new building comprising two basement levels and eight suspended levels. The principal engaged its own consultants to design the project. They included architects; designers; structural, mechanical, electrical and acoustic engineers; a building certifier, and a quantity surveyor. The principal also engaged a project manager to give "directions and approvals for the construction of the project". The principal entered into contracts with all the trade contractors who carried out the actual construction work.

[57] It is apparent from those terms of the contract which I have set out that the applicant did not erect or construct the apartments, or prepare plans or specification for the construction. Its role was that of a construction manager as that term came to be defined in the 2007 amendments to the Act. It may, I think, be accepted that the services it provided could properly be regarded as administration services, or management services, or supervisory services, as those terms appeared in s 72(11)(b) of the Act, before the 2007 amendments. The services also met the definition of administration services, management services, and supervisory services as those terms appear in the dictionary after December 2007. The applicant's role as described in the contract was to coordinate aspects of construction, monitor its progress, check the quality of construction, administer the individual trade contracts and report on these matters to the principal. Administration of trade contracts included paying the contractors with monies furnished by the principal for that purpose.

[58] The contract conferred on the applicant only a limited capacity to deal with defective work. Clauses 29.3 and 35 describe the limits of the applicant's powers. It could do no more than point out a defect to the trade contractor, request its rectification and report to the principal. It was given no power of sanction in the event a recalcitrant contractor refused to make its work good. The power rested with the principal who could, no doubt, withhold monies or have defective work repaired by others, and set off the cost of doing so against monies it owed the contractor. It could sue the contractor for damages.

[59] It is convenient to deal firstly with the subject matter of the cross-appeal, which is the legal efficacy of the first direction given by QBSA prior to the 2007 amendments. The Tribunal had ruled that QBSA could lawfully give the applicant a direction to repair the common property. The learned primary judge held the pre-amendment terms of the Act did not give QBSA that power.

[60] QBSA could not direct the applicant to rectify the defect to the common property unless it had "carried out the building work", within the meaning of that phrase in the Act as it was in October 2007, prior to the amendments. It is apparent that unless the applicant came within the expanded scope of the concept described in s 72(5)(c) or s 72(5)(d) and s 72(11), it will not have carried out such work. Only s 72(11)(b) is a possible basis for concluding the applicant may be taken to have "carried out building work", by providing "advisory services, administration services, management services or supervisory services for the work".

[61] Certainly the contract obliged the applicant to give advice of various kinds to the principal, to administer certain parts of the separate contracts by which the building was to be erected, to manage certain aspects of the building work and supervise others. The question is whether s 72(11) was satisfied. It will have been only if the applicant provided the relevant services "for the work".

[62] QBSA submits that the:

> "contract obliged the applicant to perform … one or more of the categories of advisory services, administration services, management services or supervisory services for the work comprising the construction of the apartment project",

and then argues that "the plain words" of s 72 should be given their ordinary meaning and not "read down". It is, I think, debatable whether the meaning of s 72(11)(b) is plain but I accept that the section, whatever it means when properly construed, must be given effect.

[63] The subsection requires a connection between the services described and "the work". This is obvious from the requirement that the services must be provided "for the work". The subsection does not give any indication of what is required to establish the connection.

[64] A very similar problem arose in *Puerto Galera Pty Ltd v JM Kelly* (*Project Builders) Pty Ltd* [2008] QSC 356. The case concerned s 42 of the Act, not s 72, but the two provisions are relevantly indistinguishable. Section 42 provided:

> "(1) A person must not carry out … building work unless that person holds a contractor's licence of the appropriate class … .
>
> (2) For the purposes of this section –
>
> (a) …
>
> (b) a person is taken to carry out building work if that person provides advisory services, administration services, management services or supervisory services in relation to the building work; … ."

The only difference between the two sections is that the former speaks of the services being "in relation to the building work" and s 72(11)(b) speaks of services "for" that work. The difference is, I think, incidental and insignificant.

[65] The question in *Puerto Galera* was whether a superintendent appointed under a building contract "carried out building work" and so required a licence. In concluding that he did not carry out such work I said:

"[43] The essence of 'building work' as defined in the dictionary to the Act is the erection of a structure or part of a structure, and designing a structure for construction and, in connection therewith, preparing tender documents and building contracts. The rather tedious recital of the superintendent's contractual role which I have essayed shows that Mr Jolly did not build the apartment block, or part of it, or design it.

[44] It is only if one has regard to the extended meaning of 'building work' given by s 42(2)(a) and (b) that one can consider whether the superintendent 'carried on building work'.

…

[50] The terms are themselves nebulous and the vagueness of the concept underlying s 42(2)(b) is increased by reason of the fact that each of the four types of service must be provided 'in relation to the work' before providing the service will amount to carrying out building work. If taken to literal extreme the definition, coupled with the prohibition contained in s 42(1), criminalises conduct that would ordinarily be regarded as beneficial and which could not, apart from statute, sensibly be thought to be building. Suppose an observant pedestrian, passing a building site, notices a defect in some part of the structure which, if left unattended, might lead to collapse, damage to property and perhaps loss of life. If the passerby, being a responsible citizen, should seek out the foreman and advise him of the defect, has he not provided advice ('an advisory service') in relation to the construction ('the building work')? Likewise a bank paying a cheque drawn to satisfy a claim by a builder is providing an administration or management service in relation to building work.

…

[52] It is, I think, significant that the extended prohibition contained in s 42(2)(b) extends only to providing advisory etc. services to *the* building work. The definite article limits building work in relation to which the provision of services is prohibited. The subsection does not prohibit the provision of the stated services to building work generally, or any building work. It is only in relation to *the* building work that the specified services may not be provided.

[53] What then is meant by 'the building work'? It can, I think, be only the building work which the person referred to in s 42(1) is carrying out.

[54] So understood s 42(2)(b) extends the range of activities which a builder may not perform without a licence. The subsection applies to cases in which a person is erecting or designing a structure and in relation to that work provides

> advisory services, administration services, management services or supervisory services. The subsection does not apply to the provision of such services by someone who is not himself erecting or designing the structure (or causing it to be erected or designed)."

[66] The case therefore decided that advisory etc., services are provided "for the work" if they were ancillary to building work (construction or designing) and were provided by the person during that building work. This view of the subsection limits its operation but QBSA's reading of the provision operates so widely as to make persons with a peripheral connection to building work liable for making good the defects of others. The submission ignores the requirement that the services be provided "for the work". The reasoning in *Puerto Galera* is equally apposite to the present case.

[67] The language chosen by Parliament for the two sections is relevantly indistinguishable. It would be odd if the sections had different meanings. The respondent did not challenge the correctness of the decision in *Puerto Galera*. Instead it submitted that the decision was not relevant to s 72 for two reasons.

[68] Firstly it is said that s 72:

> "is not concerned with prohibiting persons from carrying out certain work without a licence … (but it) is directed to identifying persons who may be responsible … for the defective building work and who … might be directed to rectify the work. It is not remarkable that the section would be drafted in wide terms."

The observation postulates a distinction without a difference. It is true that it is not surprising that s 72 should be "drafted in wide terms" to identify persons who may be directed to make good defective work, but the observation is equally applicable to a designation of building work which unlicensed persons are prohibited from carrying out. What the criticism ignores is the striking similarity of the language used in both sections. Moreover the submission begs the question of who is "responsible" for the defective work. To answer the question one must turn to the words of s 72(11)(b), which includes the requirement, expressed in the subsection, that before building work is taken to have been carried out the services mentioned must have been performed "for the work". This was the point stressed in *Puerto Galera.*

[69] The second reason advanced is what was said by Pincus JA in *Baulderstone Hornibrook Pty Ltd v Beneficial Finance Corp Ltd* [1998] QCA 430 at [13]:

> "… s 42 is about a licensing requirement and it would be odd to read down s 72 because of any supposed difficulty in applying s 42, which deals with quite a different subject. Secondly, the operation of s 72 in the present case depends on the proposition that the mortgagee carried out building work for profit or reward, because it directly or indirectly caused such work to be carried out; these concepts come from s 72(2)(d) and s 72(8)(a) which have no counterpart in, nor any relevance to, the construction of s 42."

The s 72(2)(d) referred to is now s 72(5)(d) and s 72(8)(a) is s 72(11)(a).

[70] The case concerned a mortgagee who took possession of mortgaged property, a partly built home unit development, and had it completed by contractors whom it engaged to carry out the work. The mortgagee clearly fell within the ambit of s 75(5)(d) and (11)(a), one who caused building work to be carried out for profit or reward. The case has nothing to say about the meaning of s 72(11)(b). While, as an abstract proposition, it is no doubt right to say that one section of the Act (s 72) should not be read down because of a "difficulty" in applying another section (s 42), the generality of the proposition is of no assistance in determining what a particular phrase, common to both sections, means.

[71] The decision in *Puerto Galera* emphasised the need for a rational connection between the provision of services and building work as defined in the dictionary. If the need for the connection is ignored or loosened the results can be odd, not to say unjust. In the context of s 42 the oddness was explained in paragraph [50] of *Puerto Galera*. The observation, though not perhaps the examples, apply with equal pertinence to s 72. The concept of advisory, administration, management or supervisory services is extremely wide. On QBSA's submission a person performing any of those services in connection with building work can be made liable for very extensive remedial work it did not undertake. Someone engaged to perform administrative or managerial services, such as checking bills of quantities or suppliers' invoices for internal accuracy and preparing cheques or making other arrangements to pay suppliers or contractors, will, on the submission come within s 72(11)(b). So will a company engaged to hire employees for the builder or to attend to the payment of wages. QBSA's submission is that such people are liable to make good the work of others, perhaps at a cost of many millions of dollars.

[72] QBSA's last submission is that there is nothing unfair in its wide construction. It submits that if a person comes within the ambit of those providing advisory etc., services "that would only mean that a direction to rectify might be made, not that one necessarily would be made." Reference is made to s 72(14) which confers a discretion on QBSA to issue rectification directions and requires it to consider the justice of giving such a direction.

[73] The submission misses the point. It is an argument that the legislation should be read to confer wide powers on QBSA because it can be trusted not to abuse them. Even if the assertion is well founded it is beside the point. What is in question is not how a power might be exercised, but whether the power exists. It was not relevant to the appeal to know why QBSA should direct the applicant to rectify defective work to the common property and a number of units rather than the trade contractors who performed the defective work, or the principal who profited from their work and had contractual remedies against them.

[74] The primary judge gave full consideration to the arguments addressed to him and concluded that the reasoning in *Puerto Galera* was equally applicable to s 72(11)(b). His Honour therefore determined that the applicant was not providing relevant services "for the work", it not being the person who built or brought about the building. That determination was, in my opinion, correct.

[75] As well as the applicability of the reasoning in *Puerto Galera* there is, I think, another reason pointing to the same conclusion. It is that the amendments which I have set out at some length, including the new definitions of carrying out building work, construction management contracts, and the new obligations on construction

managers found in s 43B and s 43C, as well as providing for the issue of supervisor's licences, were all unnecessary and made no change to the operation of the Act, if s 72(11)(b) meant that someone (other than the builder) who provided advisory, administration, management or supervisory services, was carrying out "the building work".

[76] One might ask rhetorically what purpose the amendments served if the provider of such services who was not the builder was, by virtue of s 72(11)(b), a person carrying out building work. QBSA submitted that was the result of the subsection. If the submission be right the addition of s 72(5)(f) made no change to the operation of the Act, and the amendment served no purpose.

[77] On their own terms the amendments created a new concept, that of a construction management contract, which is performed by a construction manager who is, by s 72(5)(f) deemed to be a person carrying out building work and therefore subject to an obligation to rectify defective work.

[78] The newly defined construction manager must, as a matter of statutory obligation, supervise the building work, the subject of the construction management contract. This obligation was newly created by the amending act. A combination of s 30A and s 30B, together with s 42(1) which prohibits a person carrying out building work unless the holder of a licence of the appropriate class, means that the supervision required by the amended Act must be performed by someone licensed for that task.

[79] The amendments work coherently. They make a construction manager who performs a construction management contract someone who, for the purposes of s 72, carries out building work. It defines what construction management is by reference to the services such a manager provides, and insists that part of its function is to supervise the actual construction by persons specifically qualified and licensed.

[80] This coherent and relatively elaborate legislative scheme was completely unnecessary if, as QBSA submits, anyone performing what might be regarded as advisory, administration, management or supervisory services ancillary to building work could be ordered to make good any defects in the construction itself. This leads to the point mentioned earlier. It is not, in my opinion, likely that s 72 was meant to impose an obligation to rectify substantial building defects on someone who had only a peripheral connection with the work by providing some of its management or administration. That consequence, which needs little imagination to appreciate how unfairly it might work on a manager or administrator, is the result for which QBSA contends.

[81] In my opinion the amendments point to the conclusion that prior to their enactment the provision of advisory etc., services by someone other than the builder did not make the service provider the person who carried out building work. For this reason, too, I would conclude that the primary judge was correct in determining that the applicant did not provide relevant services.

[82] The cross-appeal raises another point which is separate and distinct from that just discussed. QBSA argues that the primary judge should have concluded that the existence of the power to issue rectification directions to the applicant was to be decided by reference to the Act as it was when the Tribunal made its decision. At

that time the amended Act made the applicant, as a construction manager, a person who carried out building work.

[83] QBSA submits that the effect of *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 is that where a tribunal reviews an administrative decision in the manner provided for by s 86 of the Act and s 104 of the *Commercial and Consumer Tribunal Act* 2003 (Qld), it considers the decision afresh and itself makes the decision by reference to the evidentiary materials before it and by reference to the law as it is at that time. Accordingly, should the law change between the decision being reviewed and the reviewer's decision, the law as it has become is to be applied.

[84] QBSA relies for this submission upon the remarks of Mason J (with whom Barwick CJ and Stephen J agreed) in *Sperway* at 619-620:

> "… This appeal by way of rehearing involves rehearing of the cause at the date of the appeal, that is 'by trial over again on the evidence used in the Court below; but there is special power to receive further evidence'… . On such an appeal the right of the parties must be determined by reference to the circumstances as they then exist **and by reference to the law as it then exists**; the appellate court may give such judgment as ought to be given if the case at that time came before the court of first instance." (emphasis added)

[85] The submission reads too much into the judgment. What was meant appears from its context and in particular the authorities cited by his Honour for the proposition relied on. Mason J referred *inter alia* to *Da Costa v Cockburn Salvage & Trading Pty Ltd* (1970) 124 CLR 192, in which Windeyer J explained (208-9):

> "The rule … provides that all appeals shall be 'by way of rehearing'. This does not mean that the appeal is a complete rehearing as a new trial is. It means that the case is to be determined by the Full Court, its members considering for themselves the issues the trial judge had to determine and the effect of the evidence he heard as appearing in the record of the proceedings before him, but applying the law as it is when the appeal is heard not as it was when the trial occurred … ."

[86] For that rule Windeyer J cited two authorities: *Attorney-General v Birmingham Tame and Rea District Drainage Board* [1912] AC 788 and *Attorney-General v Vernazza* [1960] AC 965. In the first of those cases Lord Gorell said (802):

> "In (*Quilter v Mapleson*) an action of ejectment had been brought under a proviso of re-entry for breach of a covenant in a lease, and Lord Coleridge CJ gave judgment for the plaintiff. The defendant appealed and obtained a stay, so that the plaintiff did not get actual possession. After the decision and before the appeal was heard the Conveyancing and Law of Property Act, 1881, came into operation, under which power to relieve against a forfeiture was given, and the Court of Appeal … reversed the decision, and granted the relief sought for by the defendant, holding that on a rehearing such a judgment may be given as ought to be given if the case came at that time before the Court of first instance."

[87] Vernazza was a vexatious litigant. The Attorney-General obtained an order pursuant to an Act which gave the court power to prohibit such a litigant instituting

proceedings without leave. Vernazza appealed. Between the making of the original order and the hearing of the appeal the Act was amended to allow orders to be made prohibiting the institution or continuation of proceedings. On the hearing of the appeal the respondent, the Attorney-General, sought an order that Vernazza be prevented from continuing proceedings as well as instituting them. The further order was made.

[88] Viscount Simonds said (975):

> "By the amending Act a new power was given to the court to enable it to deal with proceedings of which it was seised. The object was both to prevent an abuse of its process and to relieve possible victims of vexatious litigation. I would respectfully doubt whether this could in any view be strictly called retrospective legislation, but, if it has this characteristic … it is of a procedural nature and … amply covered by … authority … . …
>
> … the Court of Appeal, being entitled and bound to apply the law in force at the time of the appeal, was enabled, if it thought fit, to accede to the application of the Attorney-General. … . … the Court of Appeal could and should have varied the order of the High Court by adding thereto the order that any legal proceedings instituted by the respondent … before the making of that order 'shall not be continued …'".

[89] Lord Denning said (978):

> "It is, of course, clear that in the ordinary way the Court of Appeal cannot take into account a statute which has been passed in the interval since the case was decided at first instance, because the rights of litigants are generally to be determined according to the law in force at the date of the earlier proceedings … . But it is different when the statute is retrospective either because it contains clear words to that effect, or because it deals with matters of procedure only, for then Parliament has shown an intention that the Act should operate on pending proceedings, and the Court of Appeal are entitled to give effect to this retrospective intent as well as a court of first instance, see *Quilter v Mapleson* … ."

[90] Lord Morris said (982-3):

> "… it has to be considered what order ought to have been made by the … Court if the matter had come before them on … (the date of the rehearing in the Court of Appeal). I entertain little doubt that the … Court would … have made an order in the extended terms that the law then authorised. The real substance of the matter … would have been whether it was shown that Mr Vernazza had habitually … instituted vexatious legal proceedings. If that were shown, then the extended procedural power of the court which was made available by the Act … as a remedial and protective measure ... would properly have been employed."

[91] These passages make it clear that the power of an appellate court, or a tribunal, on a rehearing to determine the appeal "by reference to the law as it then exists" is not a power to apply statutes retrospectively unless the terms of the statute require such an application, or the statute is procedural in nature. The presumption against the

retrospective application of legislation is not displaced by the circumstance that an appeal by way of rehearing occurs after a change to legislation relevant to the appeal.

[92] The primary judge rejected the proposition that the Tribunal could, or should, have determined whether the applicant was a person who carried out building work by reference to the 2007 amendments to the Act for the purposes of a direction given before the amendments. His Honour accordingly held that prior to the 2007 amendments to the Act and the insertion of s 72(5)(f) the applicant was not a person who "carried out the building work for the purposes of s 72(1)" and, as a consequence, it was not amenable to a direction to rectify defective building work issued prior to the amendments. The legislative changes were clearly not procedural. Unless, therefore, the changes were intended to operate retrospectively the primary judge's conclusion was correct.

[93] It is that question to which attention must now turn. On it hinges the result of the cross-appeal, and of the appeal.

[94] When the applicant performed the contract it did not engage in carrying out building work according to the Act as its terms then were. It had no liability under the contract to rectify defects in any building work performed by the trade contractors engaged by the principal. Its administrative role with respect to the construction of the apartment building had ended in about November 2006. Its contract had terminated about a month before the amendments came into effect.

[95] Nevertheless the primary judge found that the amendments conferred on QBSA a power to issue directions to rectify defects in trade contractors' work because, after the amendments, the applicant was a person who carried out building work within s 72(5)(f).

[96] The applicant complains that in so finding the primary judge ignored the well known presumption against the retrospective application of legislation in the absence of a plain indication in the statute that it was intended to apply retrospectively. His Honour was aware of the presumption but considered himself bound by two decisions, one of the Full Court and one of the Court of Appeal, to conclude as he did.

[97] The first case is *R v His Honour Judge Given; Ex parte Builders' Registration Board of Queensland* [1985] 2 Qd R 32 which was decided under earlier legislation, the *Builders' Registration and Home-owners' Protection Act* 1979 ("the *1979 Act*") which in turn replaced the *Builders' Registration Act* 1971 ("the *1971 Act*"). In 1974, during the currency of the *1971 Act*, Bartlett, a builder, erected flats which had many defects. In 1983 he was ordered to make good the defects by the Builders' Registration Board pursuant to s 59 of the *1979 Act* which is similar in effect to s 72 of the present Act. Given DCJ decided the section did not apply to work completed prior to the *1979 Act*.

[98] The Full Court disagreed. McPherson J (with whom Andrews SPJ and Shepherdson J agreed) said (36):

> "In deciding whether s 59 enables the Board to make an order in respect of pre-1979 building work the first step is to see whether, apart from any presumption against legislative retrospectivity, the terms of that section are capable of applying to the present case. …

> s 59(1) operated to authorize a rectification order where … four conditions … were satisfied …; (1) where the Board is of opinion (2) that building work performed by a person (3) who is or was at the time of … the … work a registered builder (4) has not been performed in a proper … manner. … it is clear that each of them is fulfilled in the case of the … work here in issue."

[99] His Honour noted that Bartlett had been registered under the 1971 Act and the registration under that Act was deemed to be registration under the *1979 Act* which repealed and replaced it. He was registered under the *1979 Act* when the order was made.

[100] McPherson J concluded (38):

> "The question to be decided is whether the power to make a rectification order under s 59(1) extends to work performed before the 1979 Act. That provision is, according to its terms, literally capable of applying … to authorize … an order. Does the interpretive presumption against retrospectivity displace that conclusion? The test … is whether from the legislation the intention appears 'with reasonable certainty' that it applies to facts or events that have already occurred 'in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to past events': *Maxwell v Murphy* (1957) 96 CLR 261, 267. The performance of the building work … is … a fact or event that has already occurred … but … since the 1982 amendment … that fact or event has not formed a criterion or condition of the power to make an order under the section. It was replaced in 1982 by a requirement that the fact be that the work 'is faulty or unsatisfactory', which is an element in the definition of s 59(1) having no reference to any past event. It is true that s 59(1) retains the requirement that the building work should have been performed by a person 'who is or was …' a registered builder; but those words are no more than a description of the person which is satisfied in a present sense in relation to Bartlett, he being registered as a builder at the date of the order."

[101] McPherson J then pointed out, relying upon *Coleman v The Shell Company of Australia Limited* (1943) 45 SR (NSW) 27, that a statute has retrospective operation if it affects rights or liabilities which were established by reference to events which occurred before the statute was enacted. The *1979 Act* was not retrospective, his Honour held, because the builder's liability to the building owner was unaffected by its passing. Bartlett was always liable in an action for breach of contract or negligence. The result:

> "… quite apart from s 59(1), Bartlett was almost certainly liable under the general law for the consequences of his defective workmanship undertaken in 1974. All that s 59 has done is to confer on the Board a method of enforcing that liability … ."

[102] This case is different in two respects. There was, in that case, no doubt that the builder against whom the order was made performed the faulty and unsatisfactory work. He was the actual builder, registered under the 1971 and 1979 Acts. Section 59 of the *1979 Act* applied to work done by a builder registered at the time

when the work was done or when the order for rectification was made. Bartlett did not take on the character of one who performed building work by means of a statutory fiction, or the statutory creation of a new concept of "building work". The applicant did not carry out building work, and its activities were not deemed to be "carrying out building work" at the time the contract was performed. They only took on the character with the 2007 amendments. *Judge Given* was not concerned with, and did not consider, the question which arises directly in this appeal, *viz* whether the statutory fiction, that someone who did not build is nevertheless taken to be the builder, should apply to a state of fact in existence before the fiction.

[103] The second point of distinction is that Bartlett was liable to the building owner under the general law. The *1979 Act* did no more than provide an additional remedy conferred on the Builders' Registration Board to satisfy that liability. By contrast the applicant had no contract with the Body Corporate or any of the individual apartment owners. Although the matter was not argued, it must be extremely doubtful whether the applicant had any tortious liability to them. QBSA seeks to impose a new and wholly statutory liability on the applicant that did not exist when its contract with the principal was performed.

[104] These distinctions were not addressed in the second case, *Baulderstone Hornibrook*, already mentioned in a different context. A mortgagee who took possession of an unfinished home unit development when the mortgagor, the developer, went into liquidation engaged a number of trade contractors to complete the building and allow the units to be sold. When finished, the building leaked. QBSA directed the mortgagee to make the building waterproof, it being a person who for profit or reward carried out building work in that it directly or indirectly caused it to be carried out. Sections 72(2)(d) and 72(8)(a)(ii) (as the sections were then numbered) applied.

[105] The mortgagee complained that it had engaged the trade contractors prior to an amendment to the Act which inserted those sections. At the time the contracts were let and the work was done the mortgagee was not a person "who carried out the building work". The case is thus indistinguishable on this point from the present appeal.

[106] Pincus JA referred to *Judge Given* and noted McPherson J's remark (at 38) that the preconditions to the making of an order by the Board had "no reference to any past event". Pincus JA concluded [12] that there was "No sound basis for distinguishing … *Judge Given* … ."

[107] Thomas JA agreed with Pincus JA. Byrne J also agreed but added his own opinion that:

> "… there is no sufficient reason to construe those remedial initiatives (s 72(2)(d)) as intended not to apply to events antecedent to their commencement …",

and added a reference to *George Hudson Limited v The Australian Timber Workers' Union* (1923) 32 CLR 413 at 433-4; *Nicholas v Commissioner for Corporate Affairs* [1988] VR 289 at 296-9 and *Antonelli v Secretary of State for Trade and Industry* [1998] 2 WLR 826 at 833-5.

[108] I respectfully disagree with such a peremptory assimilation of the two cases which are quite different for the reasons I have expressed. Bartlett's liability arose from

the fact that he was a registered builder who, in fact, built badly and was amenable to an order made pursuant to s 59 which applied, according to its terms, to such a person if registered as a builder when the work was done or when its rectification was ordered. The liability of the applicant, and of the mortgagee in *Baulderstone Hornibrook*, arises not from anything they did at the time they acted, but from a legal characterisation of their activities imposed, if at all, only after the activities had ceased.

[109] The question for the appeal, which did not arise in *Judge Given* and was not addressed in *Baulderstone Hornibrook*, though it did arise, is whether the legal characterisation should apply to the applicant's contract management to make it a person who carried out building work by means of an enactment passed after the activities were completed.

[110] An Act of Parliament may, of course, have that effect. The words of the Act may make it plain that it is meant to impose liabilities by reference to a past and concluded state of fact. But unless the intention is manifest in the legislation it will not be given that effect.

[111] The authority of *Judge Given* does not cover the present point. *Baulderstone Hornibrook* does but its authority is called into question by the failure of the judgments to recognise the differences between the two cases and to confront the question which arises acutely: whether the statutory alteration of what constitutes building work, expressed in s 72(5)(f), applies to impose liabilities on those within its description before the description existed. That question which justified the grant of leave to appeal, must be addressed, but without assistance from the reasons for judgment in *Baulderstone Hornibrook.*

[112] An analysis of the cases referred to by Byrne J, and others to which they, in turn, refer, show them not to be apposite. They are concerned with different situations and fall into two categories. One consists of statutes which impose a liability or disqualification on a member of a profession or an officer e.g. of a company by reference to specified circumstances such as misconduct or suspected ineptitude. For the most part the cases have held that the existence of the circumstances is enough to give rise to the disqualification even if the circumstances pre-dated the legislation which authorises the disqualification. The second category is of cases where there is an existing state of facts and an Act imposes liability as and from its enactment with reference to the existing facts. The circumstances of the present appeal do not fall into either category.

[113] Kaye J explained the limitation on the application of the presumption against retrospectivity. Not every statute which operates by reference to preceding events is relevantly "retrospective". His Honour said (*Nicholas* at 296):

> "The common law rule of construction concerning retrospectivity is subject to a qualification that 'a statute is not retrospective merely because it affects existing rights; nor is it retrospective because a part of the requisites to its action is drawn from a time antecedent to its passing': *Halsbury*, 4th Ed., vol. 44, 'Statutes', para. 921."

[114] The distinction between statutes which are retrospective and those which are not was noted by Goddard LCJ in *Re a Solicitor's Clerk* [1957] 1 WLR 1219. The clerk in question was a thief, but had not stolen from his employer. The legislation

did not permit the Law Society to prohibit his employment as a solicitor's clerk because the theft was not of his employer's money. An amendment allowed the Law Society to make such an order in all cases of theft. In upholding the validity of an order that the clerk not be employed the Lord Chief Justice said (1222-1223):

> "It enables an order to be made disqualifying a person from acting as a solicitor's clerk in the future and what happened in the past is the cause or reason for the making of the order, but the order has no retrospective effect. It would be retrospective if the Act provided that anything done before the Act came into force … should be void or voidable, or if a penalty were inflicted for having acted in this or any other capacity before the Act came into force … . This Act simply enables a disqualification to be imposed for the future which in no way affects anything done by the appellant in the past."

[115] *Nicholas* was a case of the same kind. Section 562A of the *Companies (Victoria) Code* allowed the Commissioner for Corporate Affairs to prohibit a person from being a director of a company if he or she had been a director of a failed company within a specified prior period. It was held that the power to issue the prohibition could be exercised with reference to involvement in a failed company prior to the enactment of s 652A. Kaye J referred to a number of cases, including *Re a Solicitor's Clerk* and noted that there was:

> "… a line of authority (which) establishes that a statute, the object of which is to protect the public interest by disqualification based on conduct antecedent to the enactment, does not fall within the principle of retrospectivity." (297)

His Honour also said (299):

> "The provisions of s 562A … do not affect or change the legal character or the consequences of past events. The object of the section is clearly to protect the public's interest by preventing persons, who by past conduct are unfit, from directing promoting or managing the affairs of a corporation. Furthermore, the provisions do not impose penalties for conduct antecedent to the enactment of the section."

[116] These cases are in the first category I mentioned, as was *Antonelli*. The basis for the authorities, that the public needs protection from persons unfit to conduct a professional calling, or discharge the obligations of an office, has no relevance to the purposes of the Act. Even when that consideration is present the result is not always that the Act operates with respect to past indiscretions. *In re School Board Election for Parish of Pulborough; Bourke v Nutt* [1894] 1 QB 725 is an example.

[117] *George Hudson* is in the second category. An industrial agreement obliged an employer who was a party to it to display copies of it in a conspicuous part of the employer's premises. Section 24 of the *Commonwealth Conciliation and Arbitration Act* 1904 was amended on 16 December 1921 to include as parties to industrial agreements "any successor, or … assignee … of the business of a party bound by the agreement … ." George Hudson Ltd was not a party to the agreement when made but before 16 December 1921 became a successor to a party to the agreement. It did not, on or after 16 December 1921, display the agreement in a conspicuous place. It was convicted of a breach of award.

[118] Higgins J (446) thought it was:

> "… an abuse of language to call the amending Act of 1921 retrospective if it merely imposes a future duty on existing persons as to existing agreements."

[119] Isaacs J (at 433) thought that the case was indistinguishable from *Batt v Metropolitan Water Board* [1911] 2 KB 965. Section 8 of the *Metropolitan Water Board (Charges) Act* 1907 imposed on the owner or occupier of a house which was supplied with water the duty of maintaining the connection pipe and apparatus necessary to get water to the house. The obligation had formerly rested on the Board. Ms Batt was injured when she caught her foot in a stop-cock box used in connection with supplying water to an adjoining house. The Court of Appeal held that from the date of the enactment of s 8 the obligation of maintaining the stop-cock and associated pipes was the householder's, and the Board was not liable.

[120] Vaughan Williams LJ said (970):

> "… s 8 of the Act … applies to all existing service pipes as well as to pipes thereafter to come into existence … . I am not saying that the Act of 1907 is retrospective, but that it applies to existing service pipes as well as to pipes and their fittings thereafter to come into existence … ."

Fletcher Moulton LJ said (978):

> "The supply of water to which the section relates is, of course, a future one, i.e., one which takes place subsequently to the passing of the Act. That supply must from moment to moment be given through communication pipes which must be there for that purpose, and the duty of seeing that they are so there is by this section thrown upon the owner or occupier, who has to … maintain them … . But, so long as they are duly maintained … it is … irrelevant … at what date the provision and laying down took place."

[121] Buckley LJ said, in the course of argument (970):

> "The operation of a statute is correctly said to be retrospective when it enacts that something which was not the law at a date anterior to its passing shall be treated as having been the law at that date. An enactment which provides that in future the liability to repair certain existing pipes shall rest upon certain persons upon whom it did not rest before is not retrospective in that sense."

[122] That case, and *George Hudson,* were concerned with the imposition of a liability on and from the date of the enactment so it was prospective only. The liability operated on facts which existed at the time of the enactment, and continued thereafter. The legislation was not retrospective because it operated on a state of affairs (the agreement and the water pipes) which existed when the Act was passed and with respect to which new obligations were imposed for the future. The Acts in question "spoke only as to the future", as Hayne, Heydon and Crennan JJ put it in *Chang v Laidley Shire Council* (2007) 234 CLR 1 at 33.

[123] The presumption against retrospectivity and the nature of retrospectivity were discussed in *Maxwell.* Dixon CJ said (267):

> "The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events."

Fullagar J, who dissented in the result, said (285):

> "In *Moon v Durden* … Alderson B said that in construing statutes the general rule is that 'They are not to be supposed to apply to a past, but to a future, state of circumstances' … . In *Gardner v Lucas* … Lord Blackburn said:- 'Prima facie, any new law that is made affects future transactions, not past ones' … . It is worthy of note that the word "retrospective" does not occur in either of these statements, but it has been used in many statements of the general rule. … . I think that the word "retrospective" has acquired an extended meaning in this connexion. It is not synonymous with '*ex post facto*', but is used to describe the operation of any statute which affects the legal character, or the legal consequences, of events which happened before it became law."

[124] In *Coleman* Jordan CJ said (30-31)

> "… there has been some ambiguity in the use of the word 'retrospective'. In some cases, it has been said that it would give a retrospective operation to a statute to treat it as impairing an existing right or obligation or creating a new right or obligation … . On the other hand, it was said by Buckley LJ in *West v Gwynne* … that an Act is retrospective if it provides that as at a past date the law shall be taken to have been that which it was not. It is not retrospective because it interferes with existing rights. Most Acts do. There is no presumption that inference with existing rights is not intended; but there is a presumption that an Act speaks only as to the future. Similarly it has been said that an amendment of a section in an Act makes it retrospective in its original form but not retrospective so far as it is new … .
>
> Upon a consideration of the authorities, I think that, as regards any matter or transaction, if events have occurred prior to the passing of the Act which have brought into existence particular rights or liabilities in respect of that matter or transaction, it would be giving a retrospective operation to the Act to treat it as intended to alter those rights or liabilities, but it would not be giving it a retrospective operation to treat it as governing the future operation of the matter or transaction as regards the creation of further particular rights or liabilities."

[125] The same point was made in *Re: John* [2000] 2 Qd R 322 at 325, 326. The court (McMurdo P, Davies and Thomas JJA) said:

> "As a general rule, a statute changing the law 'ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way

> as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events'.
>
> …
>
> … but if legislation is intended to affect existing rights and claims, it is not difficult for Parliament to say so."

[126] The applicant is taken to have carried out the defective building work only because it was a construction manager engaged under a construction management contract to provide building work services for the building work. Until the inclusion of s 72(5)(f) in December 2007 a person who provided such services, but did not build or design, did not carry out building work, and was not deemed or taken to have carried out the work. The applicant provided building work services under a construction management contract prior to the amendments. It was not providing such services in December 2007. If it is held to have been a person who carried out building work by reason of its provision of building work services under a construction management contract it can only be by retrospectively giving its activities in 2005-2006 a character and legal consequence they did not have until the amendment. The presumption against the retrospective operation of legislation is opposed to that consequence. Unless there be some clear indication in the amending Act that it was meant to apply retrospectively there is a presumption that it does not do so.

[127] QBSA submits that s 72(5)(f):

> "does not operate in a way which attracts the presumption against retrospectivity because it has a future operation based on a past event (as distinct from a prior effect on past events). The distinction is … important … see … *Coleman* …".

The submission mistakes the effect which QBSA seeks to give to the amendments. They do not have "a future operation based on a past event". That description is accurate with respect to the cases I have analysed by category, but it does not apply to what QBSA wants the amendments to do. In the first category of case a past fact formed the basis for a liability imposed after the legislation. In the second category of case the events were not past but continued, and on and from the date of the new legislation liabilities arose with respect to facts subsequent to the amendment. QBSA seeks to have the amendments change past facts. On the facts as they occurred the applicant was not a builder. It became a builder by a change in the law after the event. No amount of linguistic gymnastics can make the effect of such legislation anything but retrospective.

[128] The present appeal is one to which the "general rule" described by Dixon CJ applies. It is a case of the type described by Goddard LCJ by way of distinguishing this category of case from that into which *Re a Solicitor's Clerk* fell. The 2007 amendments would be retrospective if by the Act "a penalty were inflicted for having acted in this or any other capacity before the Act came into force." That is the result QBSA seeks. Jordan CJ's formulation of the test is equally applicable. QBSA contends that the amendments have brought into existence a "particular liability" in respect of events which "occurred prior to the passing of the Act", so that the operation of the Act contended for would be retrospective. As Fullager J pointed out, "retrospective":

> "… is used to describe the operation of any statute which affects the legal character, or the legal consequences, of events which happened before (an act) became law."

The application of the amendments which QBSA contends is correct falls squarely within Dixon CJ's formulation,

> "… as applying to facts … that have already occurred in such a way as to … impose or otherwise affect … liabilities …"

which attracts the presumption. To adapt the analysis of Kaye J in *Nicholas* the amendments to s 72 do impose a liability for conduct antecedent to the enactment of the amendments.

[129] On the facts of this case there is nothing on which the amendments could act prospectively. The applicant did not provide building work services on any day after 21 December 2007. If the applicant was "the person who carried out the building work" for the purposes of subsection (1) it could only be because the designation of one who is taken to have carried out the work by providing building work services under a construction management contract applies to a contract made, performed and terminated prior to the amendment. Such a legislative operation is truly retrospective and offends the presumption. Unless the language of the amendment clearly indicates it is to have that operation it should be construed as speaking to the future only.

[130] There is no such indication. There is nothing in the insertion of paragraph (f) to s 72(5) that conveys such an indication. It is expressed in words which speak of the present, "a … manager engaged … to provide … services …", and this applies to any such person on and after the amendment.

[131] *Baulderstone Hornibrook* in my respectful opinion mistakenly assumed itself to be on all fours with *Judge Given* without close examination or analysis. Accepting that this Court should depart from an earlier decision "cautiously and only when compelled to the conclusion that the earlier decision is wrong" (per Dawson, Toohey and McHugh JJ in *Nguyen v Nguyen* (1990) 169 CLR 245 at 269), I conclude that this is such a case. That decision, if followed, is capable of working substantial hardship, not to say injustice. The unfairness arises by imposing a liability upon persons such as the applicant who, at the time they contracted, were unaware of the possibility that their contract might expose them to a new set of liabilities. A construction manager who contracted after the amendments would know of the potential risk that it might be directed to repair defective work and adjust its contract accordingly. It could increase the price to reflect the risk, or take out a policy of insurance, or bargain for terms in the contract that gave it power to compel a trade contractor to make good defective work. It could obtain an indemnity from the principal against its liability to QBSA. The retrospective imposition of liability on a construction manager occurs in circumstances where it could not take any of the measures described to protect itself.

[132] The primary judge was bound by *Baulderstone Hornibrook* to decide as he did. For the reasons I have given that case should be regarded as wrongly decided. The principles I have discussed lead to the conclusion that unless s 72(5)(f) inserted into the Act on 21 December 2007 was intended by Parliament to be retrospective in operation the applicant was not a person who was taken to have carried out building

work when it performed its contract to provide contract management services for the apartment building at Skyring Terrace Teneriffe. There is no legislative intention that the amendment be retrospective. The cases relied upon by QBSA to argue that the operation of s 72(5)(f) on the applicant's performance of its contract would not make it retrospective are not on point. The 2007 amendments to the Act apply prospectively only, to those who provide the described services subsequent to 21 December 2007. The applicant was therefore not a person who carried out building work for the purposes of the Act in relation to the building of the apartments. It was not a person to whom QBSA could address directions to rectify defective work.

[133] I would give the applicant leave to appeal and the respondent leave to cross-appeal. The cross-appeal should be dismissed with costs. The appeal should be allowed and the orders made by the District Court on 7 April 2010 be set aside. Instead there should be orders that the applicant's appeal to the District Court from the Commercial and Consumer Tribunal on 26 August 2009 be allowed and a further order that the 15 decisions made by the respondent to direct the applicant to rectify defective work to the common property and to apartments 327, 8, 618, 627, 337, 603, 628, 615, 320, 620, 617, 604, 601 and 319 be set aside. The respondent should pay the applicant's costs of the appeal to the District Court and of the application for leave to appeal and of the appeal to this Court.