QCAT

Queensland **Civil and Administrative Tribunal**

CITATION:	*Lee Manson t/as Manson Homes v Brett & Anor* [2017] QCATA 124
PARTIES:	Lee Manson t/as Manson Homes (Appellant) v Stewart Brett (First Respondent) Sarah Purnell (Second Respondent)
APPLICATION NUMBER:	APL309-16
MATTER TYPE:	Appeals
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	**Member Allen** **Member Burke**
DELIVERED ON:	14 November 2017
DELIVERED AT:	Brisbane
ORDERS MADE:	**1. Leave granted to the Appellant to amend the Application for Leave to Appeal and Appeal.** **2. Leave to appeal granted.** **3. Appeal dismissed.** **4. Stewart Brett and Sarah Purnell are to file two (2) copies in the Tribunal and give to Lee Manson t/as Manson Homes one copy of any submissions in regard to their costs of the Appeal on or before seven days from the date of this order.** **5. Lee Manson t/as Manson Homes is to file two (2) copies in the Tribunal and give to Stewart Brett and Sarah Purnell on (1) copy any submissions in reply in regard to costs within fourteen days of the date of this order.** **6. The Appeal Tribunal will make an order as to costs following the receipt of submissions from the parties.** **7. Application BDL117-14 is to be listed for a directions hearing on a date to be advised.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL –

GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – where grounds for leave to appeal – whether obligation under contract to obtain development approval or building approval – construction of statute – reliance upon expert opinion – where error would not have substantially affected the original tribunal's decision

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 142, s 143, s 146

Collector of Customs v Agfa-Geveart Ltd (1996) 186 CLR 389
H.A. Bachrach Pty Ltd & Ors v The Council of the Shire of Caboolture and Anor [1992] 80 LGRTA 230
Lida Build v Miller and Anor [2011] QCATA 218
Pickering v MacArthur [2005] QCA 294
Southern Foundries (1926) Ltd v Shirlaw [1940] AC 701
The Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24
Woodgate Beach Asian pacific Realty Pty Ltd v Gerard [2010] QCATA 64
Yu Feng P/L v Maroochy Shire Council (1996) 92 LGERA 41

APPEARANCES:

APPLICANT: DC Kissane, Counsel for Appellant

RESPONDENTS: B Saal, Solicitor for Respondents

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) (QCAT Act).

REPRESENTATIVES:

APPLICANT: McInnes Wilson, Solicitors for the Appellant

RESPONDENT: Saal & Associates, Solicitors for Respondents

REASONS FOR DECISION

[1] This is an application for leave to appeal and to appeal a decision of the Tribunal in a domestic building dispute[1] pursuant to s 142 (1) and s 142(3)(a)(ii) of the QCAT Act.

[2] The dispute between the parties arose out of an HIA QC3 2011 contract dated 29 November 2013 entered into between the Respondents, as owners, and the Appellant, as the builder, in relation to renovation and extension works at a property at 16 Lind Street, Newmarket Brisbane.

[3] The issues in dispute before the Member concerned the following matters:

a) an application by the Applicant/Appellant for damages for breach of contract in the sum of $107,174.05, which included payment for works alleged to have been performed by the Appellant;

b) a declaration that that the purported termination of the contract by the Respondents on 28 April 2014 was invalid;

c) a counterclaim by the Respondents for the sum of $77,528.90 being the cost to complete the contract works and $25,200 being rental costs incurred by the Respondents as a result of the Appellant's breach of contract.

[4] It was agreed between the parties that the Member would consider the question of the validity of the termination of the contract as a preliminary point.

[5] The Member's decision in relation to the preliminary point was delivered on 5 August 2016 ("the Reasons for the Decision") and is the subject of this appeal.

Amendment of Application for Leave to Appeal and Appeal

[6] The Appellant's application for leave to appeal and appeal was filed on 14 September 2016. The Appellant wishes to amend that application, as follows:

a) replacing the date of the receipt of the decision as 17 August 2017 instead of 5 August 2017;

b) removing the first 2 grounds of appeal;

c) amending the wording of the remaining ground of appeal;

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[1] Tribunal's jurisdiction to hear domestic building disputes pursuant to s 77 of the *Queensland Building and Construction Commission Act* 1991 (Qld).

d) amending the order sought by the Appellant to read "The Member's findings at paragraph 225(a), 225(b) and 226(c) of the Reasons for the Decision be vacated."

Grounds of Appeal

[7] Given the Appellant's application for leave to amend the application for leave to appeal and appeal, it is convenient to set out in full the remaining ground of appeal relied upon by the Appellant.

[8] The Appellant's remaining ground of appeal and orders sought are set out below:

IMPROPER REASONING

3.1 The Member's reasoning for concluding that there was a breach of relevant laws or lawful requirements is improper.

3.2 The Appellant contends that during the course of his reasoning the member committed serious errors of law at paragraphs 162, 168, 169, 170 and 220 of the Reasons. This arose due to the member:

(a) applying the wrong principle;

(b) failing to apply the correct principle at all when the circumstances required it to be applied; and

(c) failing to apply the relevant statute.

3.3 At paragraph [220] the member states:

[220] The positive obligation is on the builder to show that he did comply with all requirements – in the absence of such evidence, the conclusion that he did not do so, by constructing a different roof structure with a different material, is compelling. I am satisfied that the builder has not obtained building approval as required.

3.4 At paragraphs [161] and [162] the member states:

[161] The builder submits that it is not open to the tribunal to find that the builder has failed to comply with any law or lawful requirement of any statutory or other authority, as evidence was not led at the hearing that the property is located within the Character Residential Area, or within a Demolition Control Precinct under the Brisbane City Plan, or falls with the Grange District Local Plan area.

[162] Those submissions of the builder do not attract weight, as no witness took issue with any of those categorisations at any stage. It is stated in the evidence of Mr Fowler that Development Approval was required, and that evidence was not challenged.

3.5 At paragraph [168] the member states:

> *If the builder did not accept the professional advice of Mr Laa Tay in January 2014, that there was a regulatory requirement to obtain approval to change to a metal roof, then why would the builder amend the plans in January 2914 at all? The builder says that the owners agreed to amend the plans, but why would he even ask then to do so, or agree to do so himself, if he did not accept that there was a requirement to do so? Clearly the builder did accept that the work required by the Contract to install a metal roof required a Development Approval and a Building Approval.*

3.6 Then at paragraph [169]:

> *It is not open to the builder to now look back and to question the professional advice upon which both parties relied, in analysing their conduct under the contract at the time, and to now question whether there is a demonstrated requirement for Development Approval.*

3.7 Finally, at paragraph [170]:

> *I am comfortably satisfied that there is a sufficient basis for the Tribunal to find that there was a breach of relevant laws or lawful requirements, based upon evidence, and the conduct and statements of the parties, and of the various certifiers and town planners who were involved.*

3.8 The Member's reasoning at paragraphs 162,168, 169, 170 and 220 ultimately infected the Member's findings at paragraphs [225](a), [225](b) and 226(a) of the reasons where the Member found, inter alia, that the Applicant:

(a) failed to obtain the required approvals and consents in relation to the metal roof;

(b) the failure of the Applicant to obtain all required approvals and consents was a substantial breach of the Contract; and

(c) the Respondents were entitled to terminate the Contract on 28 April 2014 based upon the breach of Contract by the Applicant as to obtaining relevant consents or approvals.

[9] Based on the amended ground of appeal set out above, the Appellant seeks the following orders:

a) leave be granted for the Appellant to amend the Application for leave to appeal and appeal;

b) leave be granted for the Appellant to appeal the decision on the remaining ground of appeal set out above;

c) the appeal be allowed;

d) the Member's findings at paragraphs [225](a), [225](b) and [226](a) of the Reasons for the Decision be vacated;

e) the Respondents pay the Appellant's costs of the appeal.

Leave to Amend the Application for Leave to Appeal and Appeal

[10] The Appellant sets out in its submissions the reasons for each of the amendments sought. The substance of its reasoning is that two of the original grounds are no longer to be pursued and the amendments to the remaining ground are necessary to give greater clarity to it and to identify a further related error in paragraph [220] of the Reasons for the Decision.

[11] The Appellant submits that the substance of the proposed amendments narrows the issues and thus shortens the application for leave to appeal with the effect that there is no prejudice to the Respondents as a result of the proposed amendments.

[12] The Respondents do not contend that they are prejudiced by the amendments proposed by the Appellant except that the original inclusion of further grounds has caused delay.[2]

[13] The Appellant's application for leave to appeal or appeal was filed on 14 September 2016. The Amended Application for leave to appeal and appeal was filed on 23 February 2017.[3]

[14] On 16 November 2016, the Tribunal made directions for the delivery of submissions by the parties by 19 January 2017 and 17 February 2017 respectively.

[15] The Appellant's submissions were delivered on 23 February 2017 and the Respondent's submissions on 7 March 2917.

[16] It does not appear that any substantial delay has been caused by the inclusion of the original grounds of appeal by the Appellant or by the amendment of the remaining ground of appeal. The Respondents have been given adequate time to respond to the amended application.

[17] There are no sufficient reasons to support the contention that leave to amend the application for leave to appeal should not be allowed. Accordingly, leave to amend the application is granted.

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2 Respondents' submissions regarding leave to appeal dated 7 March 2017, [3].

3 Paragraph 2 and Annexure TA-1 of the statutory declaration of Thomas Adames sworn 17 February 2017.

Legal Considerations for Leave to Appeal

[18] A party may appeal on a question of law without the Appeal Tribunal's leave, unless the decision falls into one of the limited categories set out in s 142 of the QCAT Act.

[19] The decision before the learned Member falls into s 142(3)(a)(ii) of the QCAT Act as it is not the final decision of the Tribunal but rather a determination of a preliminary point.

[20] If the appeal concerns a question of fact, or a question of mixed law and fact, a party may generally appeal once leave to appeal has been granted.[4] The grounds upon which leave to appeal is sought must be stated in the application for leave to appeal.[5]

[21] The distinction between questions of law and fact is not always clear. It is often stated that Courts have not found it easy to formulate a satisfactory test of universal application.[6]

[22] The Supreme Court of Canada in *Canada (Director of Investigation and Research) v Southam Inc*[7] has provided the following concise formula:

> Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.

[23] There does not appear to be any dispute that the mistakes or errors relied upon by the Appellant are errors of law, namely the Member's failure to apply the proper principles of law and a failure to properly construe the relevant statutes.

[24] The decision in *Lida Build Pty Ltd v Miller and Anor* [2011] QCATA 219 at [7] to [9] summarises the bases upon which leave to appeal will generally be granted:

> [7] Finality in litigation is highly desirable because any further action beyond the hearing can be costly, and unnecessarily burdensome on the parties. [*Fox v Percy* (2003) 214 CLR 18, 128 per Gleeson CJ, Gummow and Kirby JJ]. A finding of fact will generally not be disturbed on appeal if the evidence before the tribunal supports the inferences drawn and the facts found. [*Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 355 per Mason CJ] It is not the Appeal Tribunal's task to decide where the truth lay as between the competing versions given by parties. [*Fox v Percy* (2003) 214 CLR 118 at 129 per Gleeson CJ, Gummow and Kirby JJ]

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4 QCAT Act, s 142(3)(b).
5 QCAT Act, s 143(2)(b).
6 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389, 394.
7 [1997] 1 SCR 748, [35] per Iacobucci J.

> [8] Whether a decision is based on findings of fact which are open on the available evidence is a question of law. [*Kostas v HIA Insurance Services Pty Ltd t/a Home Owners Warranty* (2010) 241 CLR 390]
>
> [9] Leave to appeal will ordinarily only be granted when a question of general importance upon which further argument and a decision of the Appeal Tribunal is to public advantage [*Glenwood Properties Pty Ltd v Delmoss Pty Ltd* [1986] 2 Qd R 388, 389; *McIver Bulk Liquid Haulage Pty Ltd v Fruehauf Australia Pty Ltd* [1989] 2 Qd R 577, 578 and 580]; there is a reasonably arguable case that the primary decision-maker made an error [*QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41] and there are reasonable prospects that the applicant would be granted orders in its favour [*Cachia v Grech* [2009] NSWCA 232, [13]]; or to correct a substantial injustice to the applicant caused by error [*QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 QD R 41].

[25] The principles the Appeal Tribunal applies when considering an application for leave to appeal are summarised by Keane JA (as His Honour then was) in *Pickering v MacArthur*:[8]

> There are numerous authorities, in varying language but with unvarying emphasis, that leave to appeal will usually be granted where there is a reasonable argument that the decision is attended by error, and an appeal is necessary to correct a substantial injustice to the applicant caused by that error.[9]

[26] Further, the Appellant has referred to the decision of *Woodgate Beach Asian Pacific Realty Pty Ltd v Gerard*[10] in which His Honour Justice Alan Wilson (then President) outlined the criteria which must be met for leave to appeal to be granted. His Honour referred to the following four factors:

a) Is there a reasonable case of error in the primary decision?

b) Is there a reasonable prospect that the applicant will obtain substantial relief?

c) Is leave necessary to correct a substantial injustice to the applicant caused by some error?

d) Is there a question of general importance which further argument and a decision of the appeal tribunal, would be to the public advantage?

[27] The Appellant submits that:

a) there is a reasonably arguable case of error of law in the Reasons for the Decision, particularly at paragraphs [161], [162] [168], [169],

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8 [2005] QCA 294.
9 [2005] QCA 294, [3].
10 [2010] QCATA 64.

[170] and [220] which led to an error in the conclusions reach by the Member in paragraphs [225](a), [225](b) and [226](a);

b) the Member's determination in paragraphs [225](a), [225](b) and [226](a) is of particular importance to the final disposition of the proceeding and is a significant factor in determining the substantial relief sought by the parties in the event that the appeal is allowed;

c) if leave is not granted, there will be a substantial injustice to the Appellant in the event that the findings in paragraphs [225] and [226] remain undisturbed as the findings therein will be binding on the Tribunal for the balance of the hearing;

d) there is a question of general importance involved as the errors of law raised by the Appellant relate to important legal principles which it is in the public interest to determine.

[28] The Respondents submit that the appeal is hopeless and that it has no prospects of success. For that reason alone, it is submitted leave ought to be refused.

[29] The question of leave is primarily dependent upon whether there is a reasonable case of error in the Reasons for the Decision. We propose to deal with this issue first and then consider the remaining factors relevant to the determination whether leave should be granted.

Appellant's Ground of Appeal – Improper Reasoning

[30] In order to understand the ground of appeal relied upon by the Appellant, it is necessary to have an understanding of the context in which the alleged mistakes or errors occurred.

[31] It was the Respondents' case that the Appellant was in breach of clauses 1.1(b) and 11.1 of the contract.

[32] The clauses of the contract relevant to this allegation are set out below.

[33] Item 5A of the Contract provides:

> 5A PLANNING AND BUILDING APPROVALS
>
> The person to obtain and pay for all planning and building approvals, consent or approval required by a statutory or other authority (Clause 2.3 to 2.6)
>
> *Contractor*
>
> (if nothing stated the contractor)

[34] Clause 1.1 of the contract provides:

> PERFORMANCE

> Contractor's obligations
>
> 1.1 The contractor must:
>
> (a) complete the works in accordance with this contract; and
>
> (b) comply with all laws and lawful requirements of any statutory or other authority with respect to the carrying out of the works.

[35] Clause 11 of the contract provides:

> COMPLIANCE WITH REQUIREMENTS OF LOCAL AND OTHER AUTHORITIES
>
> Requirements of statutory and other authorities
>
> 11.1 The contractor must, on behalf of the owner, comply with any lawful requirement of any statutory or other authority but only to the extent that such requirement relates to carrying out and completing the works.
>
> …
>
> (b) comply with all laws and lawful requirements of any statutory or other authority with respect to the carrying out of the works;

[36] Central to the Respondents' case is that the Appellant failed to obtain the necessary development approval or development permit in breach of clauses 1.1 and 11.1 of the contract which would have enabled the Appellant to install a metal roof as part of the contract works in replacement of a tiled roof.

[37] Extensive evidence was provided at the hearing regarding the events which occurred leading up to the installation of the metal roof. The Member accepted the evidence of Mr Brett, on behalf of the Respondents, in preference to the version of events relied upon by the Appellant.

[38] For the purpose of this appeal, it is not necessary to set out the salient facts and scenario accepted by the Member, suffice to say that according to the Respondents' version:

a) the original plans allowed for a metal roof;

b) the amended plans, which were unilaterally amended by the Appellant and submitted to the certifier without the Respondents' authority, provided for the installation of a tiled roof;

c) building approval was obtained based on the amended plans, which allowed for the installation of a tiled roof;

d) no development approval, development permit or building approval was obtained for the purpose of the installation of a metal roof;

e) the Appellant removed the existing tiled roof and installed a metal roof at the property.

[39] Extensive submissions were provided to the Member by both the Respondents and the Appellant addressing the appropriate law relating to the requirements for development approval and building approval with relevant attention to the *Sustainable Planning Act 2009* (the SPA), the *Building Act* 1975 (Qld) and the Brisbane City Plan 2000.[11]

[40] For the limited purpose of this appeal, it is not necessary for us to set out those submissions or to address the statutory requirements rather to acknowledge that each party provided to the Member extensive submissions outlining the proper interpretation and construction of the relevant statutes and plans.

[41] In response to the Appellant's contention that the Member's Reasons for Decision contains improper reasoning and thus errors of law, the Respondents rely upon s 28 of the QCAT Act to support the contention that the Member was entitled to reach the determination based on the material and evidence introduced without challenge at the hearing.

[42] Section 28(3) relevantly provides:

> (3) In conducting a proceeding, the tribunal –
>
> (a) must observe the rules of natural justice; and
>
> (b) is not bound by the rules of evidence, or any practices or procedures applying to courts of record, whether than to the extent the tribunal adopts the rules, practices or procedures; and
>
> (c) may inform itself in any way it considers appropriate; and
>
> (d) must act with as little formality and technicality and with as much speed as the requirements of this Act or the rules and a proper consideration of the matters before the tribunal permit.

Errors of Law in the Reasons for the Decision

[43] The majority of the paragraphs relied upon by the Appellant as containing errors of law which it is said infected the determinations made by the Member at paragraphs [225](a), [225](b) and [226](a) of the Reasons for the Decision can be dealt with together under the one umbrella.[12]

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11 Pages 4 to 13 of the Respondents' submissions dated 24 February 2016; pages 11 to 20 of the Appellant's submissions in reply delivered 6 April 2016

12 Reasons for the Decision, [161], [162], [168], [169], [170].

[44] It is appropriate however to deal with the error in paragraph [220] separately as it concentrates on an error of law pertaining to the correct onus of proof.

[45] The Appellant submits that the Member made an error of law in finding that there was a positive obligation on the Appellant to show that he did comply with all requirements relating to obtaining the proper building approval. The Appellant relies upon the principle in *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701 at 729 which states that the onus of proving effective election of the termination of the contract rests with the promisee.

[46] In the present case, the onus was on the Respondents to demonstrate that the Applicant had not complied with its obligations under clauses 1.1 and 11.1 of the contract.

[47] We accept that on the face of the record that there is an error in addressing the onus of proof.

[48] It cannot be said with certainty however that this error alone infected the Member's reasoning or whether the Member would have reached the same or a different conclusion had the correct approach to the onus of proof been undertaken.

[49] The alleged errors in paragraphs [161], [162], [168], [169] and [170] need not be dealt with separately as they all relate to the Member's approach to the issue of whether a development approval or permit was required for the installation of the metal roof. In paragraph [168] the Tribunal Member purports to rely upon the subjective belief of the Appellant whilst in the remaining paragraphs the Member relies upon the opinions of the town planner as to the requirement to obtain a development approval and/or a building approval for the installation of a metal roof in place of the existing tiled roof.

[50] Each of those paragraphs identifies the Member's reliance upon the evidence of the town planning experts in formulating an opinion regarding the interpretation of the relevant statutory obligations for obtaining development approvals or permits.

[51] In *H.A. Bachrach Pty Ltd & Ors v The Council of The Shire of Caboolture and Anor*[13] the Court of Appeal considered the relevancy of the opinion of a town planner upon a question of construction of part of a strategic plan. The Court held that the opinion of the town planner upon a question of construction, whether that question is one of law or of fact is irrelevant. The Court stated:

> Curiously, Her Honour allowed town planning witnesses to give evidence of the meaning of these sub-clauses and purported to arrive at the

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13 [1992] 80 LGERA 230; [1992] QCA 384.

> construction which she did by accepting some and rejecting another of those witnesses. Moreover, we were told that this was a common practice in the Planning and Environment Court. Common practice or not, it was plainly wrong. The opinion of a town planner upon a question of construction, whether that question is one of law or of fact, is irrelevant. No doubt an expert may give evidence of the meaning of a technical word or phrase but that was not what was done here.

[52] The Court then went on to consider the consequence of such an error of law in the construction of a particular clause:

> The final question on this appeal is what is the consequence, if any, of that error. The Respondents say that, for any consequence to ensue, the Appellant must establish that the decision below would have been different if the error had not occurred; whereas the Appellant submits that it is sufficient to show that the decision might have been different if the error had not occurred. There are dicta in the Queen v Tennant & Anor ex parte Woods (1962) Qd.R. 241 at 261 and Barmuncol Pty Ltd v Maroochy Shire Council (1983) 50 L.G.R.A. 309 at 315 which appear to support the Respondent's contention. On the other hand in Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 C.L.R. 24 at 40 Mason J. (as he then was), with whose reasons Gibbs C.J. and Dawson J. agreed, discussing the consequence, in a review of a decision under the Administrative Decisions (Judicial Review) Act 1977 (Cth), of a failure to take into account relevant considerations, said:-
>
> > "Not every consideration that a decision maker is bound to take into account but fails to take into account will justify the court setting aside the impugned decision and ordering that the discretion be re-exercised according to law. A factor might be so insignificant that the failure to take it into account could not have materially affected the decision."
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> We think that that is an appropriate test to apply here. See also Minister for Immigration and Ethnic Affairs v Haj-Ismail (H.&N.) (1982) 40 A.L.R. 341 at 346; Shell's Self Service v Deputy Commissioner of Taxation (1989) 98 A.L.R 165. Applying that test here, it could not be said that Her Honour's construction of the strategic plan could not have materially affected her decision. Indeed that was not argued by the Respondents.

[53] In *Yu Feng P/L v Maroochy Shire Council* (1996) 92 LGERA 41 at 65,[14] the Court of Appeal re-affirmed the principle that the construction of a draft strategic plan was a matter for the Court and not for a town planning witness.

[54] As a bald assertion (relied upon by the Respondents according to s 28 of the QCAT Act), it is true that the Tribunal is not bound by the rules of evidence. Having said that, it is a general principle that every attempt must be made to administer "substantial justice" and in that context the rules of

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[14] [1996] QCA 226; [2000] 1 Qd R 36 per Fitzgerald P, Pincus JA, Mackenzie J.

evidence cannot be set to one side and the Tribunal carry out methods of enquiry which advantage one party and disadvantage another.[15]

[55] The Tribunal is bound by the decisions of the Court of Appeal to construe the relevant provisions of the planning scheme and relevant legislation and Codes and to regard the opinions of town planners on issues of construction of those documents as irrelevant.

[56] The mistake of the learned Member was to adopt the town planner's opinion on a point of construction without formulating his own opinion based on a proper construction of the relevant statute, planning scheme and Codes.

[57] This Appeal Tribunal is bound by the decision in the Court of Appeal in *H. A. Bacharach Pty Ltd v The Council of the Shire of Caboolture.* Given that a mistake or error of law has been shown to exist, the final question is what is the consequence of that error.

[58] We think that in identifying the consequences the test applied in *The Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40 by Mason J (as he then was) should be applied.

[59] It is necessary therefore to consider whether the Member's error in relying upon the expert's opinion and failing to decide the issue of whether a Development Approval was required materially affected the Member's Reasons for the Decision.

[60] In reaching a conclusion on this issue, it is necessary to take into account a significant factor which was determined by the Member based on the evidence before him. That is, the failure of the Appellant to obtain a building approval, development permit or development approval (as required under the contract) for the original plans which formed part of the contract.

[61] The evidence is clear that building approval was only obtained for the amended plans. Those plans did not allow for the removal of the original tiled roof. In fact, the building approval obtained provided for the retention of the original tiled roof.

[62] It follows that no building approval was obtained to include the installation of a metal roof.

[63] Accordingly, the Member's failure to consider the question of whether a development approval was required upon a proper interpretation of the relevant legislation is not an error which would significantly have affected the Member's conclusions in paragraphs [225](a), [225](b) and [226](a).

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15 *R v War Pensions Entitlement Appeal Tribunal; ex parte Bott* (1933) 50 CLR 228 per Evatt J.

[64] The Appellant was in breach of clauses 1.1 and 11.1 of the contract in failing to obtain the relevant building approval for the contract works. There was no necessity for the Member to find also that there was a failure by the Appellant to obtain a development approval for the metal roof through the process of a proper interpretation of the relevant legislation.

[65] To do so would have compounded the breach however a relevant breach existed to support the finding in paragraphs [225](a) and [225](b).

[66] Accordingly, we have formed the view that the errors relied upon by the Appellant have not infected the findings in [225](a), [225](b) and the determination in paragraph [226](a).

Leave to Appeal and Appeal

[67] Given our opinion that the question of construction of the statute in the present case is a question of law and that the Tribunal Member's reliance upon the expert opinion in that construction was an error of law, we have formed the view that the first factor in *Woodgate Beach Asian Pacific Realty Pty Ltd v Gerard* has been satisfied and leave should be granted.

[68] In relation to the remaining factors, it follows from the error of law relied upon by the Appellant that it was in the interest of justice that this Appeal Tribunal determine whether the course taken by the Member was justified and whether it could have materially affected the findings in paragraphs [225](a) and [225](b).

[69] Given the mistake or error was that of relying only upon the expert evidence in relation to the interpretation of the relevant statutory obligations, there was a reasonable prospect that the Appellant's argument relating to the proper interpretation of the legislation may have had some validity.

[70] As to the issue of whether there is a question of general importance which further argument would be to the public advantage, there is little doubt that the primary dispute between the parties involves matters personal to the two parties; however, there is some validity in the Appellant's argument that matters relating to the construction of statutes are of general importance and decisions of courts and tribunals are beneficial as a guideline for the general public.

[71] In the circumstances, leave to appeal is allowed.

[72] Given our reasoning that the errors relied upon by the Appellant would not have affected the Member's findings in paragraphs [225](a) and [225](b) it follows that the appeal is refused.

[73] The parties sought orders as to cost in their respective submissions. If Mr Brett and Ms Purnell wish to seek their costs in respect of the appeal, they

must make submissions in accordance with the order. With Lee Manson to have an opportunity to make submissions in reply.