

SUPREME COURT OF QUEENSLAND

CITATION: *Fraser Property Developments Pty Ltd v Sommerfeld & Ors*
[2004] QSC 363

PARTIES: **FRASER PROPERTY DEVELOPMENTS PTY LTD ACN
101 644 026**
(plaintiff/first respondent)
and
ROBERT PETER SOMMERFELD
(first defendant/applicant)
and
SYDNEY BALE
(second defendant/second respondent)
and
BURNETT SHIRE COUNCIL
(third defendant/third respondent)

FILE NO/S: S290/2003

DIVISION: Trial division

PROCEEDING: Civil application

ORIGINATING
COURT: Supreme Court Rockhampton

DELIVERED ON: 22 October 2004

DELIVERED AT: Rockhampton

HEARING DATE: 17 September 2004

JUDGE: Dutney J

ORDER: **Plaintiff to discontinue the Claim and Statement of Claim
filed on 28 June 2004 before the Supreme Court of
Queensland and re-institute the Claim before the
Commercial and Consumer Tribunal**

CATCHWORDS: INFERIOR TRIBUNALS – JURISDICTION – whether or
not Commercial and Consumer Tribunal has jurisdiction to
hear a claim against the Council for negligently approving
building plans

STATUTES – STATUTORY CONSTRUCTION – whether
or not s. 77(1) of the Queensland Building Services Authority
Act 1991 (Qld) is a stand alone provision

*Commercial and Consumer Tribunal Act 2003 (Qld) s. 8(1).
s. 40(1), s. 113 and Schedule 2*
Domestic Building Contracts Act 2000 (Qld) s. 8(3)(a)
Queensland Building Services Authority Act 1991 (Qld) s.

75(1), s. 75(2), s. 76(1), s. 77(1) and Schedule 2

COUNSEL: Mr CD Press for the applicant/first defendant
Ms KE Downes for the respondent/plaintiff
Mr GC O’Driscoll for the respondent/third defendant

SOLICITORS: Payne Butler Lang for the applicant/first defendant
McCullough Robertson Hancock for the respondent/plaintiff
Barry & Nilsson for the respondent/third defendant

- [1] The first defendant makes this application pursuant to s. 40(1) of the *Commercial and Consumer Tribunal Act 2003* (Qld) (“CCTA”). In short, that sub-section provides that if a proceeding is started in a court and the proceeding could be heard by the Commercial and Consumer Tribunal (“the tribunal”), the court must order the proceeding to be started again before the tribunal.
- [2] By way of background, the applicant (“the builder”) entered into a contract with the first respondent (“the owner”) to construct a residential building on the owner’s land. The second respondent (“the engineer”) was retained by the owner to prepare foundation plans. The builder constructed the dwelling. The owner alleges against the builder and the engineer that the designs were not in accordance with Australian Standards. Furthermore, the owner alleges against the third respondent (“the council”) that it failed to take reasonable steps to ensure the designs were in accordance with Australian Standards, and that the engineer was registered. Proceedings were commenced in the Supreme Court, Rockhampton on 29 June 2004.
- [3] The builder now applies to this Court to have the proceedings transferred to the tribunal for hearing. The builder relies on s. 77(1) of the *Queensland Building Services Authority Act 1991* (Qld) (“QBSAA”) for the tribunal’s jurisdiction. The owner submits that the tribunal has no jurisdiction to hear the claim against the council. The council supports the owner.
- [4] The issue, therefore, is whether or not the tribunal has jurisdiction to hear that part of the matter relating to the council.
- [5] Sub-section 8(1) of the CCTA provides:
- “The tribunal has jurisdiction to deal with the matters it is empowered to deal with under this Act or an empowering Act.”
- [6] Section 113 of the CCTA provides:
- “Without limiting divisions 1 to 3, the tribunal may hear and decide matters that it may hear and decide under an empowering Act”.
- [7] “Empowering Act” is defined in Schedule 2 of the CCTA to include the *Domestic Building Contracts Act 2000* (Qld) and the *Queensland Building Services Authority Act 1991* (Qld).
- [8] Section 77(1) of QBSAA states:

“A person involved in a building dispute may apply to the tribunal to have the tribunal decide the dispute.”

- [9] “Building dispute” is defined in Schedule 2 of the QBSAA to include a domestic building dispute.
- [10] “Domestic building dispute” is defined in Schedule 2 of the QBSAA to include:
- (a) a claim or dispute arising between a building owner and a building contractor relating to the performance of reviewable domestic work or a contract for the performance of reviewable domestic work; or
 - (b) a claim or dispute arising between 2 or more building contractors relating to the performance of reviewable domestic work or a contract for the performance of reviewable domestic work; or
 - (c) a claim or dispute in negligence, nuisance or trespass related to the performance of reviewable domestic work other than a claim for personal injuries; or
 - (d) a claim or dispute arising between a building owner or a building contractor and any 1 or more of the following relating to the performance of reviewable domestic work or a contract for the performance of reviewable domestic work –
 - (i) an architect;
 - (ii) an engineer;
 - (iii) a surveyor;
 - (iv) a quantity surveyor;
 - (v) an electrician or an electrical contractor;
 - (vi) a supplier or manufacturer of materials used in the tribunal work.
- [11] “Reviewable domestic work” is defined in Schedule 2 of the QBSAA to mean the following:
- “domestic building work under the *Domestic Building Contracts Act* 2000, except that for applying section 8(8) of that Act, the definition “excluded building work” in that Act is taken not to mean anything mentioned in paragraph (b), (c) or (d) of the definition.”
- [12] The matters which the *Domestic Building Contracts Act* 2000 (Qld) (“DBCA”) exclude from the definition of “domestic building work” but which Schedule 2 of the QBSAA reinstates for the purposes of the QBSAA are:
- (b) design work carried out by an architect, engineer or draftsman;
 - (c) the preparation of plans, specifications or bills of quantity for the carrying out of domestic building work;
 - (d) work involved in obtaining foundations data about a building site.
- [13] Plainly enough, (b), (c), and (d) of the list of work re-included in the definition of “reviewable domestic work” under the QBSAA are reintroduced in order to give effect to paragraph (d) of the definition of “domestic building dispute.”

- [14] The nature of the disputes over which the tribunal has jurisdiction is not defined by reference to the definition of “Tribunal work” in s. 75 of the QBSAA. The only reference to “tribunal work” in any of the chain of interrelated definitions I have set out is in sub-paragraph (d)(vi) of the definition of “domestic building dispute” in schedule 2 of the QBSAA.
- [15] Had the jurisdiction of the tribunal been limited to what was defined in s. 75 to be “tribunal work” the claim against the council would have had to have fallen under s. 75(1)(f) or s. 75(2). These provide:
- (1) The following is “tribunal work” –
 - (a) ...
 - (f) the preparation of plans, specifications or bills of quantity for the carrying out of tribunal work.
 - (2) To remove doubt, it is declared that reviewable domestic work is tribunal work.
- [16] Sub-section 76(1) of the QBSAA then defines what is not “tribunal work” and in (m) lists “tribunal work carried out by a local government for a local government ...” as work which is not “tribunal work”.
- [17] I am satisfied that the council approves plans for its own purpose of regulating building standards within its boundaries. If the jurisdiction of the tribunal was limited to “tribunal work” as defined in s. 75 of the QBSAA as limited by s. 76, the tribunal would not have jurisdiction to determine the claim against the council. I am of the view that the tribunal is not limited to hearing tribunal matters as set out in s. 75 of the QBSAA. As a consequence, one does not need to have recourse to the exclusions set out in s. 76. Sub-section 77(1) of the QBSAA is unambiguous. It confers on the tribunal an express jurisdiction to hear building disputes as defined in schedule 2. There is thus no need to refer back to the definition of “tribunal work” except in the very limited circumstance I have indicated above.
- [18] Paragraph 8(3)(a) of the DBCA states that domestic building work includes work associated with the erection, construction, removal or resiting of a detached dwelling. Such work is referred to as “associated work”.
- [19] For the tribunal to have jurisdiction to hear the owners’ claim against the council that claim must fall with the scope of “associated work.”
- [20] In my view what will ultimately be a building dispute over which the tribunal has jurisdiction turns on the construction to be placed on the words “associated with” in s. 8(3)(a) of the DBCA. The definition is inclusive and is therefore not an exhaustive definition. The legislature must therefore be taken to have contemplated a wide meaning, rather than a narrow one. Since the legislature expressly excluded work done by a local authority for its own purposes from the definition of “tribunal work”, the failure to do so in this context must be taken as deliberate. Therefore if the approval of engineering plans can properly be said to be associated with the erection or construction of a building the tribunal must have jurisdiction to determine this dispute.

- [21] Plainly, engineer's design work and preparation of plans was considered to be work associated with the erection or construction of a building because it was necessary to exclude it from the definition of "domestic building work" under s. 8 of the DBCA. Presumably such activities if done in connection with the construction of a building were regarded as "associated work". Such a connection seems to me to fall naturally within the scope of the legislative provisions. It seems to me to follow that the approval of those plans by the council, being a necessary transitional step between the design and the preparation of plans phase and the construction phase must also be associated work.
- [22] In the result, I find that the approval of the plans by the council for the purpose of granting building approval was work associated with the erection, construction, removal or resiting of a detached dwelling within the meaning of s. 8(3)(a) of the DBCA. I therefore find that this is a building dispute over which the tribunal has jurisdiction.
- [23] Accordingly, I order that the plaintiff discontinue the Claim and Statement of Claim filed on 28 June 2004 before the Supreme Court of Queensland and re-institute the Claim before the Commercial and Consumer Tribunal.
- [24] I will hear argument about costs.