DISTRICT COURT OF QUEENSLAND

CITATION:	*McNab Constructions Australia Pty Ltd v Queensland Building Services Authority* [2010] QDC 131
PARTIES:	**McNab Constructions Australia Pty Ltd (ACN 102 840 906)** **(Applicant)** **v** **Queensland Building Services Authority** **(Respondent)**
FILE NO/S:	BD2699 of 2009
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	Brisbane
DELIVERED ON:	24 March 2010
DELIVERED AT:	Brisbane
HEARING DATE:	15 March 2010
JUDGE:	Dorney QC DCJ
ORDER:	**No orders yet made.**
CATCHWORDS:	APPLICATION – Appeal from Commercial and Consumer Tribunal – error of law – statutory interpretation – whether different provisions should be interpreted similarly – whether amending provisions have retrospective effect. *Commercial and Consumer Tribunal Act* 2003, s 100 *Queensland Building Services Authority Act* 1991, s 72 *Baulderstone Hornibrook Pty Ltd v Beneficial Finance Corporation Limited* [1998] QCA 351 *Begley v Fisigi Pty Ltd* [2008] 1 Qd R 316 *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 *Coleman v The Shell Company of Australia Limited* (1943) 45 SR (NSW) 27

	Comptroller – General of Customs v Akai Pty Ltd & Ors (1994) 50 FCR 511 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 *FKP Residential Developments P/L v Maroochy Shire Council & Anor* [2009] QCA 403 *Flower v Clements* [2005] QDC 050 *Freeman v Secretary, Department of Social Security* (1988) 19 FCR *George Hudson Limited v The Australian Timber Workers' Union* (1923) 32 CLR 413 *HIA Insurance Services Pty Ltd v Kostas* [2009] NSWCA 292 *ND v GLG Australia Pty Ltd & Ors* (2005) 228 CLR 529 *Poiner v Quirk & Anor* [2007] QDC 299 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 *Puerto Galera Pty Ltd v J M Kelly (Project Builders) Pty Ltd* [2008] QSC 356 *QBSA v O'Brien* [2002] QDC 329 *Regional Land Development Corp No 1 P/L v Banana SC & Os* [2009] QCA 140 *R v His Honour Judge Given, ex parte Builders Registration Board of Queensland* [1985] 2 Qd R 32 *Re Smith and DFRDBA* (1978) 1 ALD 374 *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 *Skaines v Kovac Enterprises Pty Ltd* [2007] 1 Qd R 98 *Stingal v Clark* (2006) 226 CLR 442 *Victoria Legal Aid v Kuek & Anor* [2010] VSCA 29 *Yu Feng Pty Ltd v Maroochy Shire Council* [2000] 1 Qd R 306
COUNSEL:	D. Fraser QC with B. Codd for the Applicant J. Bond QC with M. Hindman for the Respondent
SOLICITORS:	Lenz Moreton Solicitors for the Applicant HWL Ebsworth Solicitors for the Respondent

Introduction

[1] This is an application for leave to appeal - and such leave is granted (for reasons stated later) - to appeal against the decision of the Commercial and Consumer Tribunal ("CCT") made 26 August 2009 by which it was ordered that:-

> 1. The applicant's Application in a proceeding in the CCT filed 20 March 2009 is dismissed; and
> 2. The proceeding is to be listed for a further Directions Hearing at a time and date to be advised by the Registry.

[2] What was the concern of the CCT was a review of 15 separate decisions made by the respondent to issue directions to the applicant to rectify certain building work.

[3] What the CCT had decided was to determine, as a preliminary question, the effect of the applicable legislation both prior to, and subsequent, to amendments effected in 2007, insofar as they provided legal justification, or not, for the decisions to issue the relevant directions already mentioned. The legislation governing the matters is the *Queensland Building Services Authority Act* 1991 ("QBSA Act").

[4] An appeal to the District Court against a "decision" of the CCT is available on only very limited grounds.

Legislative basis of appeal

[5] Section 100(1)(a) of the *Commercial and Consumer Tribunal Act* 2003 ("CCT Act") provides that a party to a proceeding before the CCT may appeal to the District Court, relevantly, "against a *decision* of the Tribunal, with the Court's leave, *only* on the ground of … error of law". (emphasis added)

[6] As the Notice of Appeal (subject to leave) filed 22 September 2009 states, if leave is granted, the appeal is contended to be on those grounds, in summarised terms, which wholly rely upon the Member of the CCT having "erred in law". Although there are 15 paragraphs which state the grounds of the proposed appeal, due to the diligence of counsel for both parties, it is possible to confine the determination of the relevant alleged errors to two major areas.

[7] But before considering what those two areas are, it is worthwhile paying some attention to the limited scope of this appeal.

[8] It was observed by Keene JA in the Court of Appeal in *Regional Land Development Corp No 1 P/L v Banana SC & Os* [2009] QCA 140, although dealing with the ground of "error or mistake in law", that the manifest intention on the part of the legislature is that the appeal court should not interfere with the expert resolution of issues determined by the specialist court (or tribunal) "save to the extent necessary to ensure that that court (or tribunal) acts within its jurisdiction and in conformity with the law": at [12]. This means that, applying by analogy for these purposes the relevant cases dealing with statutory appeal provisions restricted in some way to legal error, appeals on an error, or question, of law from a decision of, say, a tribunal means that the question, or error, of law is not only a qualifying condition

but "the sole subject matter of the appeal, to which the ambit of the appeal is confined": see for instance, Basten JA in *HIA Insurance Services Pty Ltd v Kostas* [2009] NSWCA 292 at [85].

[9] Regarding what is an "error of law", it is instructive that in *Regional Land Development* Keane JA quoted with approval from the decision of Fitzgerald P in *Yu Feng Pty Ltd v Maroochy Shire Council* [2000] 1 Qd R 306 (at 335-336) who had held that, as to the distinction between errors of law and errors of fact, it is a question of law "whether the material before the court reasonably admits of different conclusions" with respect to whether or not the statutory provision is met: at [17].

Leave

[10] While the applicant relied upon *Poiner v Quirk & Anor* [2007] QDC 299, the respondent relied upon *Flower v Clements* [2005] QDC 050. Considering that McGill DCJ in *Poiner* expressly accepted the test for leave expounded by Wilson DCJ in *Clements* (at [3]), I hold that the expression of the relevant factors favouring the granting of leave accepted in *Poiner* is appropriate. Those factors are that:

- there is a reasonable prospect of demonstrating an error of law on the part of the learned member who constituted the CCT;
- the error of law could have materially affected the decision; and
- it may be relevant, in a particular case, to consider the gravity of the case, the amount of the dispute, any public interest in the result in the particular case, or whether any question of law raised is of wider importance than between the parties to the immediate dispute.

[11] For the reasons expressed in *Regional Land Development*, it is often convenient for a court to reserve its decision on a question of leave until after it has heard argument on the merits of the issues sought to be agitated on appeal: while noting that the relevant legislative provision here, as there, clearly contemplates "that putative errors of law should be presented by an applicant so as to be recognisable as such without the need for the Court to descend into the evidence to be reviewed on a proposed appeal in order to determine whether leave should be granted": at [13].

[12] I have found it to be so convenient in this case. And, after hearing such argument on the merits, as indicated earlier I hold that leave should be granted because there was a reasonable prospect of demonstrating relevant error, because it could have materially affected the decision and because, in this case, the questions of law raised are of wider importance than between the parties to the immediate dispute (although the applicant is a reluctant party to this "test" case). Nevertheless, I will continue to use the term "applicant" to describe the applicant/appellant.

Putative errors of law

[13] Although the applicant's submissions in the end no longer relied upon the prospective grounds of appeal numbered 13, 14 and 15, the remaining 12 can be, and were by way of oral submissions by both parties, limited to two major questions

of law. There was, for instance, little doubt that the CCT had power to consider whether it had jurisdiction or not: see *Skaines v Kovac Enterprises Pty Ltd* [2007] 1 Qd R 98 at 101.

[14] Briefly stated, and borrowing unashamedly from the written submissions of the respondent (as amended), those questions of law are:

- as a matter of law, under the QBSA Act as it existed at the time of the first direction to rectify, did the respondent Authority have power to issue a direction to rectify the relevant building work to the applicant?
- as a matter of law, under the QBSA Act as amended in 2007, did the respondent Authority have power to issue a direction to rectify that building work to the applicant?

[15] Necessarily, the decision as to the existence of the described power involves several sub-questions of law.

[16] Before considering the legal issues, it is necessary not only to briefly survey the relevant evidence that provides the basis for determining the legal outcomes but also to deal with the question that arose that I determined was not appropriate to consider at this stage.

Sidelined issue

[17] There was a contest between the parties about whether, in the Reasons given by the Tribunal for its order made on 26 August 2009, the learned Member was relevantly in error in making the statement that, with respect to consideration of s 72(5)(f) of the post-amendment QBSA Act being "primarily procedural" and not affecting the applicant's rights, this was "because the applicant was already liable under the general law for any adverse consequence of (the identified) conduct relevant to the actual performance of the building work, (with) the amendments simply conferring upon the Authority a method of enforcing any such liability against him": at [15].

[18] The view that I formed was that, since the appeal is not against the reasons but against the decision with respect to the identified errors of law, any alleged defect in the reasoning process is irrelevant to the determination by this Court of what the correct legal position is, at least where the decisions in the reasoning processes are part and parcel of the eventual "decision" alleged to be made in error. Thus, I determined that the statement in the Reasons of the learned Member was to be ignored for present purposes since any revealed error of law would be merely a minor part of any erroneous "decision" concerning s 72(5)(f).

Factual background

[19] A Chronology prepared by the applicant was handed up to the Court during the oral submissions. Although accepted by the Court, it was done on the basis that the respondent could make submissions with respect to any alleged inaccuracy in it. The respondent, through its senior counsel, took that opportunity but the "inaccuracies", as readily conceded by senior counsel, do not affect the real issues of fact in this proceeding.

[20] On 20 December 2004 the applicant, as "Construction Manager", and Advanced Traders Pty Ltd, as "Principal", entered into a contract that was entitled "Formal Instrument of Agreement". The contract comprised several documents enumerated and described in that Instrument. The recital stated the contract was for the construction management of the W4 Apartments Project at 8 Skyring Terrace, Teneriffe in Queensland. Part A was one of the agreed documents. As shown by Items 1 and 3, for the purposes of Clause 1 of AS 4916-2002 (being the general conditions of construction management), the applicant was to be the relevant construction manager and Advanced Traders Pty Ltd was to be the relevant principal. Clause 2.1 of the General Conditions stated that the applicant should carry out and complete "the Services" in accordance with the contract and directions authorised by the contract and that the principal should pay the applicant the management fee and fee adjustments in accordance with the contract. Those "Services", by reason of Clause 1 of the General Conditions, were defined in Annexure Part B. In turn, Part B then set out the construction management Task List. This List showed the nature of the obligations which the applicant was required to meet. It should be noted that the Annexure Part D, with respect to Clause 2.1, added the words "free from any defect or omission" after the words "carry out and complete the Services". Finally, by clause 6.3 the construction manager was required to administer the construction management trade contracts entered into by the principal.

[21] It is unnecessary to survey each and every one of the matters set out in the Task List. Senior counsel for the respondent did take me through very many of those tasks. But it is sufficient, in the end, to conclude that the relevant tasks included:

- with respect to management procedures, the task of design document control;
- with respect to consultant management, the tasks of "buildability" as well as "quality", with "buildability" and "quality" again appearing with respect to contractor team liaison;
- with respect to procuring appropriate design documents consistent with the project timetable, the tasks of drawing and specifications;
- with respect to the pre-construction phase, the tasks of preparation of the construction programme, formulation and agreement for construction methods with design consultants and design on "buildability", as well as tasks of tendering, negotiating and awarding contracts in consultation with the principal (with respect to that, Annexure Part D added a new Clause 7.5 which set out trade contract requirements);
- with respect to quality assurance, the tasks of developing a quality assurance strategy for the principal's approval, managing quality assurance issues and advising on all matters relating to quality assurance;
- with respect to site management, the tasks of co-ordinating contractors, securing the prompt remedying of all defects by contractors in accordance with their contracts, and securing the prompt remedying of all defects discovered at practical completion and at the end of the defects liability period;

- with respect to performance control and reporting, the tasks of the maintenance of documentation of the performance of contractors and consultants in a form acceptable to the principal;
- with respect to the construction phase, the tasks of contract administration, carrying out all administrative procedures necessary for the efficient management of the project, progress work inspections and tests, authority inspections and tests, ensuring conformity to specification, monitoring progress of the design working and working drawings of all contractors and suppliers, and progressive completion of the works, so far as they affected quality; and
- with respect to construction, monitoring and control, the tasks of managing the construction programme, coordinating with the principal's activities, establishing and implementing construction monitoring and reporting, system and liaising with the principal on progress and quality.

[22] Although the survey is not brief, it does indicate both the limit, and the breadth, of the contractual obligations concerning the management work agreed to be carried out by the applicant with respect to the building work in question.

[23] Reverting briefly again to the undisputed parts of the Chronology:

- on 30 November 2006 the principal/developer accepted practical completion;
- on 23 April 2007 there was an amendment to the QBSA Act;
- on 23 August 2007 the respondent received a complaint from the Body Corporate of the subject property;
- on 3 October 2007 the respondent issued a direction to rectify (numbered 30654);
- on 21 December 2007 there was a further amendment to the QBSA Act (which, for present purposes, took relevant effect for this proceeding then);
- on and after 2 January 2008 the respondent issued 14 other directions to rectify;
- on 17 July 2009 there was a hearing, although interlocutory, of the CCT; and
- on 26 August 2009, the CCT handed down its relevant "decision".

[24] To round out the factual basis, it should be noted that the consideration for the Management Contract was in the order of $1.65m and that the preliminaries and disbursements not included in that fee potentially could have added up to a figure in the order of $3.9m.

[25] On the other side of the contractual matrix were the trade contracts which, by reason of that survey of the management contractual provisions, impinged on the discharge of the applicant's obligations. Such contracts were in a standard form complying with the general conditions for construction management trade contracts, AS 4917-2003. By clause 2.1 the trade contractor was obliged to carry out and complete the work under the contract in accordance with the contract and directions authorised by the contract, with it being the principal only who was required to pay the trade contractor. With respect to the construction manager, Clause 20, after stating that, where the construction manager did not act as the principal's agent for pricing

variations and certifying amounts due to the trade contactor or the principal, the principal should ensure that the construction manager fulfils all aspects of those roles reasonably and in good faith; and that, except where the contract otherwise provided, the construction manager did act as the principal's agent in the roles and functions to the exclusion of the principal and might give directions (which were eventually to be in writing). For defective work, Clause 29.3, while requiring intervention by the construction manager, including directions by the construction manager to do certain (basically remedial) work, stated that it was up to the principal, upon failure by the trade contractor (in certain circumstances) to have the work rectified, although with the construction manager certifying the cost incurred as moneys due from the trade contractor to the principal. In addition, by Clause 29.4, instead of a direction pursuant to Clause 29.3, the construction manager could direct the trade contractor that the principal elected to accept the subject work. Finally, Clause 35 dealt with defects liability, again in similar terms to Clause 29.

Conclusions concerning relevant background facts

[26] I accept the gist of the submission from senior counsel for the respondent that, after due consideration of the relationships between the principal, the construction manager, and the trade contractors, while the eventual decision to accept defective work lay solely with the principal, there is pursuant to the contractual provisions the possibility of an actual causal relationship which is potentially capable of generating legal liability in the construction manager for defective building work carried out. Further, while there is incomplete evidence presented so far because the full hearing has not occurred, not only is there the possibility of such contractual breaches sounding in damages but also the possibility (though presently seemingly remote) of tortious conduct (which will be discussed later). The contractual obligation of the applicant, in the amended Clause 2.1 of its agreement with the principal, obliging it to carry out and complete the services pursuant to the agreement "free from any defect or omission" creates such potential.

[27] The importance of the possibility and the potential is simply that, at this interlocutory stage in the determination of questions of law, due consideration has to be paid to the fact that there has not yet been any *de novo* consideration of the factual circumstances surrounding each and every one of the 15 directions given by the respondent.

[28] Thus, it may well be that, at the end of that factual consideration, it is open to the CCT to decide that the circumstances yield something more than an absence of a direct or indirect causal relationship with the building work carried out. Necessarily, if this could be the outcome, then it does have an effect on the scope of the orders that the Tribunal could make when exercising the *de novo* discretions available, as well as the orders that this Court should make on this appeal. In turn, it must have an effect on the scope of the determination of legal questions.

Pre-2007 amendment legislation

[29] The power given to the respondent to require rectification of building work is, and has been prior to the 2007 amendments, contained in s 72 of the QBSA Act.

[30] Prior to 21 December 2007 its legal effect, insofar as it affected the applicant, resulted from a combination of s 72(1), s 72(5)(d) and s 72(11)(b). That is not to

say that it was not possible that s 72(5)(c) might, in certain circumstances, have been relevant. But it is unnecessary to consider that provision to work out what, relevantly, for this analysis, the provision of advisory services, administration services, management services or supervisory services entail, insofar as it might affect the applicant. It is important when considering the combination of those provisions to fully appreciate that s 72(11) applies for "the purposes of" s 75(5)(d), and that it, in turn, applies "for s 72(1)".

[31] What the subsidiary sub-sections do is to create an ever widening net for the respondent to seize upon, exercising its relevant discretion properly, in the identification of a person to whom it may direct to rectify "the building work". That is, although s 72(1) bluntly identifies the person as the person "who carried out the building work", it may well be that the actual circumstances show that, for instance, the licensed contractor whose licence card is imprinted on the contract for carrying out the building work pursuant to s 72(5)(a) did not, in fact, actually carry out the work; but might still be the subject of the rectification order. By Schedule 2 there were definitions of "building work" and "contract administration" (with the latter limited to being "in relation to building work designed by a person").

[32] Thus, uninstructed by authority, a literal interpretation could be open in this pre-2007 amendment period which could have the consequence of including in the net of persons, who may be directed to rectify, a person who provided, for instance, management services but who had not "carried out" the building work. But there is, at least arguably, authority that may suggest to the contrary.

[33] In *Puerto Galera Pty Ltd v J M Kelly (Project Builders) Pty Ltd* [2008] QSC 356 Chesterman J considered what was meant by the term "carry out building work" as it appeared in s 42(1) and, or alternatively, s 42(2) of the QBSA Act as it was in force as at 5 February 2004. Those provisions were directed to a prohibition on carrying out building work unless a relevant licence of the appropriate class was held. The factual background to that case was not dissimilar to this case. There, the role of a superintendent in the performance of the relevant building contract was under scrutiny. In very brief summary, Chesterman J held that the superintendent's contractual role showed that the superintendent did not build the relevant building work, or part of it, or design it: at [43]. He added that the superintendent did have a role in the adjustment of contractual rights and in achieving the efficient and timely performance of the contract, "but his role was not to build" and he "did not carry out building work in the sense that building contract(ors) do": at [47].

[34] After noting that there was no statutory definition of the four types of services included in s 42(2)(b) (and that the terms themselves were nebulous and that the vagueness of the concept underlying the provision was increased by reason of the fact that each of the four types was required to be provided "in relation to the work"), he found that the provision did not apply to the providing of such services by someone who was not himself erecting or designing the structure (or causing it to be erected or designed): at [49], [50] and [54].

[35] As summarised by Chesterman J (at [51]), the combination of the terms of the two relevant sub-sections should be read as saying:

> "A person must not carry out … building work unless that person holds a contractor's licence of the appropriate class. Providing advisory etc. services in relation to building work is building work."

[36] In reaching this non-literal conclusion, while acknowledging that the construction adopted perhaps gave the provision a limited scope for operation (at [55]), Chesterman J reasoned as follows:

- if taken to its literal extreme, the definition, coupled with the prohibition contained in s 42(1), criminalises conduct that would ordinarily be regarded as beneficial which could not, apart from statute, sensibly thought to be "building": at [50];
- it was significant that the extended prohibition extended only to providing advisory etc. services to "*the* building work", with the "definite article limiting building work in relation to which the provision of services is prohibited": at [52];
- "the building work" can only be the building work "which the person referred to in s 42(1) is carrying out": at [53];
- so understood, the provision "extends the range of activities which a builder may not perform without a licence": at [54];
- this construction "is consistent with the approach a court should take to the interpretation of statutes which impose criminal sanctions, particularly those which are drafted in vague terms so that the range of conduct prescribed is difficult to comprehend and therefore to avoid": at [55]; and
- such a construction does not deprive the sub-section of substance because the sub-section "extends" the range of activities performed by an unlicensed builder for which he may not seek payment, while not making "the giving of advice or management or supervision about, or in relation, to building work performed by someone else a criminal offence": at [56].

[37] Finally, after identifying specific functions of the superintendent, Chesterman J held that the conclusion that the performance of the superintendent's role did not come within the ambit of s 42 was supported by the fact that there was no "superintendent's licence" which might be issued to those performing that role: at [62].

[38] The reason why careful attention has been paid to the reasoning in *Puerto Galera* is that it was urged by senior counsel for the applicant that this decision provided strong guidance to the interpretation of the relevant s 72 provision. For its part, the respondent's senior counsel stressed the quite different purposes of s 42 and s 72 in urging that this authority should be limited to the circumstances encompassed by s 42, stressing that the criminality from having no licence in s 42 was quite distinguishable from the criminality under s 72 (where it could only occur on a failure or a refusal to comply with a direction to rectify under s 72).

[39] Crucial to determining to what extent *Puerto Galera* provides persuasive reasoning for an interpretation of s 72 is a consideration by the Queensland Court of Appeal of

it, where an argument about the close analogy between the two provisions was rejected.

[40] In *Baulderstone Hornibrook Pty Ltd v Beneficial Finance Corporation Limited* [1998] QCA 351 the principal question was whether, under s 72 of the then applicable QBSA Act, the respondent was entitled to direct a mortgagee to rectify certain building works. The most thorough analysis was undertaken Pincus JA. Interestingly, it was unnecessary to consider the equivalent of s 72(11)(b). Rather, the consideration was a combination of s 72(1), s 72(2)(d) and – the then equivalent of s 72(11)(a) - s 72(8)(a). Relevantly, for present purposes, was the rejection of an argument that, if the relevant provisions of s 72 were to be given a wide meaning, every person building a house with a view to sale would be obliged to become a licensed contractor under s 42: at [13]. This point was rejected has having "no real substance" because:

- s 42 was 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 a quite different subject";
- the operation of s 72 in the case under consideration depended 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 coming from s 72 which have no counterpart in, or relevance to, the construction of s 42; and
- the submission was "simply incorrect" because s 42(5) read with s 44 dealt with the situation of the owner/builder who was required to have a permit under the latter provision.

[41] Thomas JA, when dealing with the same argument, held that if a mortgagee, or financier, descended into the building area to the extent that it fulfilled the requirements of both sections, there was nothing unacceptable in it becoming liable to the respective disadvantages that arose under those sections: at [5]. For his part, Byrne J did not canvass the issue at all.

[42] Correctly analysed, in my view, it is only the reasons of Pincus J A which are capable of bearing upon the present determination. The arguments in the present case do not mirror the arguments advanced in *Baulderstone Hornibrook*. There is no attempt to read down s 72 because of any supposed difficulty in applying s 42, it being obvious enough that the latter provision deals with quite a different subject. But that does not carry the consequence that they should be read as quite independent provisions. The terms in which they are expressed are remarkably similar, with it being noted that, while s 42(2)(b) refers to the services being "in relation to" the building work, s 72(11)(b) refers to such services being "for" the building work. If anything, s 42 is of wider compass.

[43] It must be freely acknowledged, as stated by Fraser JA – although in an entirely different context – that it is a completely orthodox approach to statutory interpretation to read different sections as having a different operation in the different circumstances in which the Act states they are to apply (*FKP Residential Developments P/L v Maroochy Shire Council & Anor* [2009] QCA 403 at [49]). But the conclusion cannot be escaped that what *Puerto Galera* was considering were the exact same phrases which deal with services in the exact same context of a person

being "taken" to "carry out building work" in relation to "the" building work: see, for instance, Holmes JA in *Begley v Fisigi Pty Ltd* [2008] 1 Qd R 316 at 325 [34].

[44] The logic of the approach of Chesterman J, while it does focus on the criminalisation of conduct, both initially and finally, does nevertheless proceed through an analysis that shows why it is proper in the context of the Act, construing the legislative instrument on the prima facie basis these provisions are intended to give effect to harmonious goals (*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-2), that the approach to s 42 should commend itself as the proper approach to s 72. Quite obviously, several of the factors that inclined Chesterman J to his conclusion are either absent from s 72 or expose the offender against the section to criminality at a different stage of the section's application. But, equally, the financial "penalty" that arises from a s 72 order could be a very significant imposition. Despite all that, the reason why, in circumstances where there clearly are arguments both ways, I have formed view that the preferable conclusion is a narrow interpretation of s 72 is that it still gives s 72(1), s 72(5)(d) and s 72(11)(b) a sound basis of operation, namely, to cases 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 problem with the contrary interpretation is that it yields an extraordinarily wide meaning, at least potentially, in this case without a real consideration of the wider effects of that broader interpretation that the respondent seeks to give it. That flows from the consequence that the ratio that can be discerned from *Baulderstone Hornibrook* does not gainsay such a conclusion. As for the possible use of Explanatory Notes both for the "original" QBSA Act and the 2007 Amendments, pursuant to s 14B(1)(c) of the *Acts Interpretation Act 1954,* while I have surveyed all the parts to which my attention was directed I have obtained no relevant help. This is because they merely contain a repetition of the actual words of the legislation to be enacted, because they are themselves vague or even ambiguous, or because they assert "clarification" when it is unclear what is being clarified. As observed by the High Court in both *Stingal v Clark* (2006) 226 CLR 442 and *ND v GLG Australia Pty Ltd & Ors* (2005) 228 CLR 529, the subjective contemplation of drafters as to the kind of case in which the statutory language would be most likely to be applied is not determinative (at 458 [26]) and the words of the statute, not non-statutory words seeking to explain them, have paramount significance: at 528 [22]. In particular, the omission of any reference to the 2007 amendments having retrospective effect is equivocal in light of my later holding that they do not have that effect.

[45] In consequence, subject to questions yet to be discussed concerning the effect of the CCT's hearing being a hearing *de novo*, I hold that the proper interpretation of the pre-2007 amendments to the *QBSA* Act does not cover a person who provides the nominated services but who is not erecting or designing the structure (or causing it to be erected or designed).

[46] For reasons cogently advanced by senior counsel for the respondent, this does not necessarily mean that, on an interlocutory basis, it is open to this Court to determine that after a due consideration of all relevant facts, the applicant will be able to establish, on the relevant facts and by an application of the relevant law, that it is not caught by s 72 with respect to the first direction. After all, the applicant was at all material times to 15 October 2008 a licensed builder holding an "open" license.

Further, *QBSA v O'Brien* [2002] QDC 329 shows that facts may be led at a *de novo* hearing which could show personal responsibility: at [49]; see, also, [47].

Effect of *Sperway*

[47] It was strongly urged upon the Court by senior counsel for the respondent that *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616, when correctly applied to the present hearing before the CCT, must have the effect, as contended for in the Notice of Contention filed 6 October 2009, that the CCT is entitled to find that the post-2007 amendments to the *QBSA* Act applied to the first direction to rectify because the CCT "could have found that the law to be applied" to the first direction to rectify of 3 October 2007, although before 21 December 2007, "was the law as at the date of the hearing", with a consequent effect that the CCT had power under s 104 of the CCT Act to issue a direction to rectify to the applicant.

[48] In my view, that approach does not accord with the proper interpretation of *Sperway*. And, in any event, it attempts to apply appeal concepts to administrative processes which, while similar, are not analogous. In *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, the High Court had occasion to consider what approach should be made by a tribunal when reviewing a matter *de novo*. The Court as a whole decided, for the case that it was considering, that when that Tribunal reviews a decision where the powers of that Tribunal include affirming, varying or setting aside the decision under review (including making a decision in substitution or remitting the matter for reconsideration) the question which that Tribunal must consider is a question which invites attention to the state of affairs as they exist at the time that Tribunal makes its decision. That state of affairs is wide enough to encompass both the facts and law. But the important point made by all the Justices' decisions was that were, nevertheless, circumstances where the particular legislation demands that the critical statutory question to be answered is whether a criterion was met, or not met, *at a particular date*: see, for instance, Hayne and Haydon JJ at 315 [101]. As analysed by Keifel J, with whom on this question Crennan J agreed, the nature of the review conducted depends upon the terms of the statute conferring the right, rather than upon the identification of it as an administrative authority entrusted with a particular type of function, noting, among other authorities, *Sperway*: at 324 [132]. In a consideration of *Freeman v Secretary, Department of Social Security* (1988) 19 FCR at 342, all the Justices who discussed it noted that that particular decision, which was not even implicitly overruled, was authority for the conclusion that, while the Tribunal was entitled to take into account all of the facts placed before it, the issue was whether the decision it was reviewing (namely, to cancel a pension) "was the correct or preferable decision *when* it was made" (emphasis added): for instance, Keifel J at 328 [144]. As Keifel J went on to point out, the critical requirement was *not* whether Mrs Freeman had an entitlement to a widow's pension "at the date of the Tribunal's decision", referring to *Freeman* at 345: at 328 [144]

[49] If that approach were not to be right then it might be advanced that in, say, a taxation review the AAT could take the law at the time of the making of the decision and apply it to the facts of perhaps several years earlier as the law applicable to the assessment. See, also, *Re Smith and DFRDBA* (1978) 1 ALD 374, *Victoria Legal Aid v Kuek & Anor* [2010] VSCA 29 at [24] and *Comptroller – General of Customs v Akai Pty Ltd & Ors* (1994) 50 FCR 511 at 521.

[50] For good measure, *Shi* reiterated that the reasons of the members of the Full Court of the Federal Court in *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 confirm that, under the relevant AATA Act (which is not distinguishable in terms from the power of the CCT on review), the Tribunal reaches its conclusion as to what is the correct decision by conducting its own, independent assessment and determination of the matters necessary to be addressed, with the Tribunal's exercise of power not being dependent upon the existence of error in the original decision but with the Tribunal being authorised and required to review the actual decision and not the reasons for it: see, for instance, Keifel J at 327 [141].

[51] Consequently, although the CCT in its review of the first direction to rectify should undertake the review by considering the facts *de novo*, the law that it is to apply is the law that existed as at 3 October 2007.

Post- 2007 Amendments to QBSA Act

[52] The opposing contentions with respect to the Act as it existed with respect to the 14 other directions to rectify are also multi-layered.

[53] The first subsidiary question to be determined is the width of the "new" provisions governing "a construction manager". This provision, relevantly, now appears as s 72(5)(f). Incorporating the three relevant sub-sections, it would be read as follows:

> "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 and the person *who carried out the building work* is *taken to include* a construction manager engaged under a construction management contract to provide building work services *for the building work*" (emphasis added).

[54] As I understood the arguments of senior counsel for the applicant, it was acknowledged on behalf of the applicant that, at least with respect to the prospective operation of the QBSA Act on and from 21 December 2007, with respect to building work actually carried out on and after that date, the relevant contract to which the applicant was a party would have fallen in other circumstances within that widened net. Even if I have misstated that concession, it is my view that such a conclusion would be correct in any event. This is because, while not considering again in detail all of the relevant contractual arrangements, it is clear to my mind that the new, expanded definition would include a construction manager under a contract such as the one in question which was entered into by a person such as the applicant in as far as building work was in fact carried out on and after 21 December 2007.

[55] Necessarily, that is not sufficient for present purposes because the 14 other notices to rectify concerned work, at least insofar as the applicant is concerned, with respect to a contract that was terminated on 29 November 2007. Therefore, for those notices to rectify to be held to be valid, it is necessary that there be an interpretation of s 72(1) together with s 72(5)(f) which takes hold of events which occurred before amendment but for which notices of rectification were given after amendment.

[56] This, then, opens up arguments of presumptions against retrospectivity and their interplay, if any, with arguments in favour of the application of amended law to events preceding amendment.

[57] It is convenient for this purpose to begin with the decision of the Full Court of the Supreme Court of Queensland of *R v His Honour Judge Given, ex parte Builders Registration Board of Queensland* [1985] 2 Qd R 32. The judgment of McPherson J (as he then was), with whom Andrews SPJ (as he then was) agreed expressly and with whom Shepherdson J agreed (with additional comments), canvassed the applicable law concerning an order to remedy under previous legislation akin to the QBSA Act where there were new legislative provisions introduced. The conclusion was that the Builders' Registration Board had power to order the relevant builder to remedy work done prior to the commencement of the new legislation. Against that background, McPherson J, after discussing *Maxwell v Murphy* (1957) 96 CLR 261, concluded, that *prima facie* the new legislation was not within the class of statutory provision that attracted the presumption against a retrospective application of statute: at 38. The reason for that conclusion was supplied by Jordan CJ in *Coleman v The Shell Company of Australia Limited* (1943) 45 SR (NSW) 27 who, when propounding the relevant tests for retrospectivity, concluded that it would not be giving the new act 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": per McPherson J at 38-39. After a consideration of common law and contractual liability, but only as the first part of a fall-back position should the primary conclusion not hold, McPherson J held that the importance of that for present purposes was simply that, quite apart from the statutory provision, the builder was almost certainly liable under the general law for the consequences of his defective workmanship undertaken before the legislative provision took effect, and that all that it had done was to confer on the Board a method of enforcing that liability against him later and, incidentally perhaps, also depriving him of a defence under the Statute of Limitations: at 39. He added that, viewed in that manner, it was possible to regard the legislative provision as having an effect that was "primarily procedural" and, as such, being "outside the presumption against legislative retrospectivity": also at 39. He added, as a further alternative fall-back position, that if the justification for the presumption is that retrospective legislation is unjust, there would be no compelling injustice in requiring the builder to rectify work done earlier that now appeared to be faulty and unsatisfactory: at 39 – 40. Given the unsettled nature of the present law concerning tortious liability [see, for instance, Hayford *Watch Out! The duty to Warn on Construction Projects* (2008) 24(3) BCL 163 at 182], it is impossible to rule out the fall-back position applying here if it were to be necessary to apply it. So far as necessary intendment goes – if it is even applicable here – I am of the view that the power of rectification has been granted so widely in the 2007 Amendments that the "victims" of defective work should be considered in the balancing of manifest injustice: see Pearce & Geddes *Statutory Interpretation in Australia* (6th Edition – 2006) at [10.12]. The absence of tortious conduct or any breach of contract may go to the exercise of the undoubted discretion that accompanies the exercising of rectification notices; but any such decision now by this Court on a very restricted appeal would be wrong and, in these particular circumstances of an interlocutory matter, premature.

[58] In *Baulderstone Hornibrook* Pincus JA considered this argument concerning retrospective operation. The new legislative provisions in question there commenced on 1 July 1992 but the work was done in 1991. He concluded there

was no sound basis for distinguishing *R v Judge Given* unless there was some transitional provision to the contrary effect: at [12]. On posing the question to both senior counsel, neither was able to point me to any relevant transitional provision in the present QBSA Act. This peremptory dismissal of the argument was supported by Byrne J (as he then was) and he, in particular, referred to the discussion of general principle in *George Hudson Limited v The Australian Timber Workers' Union* (1923) 32 CLR 413 at 433-434 and 447-448: at [2]. A reference to those passages, without quoting relevant authority there cited, shows that the import of the decision of Isaacs J placed its foundation upon statements by Lord Wrenbury (then Buckely LJ) to the effect that an Act which provides that in future the liability to repair certain existing pipes should rest upon certain persons upon whom it did not rest before "is not retrospective" in the sense that statutes can enact that something which was not the law at a date anterior to its passing can be treated as having been the law at that date. Before leaving *George Hudson*, it is illustrative, for reasons to be developed next, to note that Isaacs J stated that the words "to be" in the phrase "to be provided" have no relation to futurity but (rather) to obligation: at 433.

[59] Dealing**,** then, with the phrase that appears in s 72(5)(f) of the QBSA Act [namely, "under a construction management contract *to provide* building work services for the building work" (emphasis added)], a similar conclusion can be reached that the verb "to provide" is not one of futurity but one of obligation, such that if, as is the case here, the relevant contractual obligation is to provide building work services for "the building work", it satisfies the provision.

[60] Additionally, if a past tense is needed for the purposes of proper interpretation, the past participle "engaged" should be judged to be the governing tense applicable to the relevant construction management contract existing at the time of the carrying out of the building work.

[61] The consequence of that analysis is that there is no retrospective operation for s 72(5)(f), as it affects s 72(1) of the *QBSA* Act, in its application to the 14 notices to remedy defects issued in 2008 and 2009.

[62] That conclusion then permits the CCT to proceed, also, with a review of those 14 "decisions" applying the facts as will obtain in the *de novo* proceeding insofar as such facts are applicable to the notices given and involve the application of provisions of the post-2007 amendments to the *QBSA* Act.

Notice of Appeal and Notice of Contention

[63] Given that this Court has given leave to appeal, it is necessary to consider what parts of the Notice of Appeal in its draft form have been applicable to the actual consideration of the appeal itself.

[64] Since it is clear, and was not the subject of any sustainable argument, that the CCT could determine whether it did, or did not, have jurisdiction, paragraph 2 of the draft Notice of Appeal is not allowed. For the reasons I canvassed earlier, paragraph 12 of the draft Notice of Appeal is also not allowed.

[65] Lastly, since the alleged errors in paragraphs 13, 14 and paragraph 15 of the draft Notice of Appeal were not pressed, I would also not allow those in the Notice of Appeal.

[66] With respect to the Notice of Contention, that must, similarly, be treated as having been in draft until the appropriate leave was obtained. With respect to it, I allow the three grounds of contention contained in it to be included in the final Notice of Contention.

Irrelevant or unpersuasive matters

[67] My attention was drawn to various provisions contained in Pt 4A of the *QBSA* Act. As senior counsel for the respondent quite rightly submitted, the definitions and other parts of Pt 4A are irrelevant to s 72. This particularly applies to the definitions contained in s 67A, at least in circumstances where the Schedule 2 definitions expressly distinguish between relevant definitions inside and outside Pt 4A. To the extent that they are pressed as establishing context, I have found them to be of no assistance for the last reason mentioned.

[68] Further, the new and expanded definitions in Schedule 2 following the 2007 amendments to the *QBSA* Act, while informative in a general sense, merely confirm the conclusion that the amendments introduced by the 2007 amending legislation bought into effect a deliberate legislative purpose of expanding, relevantly, the width of the rectification net. They do not in any way assist me in any persuasive way to consider that the new provisions are not intended to apply rectification rules to events that have occurred and yet fall within the expanded definitions. Additionally, the later amendments, including those to the definitions in Schedule 2, in no way convince me that the *Dunmumkle* principles have application here; see, also, *FKP* at [2].

[69] Likewise, references to cases that have no relevance to the legislative provisions under consideration and do not otherwise exemplify any instructive analysis about the correct interpretative approach to the circumstances of this case I find to be of little or no help.

[70] Any contended distinction between s 72(11)(a) and s 72(11)(b), about the former being concerned with "how" work is carried out and the latter being concerned with a suggested different topic (namely, the "nature" of what was done), does not illuminate any relevant issue. Those two provisions are directed to different steps in widening the net but both, in the end, are referable only to paragraph (c) and paragraph (d) of s 75(5) and both of those paragraphs deal with, in passive and active voice respectively, persons who "carried out" the building work. If any relevant distinction exists that has a consequential effect on the proper interpretation of those provisions, it is simply that s 75(11)(b) widens, as was held in *Puerto Galera*, the net slightly to include services that are not otherwise caught up in effecting the building work that otherwise falls within the definition of carrying out such building work by the actor who did so.

Nature of Relief

[71] The Notice of Appeal in its final form (i.e. to the extent to which leave has granted reliance on specific grounds) seeks, relevant to the conclusions reached by this Court, that the appeal be allowed to the extent of success and that the decision of the CCT made 26 August 2009 be set aside, again to the extent of that success. Senior counsel for the respondent, given the conclusions that have been reached, has sought – insofar as I comprehend his oral submissions - in the event of the outcome

that I have reached, that the proceeding by remitted to the CCT because there has been no final resolution (even of the first rectification direction concerning the pre-2007 amendment notice of defect).

[72] By s 100(6) of the CCT Act this Court may do any of the following:

(a) confirm, annul, vary or reverse the Tribunal's decision;
(b) remit the case to the Tribunal for further hearing or rehearing; or
(c) make consequential or ancillary orders or directions.

[73] I am of the view that the appropriate relief in this case is to remit the whole of the "case" to the CCT for further hearing and that that hearing be in accordance with the law determined on this appeal. As I indicated to both senior counsel at the conclusion of the oral submissions, I will give leave to both parties to propose, within seven days of the handing down of the decision, either a joint draft order encompassing what I have indicated I intend to do, or, failing an agreement to that effect, prospective draft orders from each.

[74] Such draft orders will also need to do with the issue of costs.

[75] With respect to that, while the applicant/appellant has succeeded on one of the questions concerning the "error of law", it has succeeded only to a limited extent. Even on the issue on which the applicant/appellant has had limited success, I have rejected arguments of the respondent as to the application of the principles in *Sperway*, while upholding other arguments in the respondent's favour.

[76] But given that the respondent has otherwise succeeded and that I have concluded, overall, that the case is to be remitted to CCT for a final determination in accordance with the law decided in this Court, my present inclination as to costs is to order only that the applicant/appellant pay 50% of the respondent's costs of the appeal to be assessed on the standard basis. Patterned on that which occurred in *R v Judge Miller*, costs in the CCT hearing, both past and for the future, should be in its hands: at 454.

[77] Given that I have granted 7 days for the parties to respond concerning the form of the orders to be made, I will permit both parties that same period also in which to address me on the question of costs that I have foreshadowed making.

Proposed Orders

[78] My proposed orders are that:

1. Leave to appeal and file a Notice of Appeal, and leave to file a Notice of Contention, are granted.

2. The decision of the Tribunal of 26 August 2009 that the applicant's Application in the proceeding filed 20 March 2009 be dismissed is confirmed.

3. The proceeding be remitted to the Tribunal for further hearing in accordance with the law determined in this appeal.

4. The applicant/appellant pay 50% of the respondent's costs of the appeal to be assessed on the standard basis

5. The costs of the interlocutory Application heard in the Tribunal be at the discretion of the Tribunal.