QCAT

Queensland Civil and Administrative Tribunal

CITATION:	*Mair Renovations v Miller* [2016] QCATA 79
PARTIES:	Jeffrey Mair t/as Mair Renovations Pamela Mair t/as Mair Renovations (Appellant) V Duncan Thomas Miller Genevieve Kay Miller (Respondent)
APPLICATION NUMBER:	APL384-15
MATTER TYPE:	Appeals
HEARING DATE:	15 April 2016
HEARD AT:	Brisbane
DECISION OF:	**Senior Member O'Callaghan** **Member Hughes**
DELIVERED ON:	20 May 2016
DELIVERED AT:	Brisbane
ORDERS MADE:	**1. Leave to appeal is refused; and** **2. The appeal is dismissed.**
CATCHWORDS:	APPEAL – whether grounds for leave to appeal established – whether Member erred in not allowing claim for upstairs flooring – whether Member erred in having recourse to 'order of precedence' – where documents cannot be read together as a whole – whether Member correctly applied 'order of precedence' – where schedule 3 did not contain terms of contract but provided description of documents as aid to interpretation only - whether contract price increased for upstairs flooring – where findings open on evidence - where reasons adequate - whether Member erred in not approving upstairs flooring as variation beyond $8,087.00 – where no evidence to support amount claimed – where finding to not allow amount claimed open on evidence - whether Member erred in not finding indemnity in favour of builder for non-inclusion of upstairs flooring –

where open on evidence to find that indemnity did not operate in circumstances of builder's own failure to comply with statutory and contractual obligations – where indemnity clause cannot operate to confer greater entitlement than allowed under Act of $8,087.00 – where no substantial injustice even if indemnity clause had not been properly applied - whether Member erred in not awarding interest – where variations approved on statutory basis - where Tribunal does not have wide statutory discretion to award interest – where variations arise from statutory right of restitution – where each party must pay contractual interest on any money it 'owes the other party' - where 'Balance contract sum' not money 'owed' under contract – where 'contract amount' is adjusted for variations, retentions and defects to calculate amount 'owed' – where Member did not err in awarding interest as she did — where no grounds to grant leave to appeal as no error by Member causing substantial injustice or question of public importance

Civil Proceedings Act 2011 (Qld) ss 5, 58, 59
Domestic Building Contracts Act 2000 (Qld) ss 84, 86, 93
Queensland Building and Construction Commission Act 1991(Qld) s 77
Queensland Civil and Administrative Tribunal Act 2009 (Qld) ss 142, 143

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321
Bradlyn Nominees Pty Ltd v Saikovski [2012] QCATA 39
Bullfrog Constructions Pty Ltd v Crowther [2014] QCAT 189
Cachia v Grech [2009] NSWCA 232
Chambers v Jobling (1986) 7 NSWLR 1
Clarke v Symphony Homes & Anor [2013] QCAT 78
Dearman v Dearman (1908) 7 CLR 549 at 561
Drew v Bundaberg Regional Council [2011] QCA 359
Fox v Percy (2003) 214 CLR 118
Glamoren Pty Ltd t/as Keyline Realty v Lee [2012] QCATA 176
Glenwood Properties Pty Ltd v Delmoss Pty Ltd

[1986] 2 QdR 388
Grey v Little [2005] QCCTB 185
Henry Constructions Pty Ltd v De Riz [2006] QCCTB 186
HK Developments Pty Ltd v Carter [2014] QCAT 330
Imperial Homes (Queensland) Pty Ltd v Queensland Building and Construction Commission [2014] QCAT 42
Jimenez v Sternlight Investments t/a LJ Hooker Alexandra Hills [2010] QCATA 29
Kennedy v Barrie [2006] QCCTB 196
Lida Build Pty Ltd v Miller & Anor [2011] QCATA 219
Minister for Immigration and Citizenship v SZMDS & Anor (2010) 240 CLR 611
QUYD Pty Ltd v Marvass Pty Ltd [2009] 1 Qd R 41
RWE Npower Renewables Ltd v JN Bentley Ltd [2013] EWHC 978
Selvanayagam v University of the West Indies [1983] 1 All ER 824
Slater v Wilkes [2012] QCATA 12
Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247
Waterford v The Commonwealth (1987) 163 CLR 54
XMR Holdings Pty Ltd v Body Corporate for Xanadu CTS 26361 & Ors [2016] QCAT 27

APPEARANCES:

APPELLANT: Mr P G Jeffery of Counsel instructed by Daley Law Practice

RESPONDENT: Ms S McNeil of Counsel instructed by CBP Lawyers

REASONS FOR DECISION

Senior Member O'Callaghan

[1] In this appeal, the Appeal Tribunal was comprised of Member Hughes and me. I have had the benefit of reading Member Hughes' reasons in draft and I agree with his reasons, conclusions and the orders he proposes.

Member Hughes

What is this appeal about?

[2] Mair Renovations ('Mair') renovated an old Queenslander home for Duncan Thomas Miller and Genevieve Kay Miller. After Mr and Mrs Miller moved in, they disputed the work performed. The Tribunal ordered Mair to pay Mr and Mrs Miller $200,870.28, including rectification costs.

[3] The Tribunal relevantly found that the contract price of $550,000.00 included the upper floor and that Mair was not entitled to any extra payment for this or interest. Mair has appealed this part of the decision.

What are the grounds of appeal?

[4] Mair's appeal involves questions of mixed law and fact. Failing to consider evidence or making findings of fact not open on the evidence raises questions of fact or questions of mixed law and fact[1] and therefore requires leave to appeal.[2] Similarly, a failure to give full reasons does not necessarily amount to an error of law – the nature and extent of the obligation varies according to the nature of the case.[3] The question is not whether some reasons must be given relevant to the findings of fact that are made, but what reasons are required.[4]

[5] Mair submitted that the learned Member erred in not allowing its claim of $50,000.00 for the upstairs flooring and in not allowing its claim for interest under the contract.

[6] The issues for the Tribunal to determine are: whether the learned Member erred in not allowing Mair's claim for the upstairs flooring; if not, whether the learned Member erred in not approving the upstairs flooring was a variation beyond $8,087.00 or whether the learned Member erred in not finding that Mr and Mrs Miller were required to indemnify Mair for the non-inclusion; and whether the learned Member erred in not awarding interest to Mair.

Did the learned Member err in not allowing the claim for the upper floor?

What did the learned Member find?

[7] The learned Member found:

> I find that any inconsistency in the wording of the work to be performed upstairs as it appears in schedule 3 and the reference to '*Stage 2'* by reason of the words '*(EXCL. new floor covering Dry areas)'* can be resolved when reading the contract in its entirety in the '*order of contracted documents'.* In schedule 3

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1 *Waterford v The Commonwealth* (1987) 163 CLR 54 at 77; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 341.

2 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) (QCAT Act) s 143(2)(b).

3 *Jimenez v Sternlight Investments t/a LJ Hooker Alexandra Hills* [2010] QCATA 29 at [26].

4 *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 268.

> '*the order of precedence of contract documents*' is the contract, drawings and specifications and the written quotations. There is no reference to '*exclusions'* in the *'works'* to be performed in *'the contract'* (introduction) because in item 5 of the contract the two stages of work are identified and there is no reference (in respect of stage two) to any exclusion of work such as flooring. The specifications for the upper level refer to '*floor cladding*' and the drawings refer to '*timber*'. The quotation (No. 40) for stage two specifies '*new pine flooring'* in the work to be included. Mr Eccles accepted when giving his evidence at the hearing that the quotation for upstairs (No. 40) included '*new pine flooring'.*

[8] Mair submitted that the learned Member erred in first, resorting to the 'Order of Precedence' under the contract and then, did not correctly apply that order of precedence.

Did the learned Member err in having recourse to the order of precedence without attempting to derive a 'clear and sensible commercial interpretation'?

[9] Mair submitted that the learned Member should have attempted to identify a 'clear and sensible commercial interpretation' of the issue before resorting to the order of precedence clause:

> If it is possible to identify a clear and sensible commercial interpretation from reviewing all the contract documents which does not produce an ambiguity, that interpretation is likely to be the right one; in those circumstances, one does not need the 'order of precedence' to resolve an ambiguity which does not actually on a proper construction arise at all.[5]

[10] Specifically, Mair submitted that schedule 3 of the contract and Quote 39 clearly exclude the upstairs flooring. Mair contended that because schedule 3 forms part of the contract and the reference in schedule 3 to Stage 2 excluding new floor covering is a term of the contract, the learned Member should not have considered the remaining documents. Conversely, Mr and Mrs Miller contended that schedule 3 merely describes the documents in their 'order of precedence', without the descriptions becoming terms of the contract.

[11] Schedule 3 has these notations:

1 THIS CONTRACT

2 ARCHITECTURAL DRAWINGS

MILLER STAGE 1 08140/01-07-S1/G

STAGE 2 08140/01-07-52/G

3 ARCHITECTURAL SPEC – MILLER

ATHLONE ST / STAGE 1 / STAGE 2

4 GEOTECH REPORT & CONCRETE DESIGN

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5 *RWE Npower Renewables Ltd v JN Bentley Ltd* [2013] EWHC 978 at [24].

STRUCTERRE 18777-IOHS

5 BUILDER'S WRITTEN QUOTE 1.9.10

STAGE 1 $330,000 – INCL GST

STAGE 2 $220,000 – INCL GST (EXCL. NEW FLOOR COVERING DRY AREAS)

[12] The Appeal Tribunal does not accept that the descriptions in Schedule 3 are terms of the contract. Clause B2 of the contract refers to Schedule 3 merely in the context of providing the order of precedence. Clause B2 refers to 'any special conditions shown in **schedule 2**', 'the conditions set out in this contract, the **introduction** and **schedule 1**' but importantly, does not temporally link 'conditions' with schedule 3. Schedule 3 itself is entitled 'Order of precedence of contract documents' and begins with the words: "The Order of **contract documents* is:".

[13] From this, it is clear that the parties intended schedule 3 to describe the order of documents, rather than to incorporate special conditions into the contract – these are already specifically provided for in the introduction and schedules 1 and 2.

[14] This means that the exclusion in schedule 3 is not a term of the contract and did not operate to exclude the upstairs flooring from the contract price.

[15] Item 5 of the contract refers to "The works" and provides:

> This contract is for the works set out in the contract documents, as briefly described below:
>
> $330,000 – STAGE 1 LIFT EXISTING HOUSE AND BUILD UNDER
>
> 3 BEDROOM UNIT / TW0 BATH / LIV / DIN / KIT / LNDRY
>
> $220,000 – STAGE 2 RENOVATE EXISTING UPPER FLOOR TO
>
> 4 BEDS / TWO BATH / STUDY / LIV / DINING / KIT /
>
> 2 BALCONYS / G.FLLNDRY / UNDERCOVER PARKING

[16] Item 5 specifically refers to "upper floor". However, item 5 also appears in the 'Introduction' to the contract, suggesting more detail is to follow. Consistent with this, item 5 does not purport to be a complete description of the works: it refers to the 'contract documents' and contains the qualifying phrase 'briefly described below'. It is implicit from this that the 'contract documents' provide a more comprehensive description of the works and thereby expand upon item 5.

[17] 'Contract documents' includes any other documents shown in schedule 3.[6] Schedule 3 refers to 'Builder's written quote 01.09.10'. The Appeal

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6 Contract dated 14 September 2010, Schedule S – Definitions.

Tribunal is satisfied that both Quote 39 and Quote 40 form part of the contract. Quote 40 relates to 'upstairs' and specifies new pine flooring without exclusions.[7] Quote 39 purports to relate to 'downstairs', but excludes new floor cladding to the upper floor.[8] The Appeal Tribunal is satisfied that the Quote excludes the upper floor, although it appears in Quote 39 relating to downstairs. This is because the exclusion is out of context if read literally as part of Quote 39.

[18] However, schedule 3 - and clause B2 - also refer to the architectural drawings. The difficulty is that the architect drawings also form part of the contract but did not exclude upstairs. While there is no contract without the Quote, equally there is no contract without the drawings. This means that the drawings and the Quote are inconsistent, as each cannot be performed without breaching the other. They cannot be read together as a whole. The Appeal Tribunal is therefore not satisfied that it is possible to derive a 'clear and sensible commercial interpretation from reviewing all the contract documents without producing an ambiguity.'[9]

[19] Although the drawings pre-date the Quote, the contract does not provide that the documents are to be read so that later documents repeal earlier documents to the extent of any inconsistency – a rule of construction for inconsistent legislation. Instead, the contract expressly provides an 'Order of precedence of contract documents.'

[20] It was therefore correct for the learned Member to have recourse to the 'Order of Precedence'. The Appeal Tribunal is satisfied that the learned Member did not err in having recourse to the 'Order of Precedence.'

[21] This is not an appellable error.

Did the learned Member correctly apply the 'Order of Precedence'?

[22] Because the Appeal Tribunal has already found that schedule 3 only formed part of the contract to the extent that it provided a description of the documents for the 'Order of Precedence' - rather than the descriptions providing additional terms - the learned Member was also correct in not giving precedence to the descriptions in schedule 3 over the other contract documents. Schedule 3 forms part of the contract to the extent that it is an aid to interpretation only.

[23] Applying the 'Order of Precedence', the architect drawings are listed higher than the Quote in schedule 3, which has lowest priority. All other contract documents, including the drawings therefore have precedence over the Quote.

[24] This means that the learned Member did not err in not applying the 'Order of Precedence to schedule 3', but correctly applied schedule 3 *as the*

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7 Quotation 40 dated 1 September 2010.
8 Quotation 39 dated 1 September 2010.
9 *RWE Npower Renewables Ltd v JN Bentley Ltd* [2013] EWHC 978 at [24].

order of precedence to the contract documents so that drawings prevailed over the Quote.

[25] The Appeal Tribunal is therefore satisfied that the contract price did include the upper floor.

[26] This is not an appellable error.

Did the contract price increase from $550,000.00 to $600,000.00 for the upstairs flooring?

[27] Mair submitted that the learned Member erred in finding that that the contract price did not increase from $550,000 to $600,000.00 to accommodate the upstairs flooring. The relevant passage of the learned Member's reasons reads:

> I accept Mr Miller's evidence that the pinewood flooring was included in the contract works and that he was not told prior to signing the contract that there was a change in the contract works (to exclude flooring). This is because it is consistent with Mr Eccles' evidence that he did not tell the Millers on the day they signed the contract that pinewood flooring was no longer included.
>
> I have carefully considered the contract, the evidence given by Mr Mair, Mr Miller and Mr Eccles and the written submissions filed by Mair Renovations. Mair Renovations submit that *'it is inconceivable that the works of the builder would not include constructing the floor otherwise there would not be access to use the upper level'.* Mair Renovations says that when the flooring went into the *'job'* the contract price went up to $600,000. I do not accept Mair Renovations' submission that the contract price went up to $600,000.00 when flooring was added because there was no written agreement between the parties to vary the contract and Mr Eccles did not notify the Millers of any changes to the contract works.[10]

[28] This is a finding of fact. A finding of fact will usually not be disturbed on appeal if the facts inferred by the Tribunal, upon which the finding is based, are capable of supporting its conclusions, and there is evidence capable of supporting the underlying inferences.[11] No error of law arises in making a wrong finding of fact unless no evidence supports that finding.[12] An appellate tribunal may interfere if the conclusion is 'contrary to compelling inferences' in the case,[13] but will not usually disturb findings of fact on appeal if the evidence is capable of supporting the conclusions.[14]

[29] Mair submitted that the learned Member ignored the "damaging effect" of Mr Miller's evidence about the flooring being included in the contract price, referred to in its submissions before the original Tribunal. However, the

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10 *Mair Renovations v Miller* [2015] QCAT 333 at [20] to [21].
11 *Fox v Percy* (2003) 214 CLR 118 at 125-6.
12 *Waterford v The Commonwealth* (1987) 163 CLR 54 at 77; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 341.
13 *Chambers v Jobling* (1986) 7 NSWLR 1 at 10.
14 *Dearman v Dearman* (1908) 7 CLR 549 at 561; *Fox v Percy* (2003) 214 CLR 118 at 125-6.

learned Member was not required to decide every matter raised in argument or make an explicit finding on every disputed item of evidence:

> … the law does not require that a judge make an express finding in respect of every fact leading to, or relevant to, his final conclusion of fact; nor is it necessary that he reason, and be seen to reason, from one fact to the next along the chain of reasoning to that conclusion.[15]

[30] The learned Member expressly stated that she accepted Mr Miller's evidence that the flooring was included in the contract works and explained that this was because it was consistent with the evidence of the architect that he did not tell Mr and Mrs Miller that the flooring was no longer included.[16] The learned Member also expressly stated that she did not accept Mair's evidence that the contract price went up to $600,000.00 when the floor was added, because of no written agreement to vary the contract and the architect's failure to notify Mr and Mrs Miller of any changes.[17] It is clear that the learned Member's reasons were adequate.

[31] Mair's submissions also list what it describes as "compelling inferences" for the price increase:

- the learned Member's finding that the Quote was originally for $380,000.00 but later crossed out and changed to $330,000.00 with the words *"Exclusions new floor cladding to upper floor. Living & hallway"*;
- the learned Member's finding that Mair reduced the quotations by $50,000.00 for the flooring because Mr and Mrs Miller were still undecided about the type of floor at that time;
- Mr Miller's evidence of a budget between $550,000.00 to $600,000.00 and it was therefore conceivable that the contract price would increase to $600,000.00 when adding the upstairs floor; and
- The evidence showed that Mr and Mrs Miller signed the contract with the quotations attached and that Mr Miller was aware of the change to exclude upstairs flooring.

[32] However, the learned Member was entitled to not place weight on this evidence in the face of competing evidence to support alternative possibilities and her ultimate findings.[18] Rather than "compelling inferences", these, at most, provide some basis for an alternative finding of a price increase. They do not inevitably, or even more likely than not, lead to that conclusion, but merely provide a basis for an alternative finding. Providing a basis for a possible alternative finding does not demonstrate error by the learned Member. Where reasonable minds may

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15 *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 271.
16 *Mair Renovations v Miller* [2015] QCAT 333 at [20].
17 *Mair Renovations v Miller* [2015] QCAT 333 at [21].
18 *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 269-271.

differ, a decision cannot properly be called erroneous, simply because the learned Member prefers one conclusion to another possible conclusion.[19]

[33] Mair's contention is essentially that because Quotes 39 and 40 totalled $600,000.00 before the notations excluded the floor and reduced the price to $550,000.00, once the floor was reinstated and done, it follows that the price was reinstated to $600,000.00.

[34] The Appeal Tribunal does not accept Mair's contention. The Appeal Tribunal has already determined that the contract did include the upper floor. Item 4 of the contract provides a price of $550,000.00 including GST. Quotes 39 and 40 were amended to total $550.000.00. Whether or not Mr and Mrs Miller were informed of changes to the quotes before signing the contract, they were bound by its terms.

[35] Neither the contract nor any other document provides for a $50,000.00 increase to the contract price if the floor is reinstated. No evidence was adduced of any intent to reinstate the price commensurate with the floor being reinstated.

[36] It was therefore open for the learned Member to conclude that the contract price did not increase by $50,000.00 when the floor was reinstated. No judicial reasons can ever state all of the pertinent factors, nor can they express every feature of the evidence that causes a decision-maker to prefer one factual conclusion over another.[20] An applicant for leave must show an appellable error, resulting in a substantial injustice.[21] Preferring one version of facts to another, or attributing more weight to the evidence of one witness over another, is not such an error.[22]

[37] This is not an appellable error.

Did the learned Member err in not approving the upstairs flooring as a variation beyond $8,087.00?

[38] Mair submitted that the learned Member erred in disallowing a variation[23] for the upstairs flooring beyond $8,087.00. Mair submitted that the learned Member should have allowed $36,685.00 as claimed in its 'List of Variations'.

[39] Mair submitted that the learned Member did not examine the requirements of the section for the supply and installation of the upstairs flooring. However, it is apparent from her reasons that the learned Member expressly referred to the requirements of the relevant section.[24]

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19 *Slater v Wilkes* [2012] QCATA 12 at [6], citing *Minister for Immigration and Citizenship v SZMDS & Anor* (2010) 240 CLR 611.

20 *Fox v Percy* (2003) 214 CLR 118 at [41].

21 *Slater v Wilkes* [2012] QCATA 12 at [6], citing *QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41; *Drew v Bundaberg Regional Council* [2011] QCA 359 at [19].

22 *Slater v Wilkes* [2012] QCATA 12 at [6].

23 *Domestic Building Contracts Act* 2000 (Qld) s 84(4).

24 *Mair Renovations v Miller* [2015] QCAT 333 at [80].

[40] Moreover, Mair did not adduce any evidence to support the amount claimed for the variation. It was open for the learned Member to not allow the amount claimed by Mair for the variation, in the absence of evidence to support the cost of carrying out the variation.[25]

[41] This is not an appellable error.

Did the learned Member err in not finding that Mr and Mrs Miller were required to indemnify Mair for the non-inclusion of the upstairs flooring?

[42] Mair submitted that the learned Member erred in not addressing whether the indemnity in Clause A4.2 of the contract applied to the upstairs flooring. Mair submitted specifically, that the learned Member did not make an explicit finding about whether Clause A4.2 excluded Mair from liability for the architect's failure to notify Mr and Mrs Miller of the change to the contract works to exclude the upstairs flooring.

[43] The relevant passage of the learned Member's reasons reads:

> It is common ground that the variations claimed by Mair Renovations was not put in writing. Mr Eccles in his role as architect did not provide Mair Renovations with a written instruction and Mair Renovations did not provide Mr Eccles or the Millers with a claim including details of any estimate or quotation for the work
>
> Mair Renovations says that pursuant to the contract Mr Eccles gave directions to Mr Mair, the licensed builder, to carry out the works. Mair Renovations says that Mr Eccles was appointed to administer the contract and Mr Eccles agreed on a '*number of occasions'* that he did not follow the contract in relation to the variations. Mair Renovations says that the Millers must under clause A4.2 of the contract indemnify the '*contractor'* in respect of any negligence of *'the architect'.* Mair Renovations says that Mr Eccles was negligent in administering the contract and in '*his drawings*'.
>
> I accept that Mr Eccles is the *'representative*' for Robert Eccles Pty Ltd the appointed '*Architect'* that would also administer the contract because the name '*Bob Eccles'* appears in item 2 of the contract as the *'architects representative'.*
>
> I do not accept Mr Mair's evidence that the contract required him to follow Mr Eccles' verbal directions (as the architect). The contract requires the contractor to '*carry out'* the architect's *'written'* instruction '*promptly*' if as provided in clause J2 the instruction will not result in an adjustment of the contract price or require an adjustment to the date for practical completion.
>
> Mair Renovations as the contractor has obligations under the contract in relation to receiving instructions from the architect and making a claim to adjust the contract. Because there was no compliance with the contract or the DBC Act, the amount claimed for the variations can only be recovered by Mair Renovations with the Tribunal's approval under s 84(4) of the DBC Act.

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[25] *Domestic Building Contracts Act* 2000 (Qld) s 86(6) provides that the amount a builder is entitled to recover for a variation is the cost of carrying out the variation plus a reasonable profit.

…

> Mr Mair said that he did read the contract with the architect but when asked if he did '*go through [the contract] clause by clause',* he said *'no'.* Mr Mair said he *'followed [the architect] blindly'* and said, when questioned, that he thought the architect could override the DBC Act that requires variations to be put in writing. Mr Mair was questioned about the contract and the role of the architect. Mr Mair said he thought if he performed the job '*properly'* then he would get paid. Mr Mair referred to himself as a '*lowly carpenter'* and said that he relied on the architect.
>
> Mr Mair has many years' experience as a builder and even though he says he did not know about the DBC Act when he signed the contract he is still required to comply with the contract and the DBC Act as the contractor's representative.
>
> There is no evidence before me that Mr Mair as representative for Mair Renovations received a written instruction from Mr Eccles to perform all of the variations, as required under the contract. There is no evidence before me that Mr Mair provided the Millers or Mr Eccles with written notification about all of the variation work and whether it would, if performed, result in an increase or decrease in the contract price.[26]

[44] It is implicit from the learned Member's reasons that the indemnity clause did not operate in circumstances of Mair's own failure to comply with its statutory and contractual obligations. It was open for the learned Member to make this finding based on Mair's own admissions of simply following the architect:

> An experienced builder who follows a plan that it knows, or could reasonably be expected to know, is in error, cannot nevertheless just slavishly follow the plan, but is expected to exercise good construction practice.[27]

[45] Mr and Mrs Miller conceded that the learned Member's reasons do not reveal a finding about the application of the indemnity clause to the architect's failure to notify them of the exclusion of the upstairs flooring from the contract works.

[46] However, the Appeal Tribunal is not satisfied this error leads to a 'substantial injustice'. Even if the indemnity clause did apply, the architect's failure to notify of the exclusion does not mean that the builder incurred a liability of $50,000.00.[28]

[47] Had the upstairs floor been excluded from the contract, then its later reinstatement would at most, have been a variation. At most, Mr and Mrs Miller would be required to indemnify Mair to the extent of its entitlement to recover an amount for the variation.

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26 *Mair Renovations v Miller* [2015] QCAT 333 at [42]-[46], [48]-[50].

27 *Imperial Homes (Queensland) Pty Ltd v Queensland Building and Construction Commission* [2014] QCAT 42 at [67]; see also *Glen Williams Pty Ltd v Queensland Building Services Authority* [2012] QCAT 127.

28 See paragraph [34].

[48] The *Domestic Building Contracts Act* 2000 (Qld) (the Act) provides the only circumstances where Mair may recover an amount for a variation. The indemnity clause is void to the extent that it would operate contrary to that Act or seek to change a right conferred under it.[29] The indemnity clause therefore cannot operate to confer a greater entitlement upon Mair than it would otherwise be entitled to under that Act.

[49] Applying the provisions of the Act and in the absence of evidence to support the cost claimed by Mair to carry out the variation, the learned Member awarded Mair an amount of $8,087.00.[30] The indemnity clause cannot operate to confer a greater entitlement than this.

[50] This means that even if the learned Member did not properly apply the indemnity clause, the Appeal Tribunal is not satisfied this demonstrates error warranting leave to appeal. The error does not lead to a 'substantial injustice'.

Did the learned Member err in not awarding interest?

[51] Mair submitted that the learned Member erred by not awarding contractual interest on $50,000.00 for the upstairs flooring or alternatively, the variations approved at $28,805.70. Mair cited previous Tribunal decisions awarding interest.[31]

Did the learned Member err in not awarding interest on $50,000.00 for upstairs flooring?

[52] The Appeal Tribunal has found that the learned Member was correct in not awarding $50,000.00 for the upstairs flooring as a contractual entitlement. The learned Member did not err in not awarding interest on this amount.

Did the learned Member err in not awarding interest on approved variations?

[53] The learned Member approved variations on a statutory basis rather than contractual.[32] Contractual interest on variations therefore cannot be awarded. The learned Member did not err in not awarding contractual interest on variations.

[54] Unlike the Courts,[33] the Tribunal does not have a wide statutory discretion to award interest.[34] As a creature of statute, the Tribunal must be given a

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29 *Domestic Building Contracts Act* 2000 (Qld) s 93.

30 See paragraphs [37] to [39].

31 *Grey v Little* [2005] QCCTB 185; *Henry Constructions Pty Ltd v De Riz* [2006] QCCTB 186; *Kennedy v Barrie* [2006] QCCTB 196; *Clarke v Symphony Homes & Anor* [2013] QCAT 78; *Bullfrog Constructions Pty Ltd v Crowther* [2014] QCAT 189; *HK Developments Pty Ltd v Carter* [2014] QCAT 330.

32 Pursuant to the provisions of the *Domestic Building Contracts Act* 2000 (Qld).

33 *Civil Proceedings Act* 2011 (Qld) ss 5 (definition of 'court'), 58, 59.

34 *Glamoren Pty Ltd t/as Keyline Realty v Lee* [2012] QCATA 176 at [18] per Wilson J; *XMR Holdings Pty Ltd v Body Corporate for Xanadu CTS 26361 & Ors* [2016] QCAT 27 at [8]-[11].

specific power to award interest on compensation or damages.[35] The variations arise from a statutory right of restitution, without a statutory entitlement to interest. [36]

Did the learned Member err in not awarding interest on the 'Balance contract sum' of $73,050.00?

[55] Mair also submitted that the learned Member erred in not awarding contractual interest on the 'Balance contract sum' of $73,050.00. Mair contended that the learned Member awarded this amount under the contract, based on a contract price of $550,000.00 less $476,950.00 already paid by Mr and Mrs Miller under the contract.

[56] Conversely, Mr and Mrs Miller submitted that the learned Member's awarding of $73,050.00 cannot be correct, because Mair did not attain practical completion. However, Mr and Mrs Miller did not cross-appeal and the appeal process is not an opportunity for a party to again present their case.[37]

[57] The relevant passage of the learned Member's reasons reads:

> Mair Renovations' claim for building work completed is to be determined from the contract amount plus any variations assessed by the Tribunal under the DBC Act (plus 10% for profit on the variations assessed). The amount owing to Mair Renovations is to be offset against the rectification costs of the defective work because I have found that the Millers properly terminated the contract.
>
> The final amount owing is assessed as follows:

Contract amount		$ 550,000.00
LESS amount paid by the Millers		476,950.00
Balance contract sum		**73,050.00**[38]
PLUS 'the five variations' (assessed)	$17,297.00	
PLUS variation 'item iv' (assessed)	803.00	
PLUS variation 'flooring' (assessed)	8,087.00	
Total amount for variations		26,187.00
PLUS 10% (for profit)		2,618.00
LESS retention monies (certificate No. 5)	8,250.00	

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35 *XMR Holdings Pty Ltd v Body Corporate for Xanadu CTS 26361 & Ors* [2016] QCAT 27 at [9].

36 *Queensland Building and Construction Commission Act* 1991 (Qld) s 77(3)(d).

37 *Lida Build Pty Ltd v Miller & Anor* [2011] QCATA 219 at [12]; *Bradlyn Nominees Pty Ltd v Saikovski* [2012] QCATA 39 at [9]

38 *Mair Renovations v Miller* [2015] QCAT 333 at [213] to [214].

LESS retention monies (certificate No. 4)	5,500.00	
Total amount of retention monies		- 13,750.00
LESS rectification costs (retaining wall)	146,869.00	
LESS rectification costs (painting)	40,184.00	
LESS rectification costs (various defects)	25,635.00	
Total amount of rectification costs		- 212,688.00
LESS interest at 12% per annum on the total amount of rectification costs		- 76,287.98
TOTAL		**- $200,870.28**

[58] Under the contract,[39] each party must pay interest on any money that it *owes* the other party. The contract provides for adjustments. An amount is 'owed' once those adjustments have been made. Contractual interest is then calculated on the amount owed (by either party), after those adjustments.

[59] In calculating the amount owed (by either party), the learned Member (correctly) used the contract price as the starting figure and then added and subtracted amounts according to whether they were variations, retentions or defects. Any amount owed (by either party) can only be determined once those adjustments are made. It is this amount that is 'owed' and upon which interest may be – and was – awarded.

[60] The learned Member found that the works did not reach practical completion when Mr and Mrs Miller moved in on 15 September 2011. The learned Member also found that Mr and Mrs Miller properly terminated the contract on 28 August 2012[40] due to Mair's failure to attend to works,[41] and thereafter the contract was mutually abandoned.[42]

[61] Under the contract, if the builder fails to correct a defect, the owner may correct the defect at the builder's cost and the contract Amount is adjusted accordingly.[43] This means that Mr and Mrs Miller did not owe Mair the *Balance contract sum of $73,050.00*, because this had to be adjusted to allow for relevant deductions (and variations). Contractual interest was not payable on $73,050.00 because Mr and Mrs Miller did not owe it under the contract.

[62] The learned Member correctly used the *Balance contract sum of $73,050.00* as part of her calculations to arrive at the adjusted amount

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39 Clause N15.
40 *Mair Renovations v Miller* [2015] QCAT 333 at [171].
41 Ibid [176].
42 Ibid [180].
43 Clauses M10 and M11.

owed (by either party). The learned Member then correctly awarded interest on the net rectification costs of $212,688.50, as this was the amount owed once the contract had been adjusted to allow for variations and rectification. That is the amount Mair owed Mr and Mrs Miller under the contract and upon which contractual interest is payable. Mr and Mrs Miller did not owe Mair any amount under the contract and therefore no interest was to be awarded to Mair.

[63] The learned Member did not err in awarding interest as she did.

Has Mair established grounds to grant leave to appeal?

[64] As the appeal is on grounds of mixed law and fact, leave is needed to appeal.[44] In determining whether to grant leave to appeal, the Tribunal will consider established principles including whether there is a reasonably arguable case of error in the primary decision,[45] whether there is a reasonable prospect that the appellant will obtain substantive relief,[46] whether leave is needed to correct a substantial injustice caused by some error,[47] and whether there is a question of general importance upon which further argument, and a decision of the Appeals Tribunal, would be to the public advantage.[48]

[65] The Appeal Tribunal will not usually disturb findings of fact on appeal if the evidence is capable of supporting the conclusions.[49] The learned Member's findings were open to her on the evidence. Nothing in the material demonstrates that the learned Member should have adopted a different view of the facts. The learned Member had evidence upon which she could properly reach the conclusion that she did.[50]

[66] Mair has not demonstrated any error by the learned Member that would cause a 'substantial injustice'. No question of general public importance arises. Mair has therefore not established grounds to grant leave to appeal.

What are the appropriate orders?

[67] Because Mair has not established any appellable error to correct a 'substantial injustice' or question of general public importance, it has not established any grounds to grant leave to appeal.

[68] Leave to appeal is therefore refused and the appeal is dismissed.

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44 QCAT ACT s 142(3)(b).
45 *QUYPD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41.
46 *Cachia v Grech* [2009] NSWCA 232 at 2.
47 *QUYPD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41.
48 *Glenwood Properties Pty Ltd v Delmoss Pty Ltd* [1986] 2 Qd R 388 at 389; *McIver Bulk Liquid Haulage Pty Ltd v Fruehauf Australia Pty Ltd* [1989] 2 Qd R 577 at 577, 580.
49 *Dearman v Dearman* (1908) 7 CLR 549 at 561; *Fox v Percy* (2003) 214 CLR 118 at 125-126.
50 *Selvanayagam v University of the West Indies* [1983] 1 All ER 824 at 826.