SUPREME COURT OF QUEENSLAND

CITATION:	*Puerto Galera Pty Ltd v JM Kelly (Project Builders) Pty Ltd* [2008] QSC 356
PARTIES:	**PUERTO GALERA PTY LTD (ACN 106 044 553)** (applicant) **v** **JM KELLY (PROJECT BUILDERS) PTY LTD (ACN 010 280 412)** (respondent)
FILE NO:	11809 of 2008
DIVISION:	Trial Division
PROCEEDING:	Civil hearing
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	18 December 2008
DELIVERED AT:	Brisbane
HEARING DATE:	5 December 2008
JUDGE:	Chesterman J
ORDER:	**I declare that:** **1. The superintendent appointed under the building contract between the applicant and the respondent did not carry out or undertake to carry out 'building work' within the meaning of s 42(1) and/or s 42(2) of the Queensland Building Services Authority Act 1991 as in force as at 5 February 2004.** **2. There was no 'contractor's licence of the appropriate class' relevant to the functions of the superintendent.**
CATCHWORDS:	BUILDING AND ENGINEERING CONTRACTS – Performance of work – whether the performance of the superintendent's role as defined by the contract involved the superintendent in building work – whether this conduct would have consequences for the building contract
COUNSEL:	Ms S Armitage for the applicant/respondent Mr B E Codd for the respondent/applicant
SOLICITORS:	Freehills for the applicant/respondent Hopgood Ganim Lawyers for the respondent/applicant

[1] The applicant and respondent were parties to a written building contract and are in dispute about the respondent's entitlement to payments for variations and extensions

of time for completing the project. The dispute was referred to arbitration on 12 December 2005. An arbitrator was appointed in April 2006. The arbitration has not progressed very far. On 3 November 2008 the arbitrator gave his written consent to the referral of three questions of law to the Court. They arise as a result of amended pleadings delivered in June 2008. The parties thought, and the arbitrator agreed, that the Court's answer to those questions, pursuant to s 39 of the *Commercial Arbitration Act* 1990, would save time and money.

[2] Section 39 provides:

> '(1) Subject to subsection (2) and s 40, on an application to the Supreme Court made by any of the parties to an arbitration agreement –
>
> (a) With the consent of an arbitrator who was entered on the reference ...
>
> (b) With the consent of all the other parties;
>
> the Supreme Court shall have jurisdiction to determine any question of law arising in the course of the arbitration.
>
> (2) The Supreme Court shall not entertain an application under subsection (1)(a) ... unless ... satisfied that -
>
> (a) The determination of the application might produce substantial savings in costs to the parties; and
>
> (b) The question of law is one in respect of which leave to appeal would be likely to be granted under s 38(4)(b).

[3] The condition specified in s 39(2) has been satisfied. The points of law are appropriate for determination by the Supreme Court. Section 40 has no application to the arbitration.

[4] The contract consisted of a tender (the copy in evidence was undated) by which the respondent offered to construct 16 apartment units in a high rise building, a marina, a car park, a swimming pool and landscaping at Mackay, all as described in specifications and drawings and in accordance with general conditions of contract, for a price of $7,948,726. The applicant accepted the tender by a letter dated 27 January 2004. The formal contract documents were executed by the respondent, described as 'the contractor' on 5 February 2004 and by the applicant, described as 'the principal' on 6 February 2004. By clause 2.1 of the general conditions of contract the respondent promised to 'carry out and complete (the work which is or may be required under the contract including variations, remedial work and temporary work) in accordance with the contract and directions authorised by the contract'. By the same clause the applicant promised to pay the contractor the contract price. The buildings were erected between February 2004 and May 2005.

[5] The points of law are:

1. Whether the superintendent appointed under the building contract between Puerto Galera Pty ltd and J M Kelly (Project Builders) Pty Ltd ('the Contract') carried out, or undertook to carry out, 'building work' within the meaning of sections 42(1) and/or 42(2) of the *Queensland Building Services Authority Act* 1991 (Qld) as in force as at 5 February 2004 ('the Act');

2. Whether a 'contractor's licence of the appropriate class' under the Act relevant to the functions performed by the superintendent appointed under the Contract existed;

3. Whether:

   (a) A person appointed as superintendent under the Contract would be in breach of section 42(1) of the Act by carrying out, or undertaking to carry out, the functions of superintendent under the Contract if that person did not hold any licence issued pursuant to the Act;

   (b) if the answer to question 3(a) is in the affirmative, as a consequence of the superintendent having breached s 42(1) of the Act:

      (i) was the Contract an illegal contract, wholly or in part (and if so, to what extent);

      (ii) is the Contract unenforceable by PG and/or JMK on public policy grounds, wholly or in part (and if so, to what extent);

      (iii) was the purported appointment of a superintendent who was not the holder of a 'contractor's licence of the appropriate class' within the meaning of s 42(1) of the Act void or, alternatively, voidable by J M Kelly (Project Builders) Pty Ltd;

      (iv) were any acts performed by an unlicensed person acting in the capacity as superintendent appointed under the Contract invalid, null, void, unenforceable or of no contractual effect in relation to the contractual rights created by the Contract.'

[6] It is common ground that the superintendent appointed pursuant to the building contract, Mr Jolly, did not hold any licence issued under the *Queensland Building Services Authority Act* 1991 ('the Act') and he was not an architect nor an engineer.

[7] Section 42 of the Act is central to the parties' submissions. It provides:

> '42. **Unlawful carrying out of building work**
>
> (1) A person must not carry out ... building work unless that person holds a contractor's licence of the appropriate class under this Act.

(2) For the purposes of this section -

(a) a person carries out building work whether that person carries it out personally, or directly or indirectly causes it to be carried out; and

(b) a person is taken to carry out building work if that person provides advisory services, administration services, management services or supervisory services in relation to the building work; and

(c) a person undertakes to carry out building work if that person enters into a contract to carry it out or submits a tender or makes an offer to carry it out.

(3) Subject to subsection (4), a person who carries out building work in contravention of the section is not entitled to any monetary or other consideration for doing so.

(4) A person is not stopped under subsection (3) from claiming reasonable remuneration for carrying out building work, but only if the amount claimed -

(a) is not more than the amount paid by the person in supplying materials and labour for carrying out the building work; and

(b) does not include allowance for any of the following -

(i) the supply of the person's own labour;

(ii) the making of a profit by the person for carrying out the building work;

(iii) costs incurred by the person in supplying materials and labour if, in the circumstances, the costs were not reasonably incurred; and

(c) is not more than any amount agreed to ... as the price for carrying out the building work; and

(d) does not include any amount paid by the person that may fairly be characterised as being, in substance, the amount paid for the person's own ... benefit.

(9) A person who contravenes this section commits an offence.

Maximum penalty –

(a) For an individual - 80 penalty points ...

(b) For a company – 160 penalty points ...'

[8] The respondent's case, put shortly, is that Mr Jolly carried out, or undertook to carry out, building work as defined by the Act and in so doing contravened s 42. The consequence is said to be that his appointment was unlawful with the further consequence that his determinations made under the contract were ineffective: null and void. The absence of determinations has particular ramifications for the contractual dispute referred to the arbitrator.

[9] The issues raised by the application are:

(i) Did the superintendent carry out building work, or undertake to carry it out?

(ii) If 'yes' what are the legal consequences for the contract of the superintendent's breach of s 42?

[10] The appropriate place to begin a consideration of the submissions is the superintendent's role in the performance of the contract by reference to the general conditions.

[11] Clause 20 provided that the principal should ensure that at all times there was a superintendent who would fulfil 'all aspects of the role and functions reasonably and in good faith.'

[12] The general conditions allowed the contract to be either one for a lump sum, or a bill of rates, or both lump sum and bill of rates. To the extent that payment was by reference to rates and quantities clause 2.3 provided that the contractor should lodge its bill of quantities with the superintendent before the expiration of a time fixed by clause 10(c) 'or such further time as may be directed by the superintendent from time to time.' By the same clause the superintendent was empowered to 'determine an appropriate correction of errors and inconsistencies in weights and prices' so that the aggregate amount in a bill of quantities was equal to the sum accepted for the work.

[13] By clause 3 a provisional sum included in the contract was not payable unless the principal directed the work or item to be carried out or supplied, whereupon the work or item was to be priced by the superintendent 'and the difference ... added to or deducted from the contract sum.'

[14] By clause 4 the superintendent might direct that part of the contract work be a separable portion and fix, with respect to the portion, the date for practical completion and amounts for security, bonuses, liquidated damages and damages for delay.

[15] By clause 8.1, headed 'Discrepancies', any inconsistency, ambiguity or discrepancy in any document prepared for the purposes of carrying out the works discovered by a party had to be brought to the attention of the superintendent. The superintendent, upon being given written notice of the discrepancy, was to 'direct the contractor as to the interpretation and construction to be followed.' Should compliance with any

such direction cause the contractor to incur more or less cost than otherwise would have been the case the difference was to be assessed by the superintendent and added to or deducted from the contract sum.

[16] By clause 8.3 the contractor had to give the superintendent 'the documents ... stated elsewhere in the contract', but the superintendent was not required to check the documents for error or omissions and any acknowledgement by the superintendent with respect to the documents did not 'prejudice the contractor's obligation'.

[17] By clause 9.2 the contractor was not to engage any subcontractor, or allow a subcontractor to assign his subcontract to another subcontractor without the superintendent's prior written approval, which was not to be unreasonably withheld.

[18] By clause 11 the contractor was to satisfy all legislative requirements directed by the superintendent. Should such direction be 'at variance with the contract' the contractor was to give the superintendent prompt written notice and in the event that the direction occasioned the contractor additional or reduced expenditure the difference was to be assessed by the superintendent 'and added to or deducted from the contract sum.'

[19] Clause 12 required the contractor to take necessary measures to protect people and property and to avoid unnecessary interference with the passage of people and vehicles and prevent nuisance. Should the contractor fail to comply with these obligations the principal, after the superintendent had given reasonable written notice to the contractor, could have the obligations performed by others and the cost of doing so, certified by the superintendent, became a debt due from the contractor to the principal.

[20] Clause 13 is headed 'Urgent protection' and provided:

> 'If urgent action is necessary to protect (the contract works) other property or people and the contractor fails to take the action, ... the superintendent may take the necessary action. If the action was action which the contractor should have taken ... the superintendent shall satisfy the cost incurred as monies due from the contractor to the principal.'

[21] By clause 14.2 if the contract work were damaged other than by a defined risk the contractor was obliged to rectify 'such loss or damage'. In the event that loss or damage occurred by one or more of the defined risks the contractor was 'to the extent directed by the superintendent (to) rectify the loss or damage and such rectification (was to be) a deemed variation.' If loss or damage was caused by a combination of a defined risk and another risk the superintendent, in pricing the variation, was to assess the 'proportional responsibility of the parties.'

[22] By clause 24.1 the principal was to give the contractor possession of the site but the right was 'to only such use and control as is necessary to enable the contractor to carry out (the contract works) and shall exclude camping, residential purposes ... unless approved by the superintendent.'

[23] By clause 25 latent conditions of the site involving the contractor in additional work, resources, time or cost were deemed variations to the contract but the contractor's right to recover the cost of those variations was conditional upon it

giving the superintendent written notice of the condition promptly after it was discovered.

[24] Clause 27 provided that the contractor was to keep the site clean and tidy and remove temporary works and construction plant within 14 days after the date of practical completion. The superintendent was allowed to extend the time but if the contractor failed to comply with the obligations contained in the clause the superintendent could direct the contractor to rectify non-compliance and fix the time for rectification. If the contractor did not comply with such a direction and the failure 'has not been made good within five days after the contractor receives written notice from the superintendent that the principal intends to have the work carried out by others', the principal could have the work so carried out. The cost of doing so, certified by the superintendent, became monies due from the contractor to the principal.

[25] By clause 29 the contractor was to 'plan, establish and maintain a ... quality system' and give the superintendent access to that system 'so as to enable monitoring and ... auditing.'

[26] By clause 29.3 if the superintendent became aware of any work done by the contractor which did not comply with the contract the superintendent was to give written notice as soon as practicable of the non-compliance. If the work were not rectified the superintendent could direct the contractor:

> '... to do any one or more of the following (including times for commencement and completion):
>
> (a) remove ... material from the site;
>
> (b) demolish the work;
>
> (c) reconstruct, replace or correct the work; and
>
> (d) not deliver it to the site.
>
> If:
>
> (a) the contractor fails to comply with such a direction; and
>
> (b) that failure has not been made good within eight days after ... written notice from the superintendent that the principal intends to have the subject work rectified by others,
>
> the principal may have the work so rectified and the superintendent shall certify the cost incurred as monies due from the contractor to the principal.'

[27] By clause 30 the superintendent could, at any time before the expiration of the last defects liability period, direct that any part of the works be tested. In that event the contractor was to give such assistance and samples and make the work accessible 'as may be directed by the superintendent', who could also direct that the work not

be 'covered up'. The superintendent could nominate the persons to conduct the tests he directed.

[28] By clause 32 the superintendent could direct 'in what order and at what times the various stages or portions of (the contract work) should be carried out.' The contractor was obliged to comply with that direction but if it could not do so, it was to give the superintendent written notice of the reasons for its inability. By the same clause the superintendent could direct the contractor to provide a construction program. Again if compliance with directions given under the clause occasioned 'more or less cost than otherwise would have been incurred' the difference was to be assessed by the superintendent and added to or deducted from the contract price.

[29] By clause 33 the superintendent could direct the contractor to suspend construction if the superintendent thought it necessary for the protection or safety of persons or property or to comply with a court order. By the same clause the contractor could, with the superintendent's prior written approval, suspend the carrying out of the contract works. When the superintendent became aware that the reason for a suspension of works had passed he was to direct the contractor to recommence as soon as reasonably practicable.

[30] Clause 34 deals with 'time and progress'. By its terms the contractor was entitled to extensions of time for completing the building if the cause of the delay was one of those specified in the contract, and if the contractor gave the superintendent a written claim for an extension within 28 days from the time when it should reasonably have become aware of the cause of the delay. If delays occurred by reason of events some of which were specified in the contract, and others, the superintendent was to apportion 'the resulting delay ... according to the respective causes' contribution.' The superintendent had to give the contractor and the principal a written direction stating what extensions of time had been allowed. If he did not do so there was to be a 'deemed assessment and direction for an (extension of time) as claimed.' As well the superintendent could extend time whether or not the contractor was entitled to or had claimed the extension.

[31] By clause 34.6 the contractor was to give the superintendent 14 days written notice of the date upon which it anticipated that practical completion would be achieved. When it believed it had achieved that result the contractor could request the superintendent to issue a certificate and the superintendent was obliged, within 14 days, to give the certificate or 'written reasons for not doing so.'

[32] By clause 34.7 if the works were not practically complete by the contract date the superintendent was to certify 'as due and payable to the principal, liquidated damages ... for every day ...'.

[33] By contrast, clause 34.8 provided for the payment of a bonus to the contractor should it achieve practical completion earlier than the contract date. In that event the superintendent was to certify the amount of the bonus.

[34] By clause 35 the superintendent could give the contractor directions during the defects liability period, which commenced on the date of practical completion, requiring it to rectify specified defects. If he did not comply the principal could have the defects rectified by others and the cost of doing so was to be certified by the superintendent as monies 'due and payable to the principal.'

[35] By clause 36 the superintendent could, before the date of practical completion, direct the contractor to vary the extent of the contract works by omitting parts or increasing or decreasing parts, or changing the character or quality of work, or changing levels, lines, positions or dimensions, or demolish work no longer required by the principal. Upon receipt of such a direction the contractor was to give the superintendent advice as to the effect on the construction program and cost of the variations. The costs, certified by the superintendent, were to be paid by the principal to the contractor. If the variations resulted in savings the amount certified by the superintendent was to be deducted from the contract price.

[36] Clause 37 deals with the payment of progress claims made by the contractor. The superintendent was obliged to give a certificate setting out his opinion of what money was due pursuant to the claim and 'reasons for any difference', within 14 days of receiving the claim. The certificate was also to set out the superintendent's assessment of retention monies and any sums due from the contractor to the principal. If the superintendent did not issue his certificate within 14 days then the claim was deemed to be the relevant certificate for payment. The principal was obliged to pay the amount certified, or deemed due because of lack of certification, within the time specified in clause 37.2.

[37] By clause 37.4 the contractor was to give the superintendent a final payment claim within 28 days after the expiration of the last defects liability period. Within a further period the superintendent was to issue to both contractor and principal a final certificate evidencing the monies finally due and payable between the parties 'on any account whatsoever in connection with the subject matter of the contract.' The monies so certified were to be paid within seven days of receipt of the final certificate which was to be 'conclusive evidence of accord and satisfaction and ... discharge of each party's obligations in connection with the ... contract ...' save for express, limited exceptions.

[38] The last clause to note is 40 by which if the contract became frustrated the superintendent was to issue a progress certificate for work carried to the date of frustration and the principal was to pay the contractor the amount certified.

[39] The first question to be answered is whether the performance of the superintendent's role as defined by the contract involved the superintendent in building work.

[40] Building work is defined in the dictionary in Schedule 2 to the Act to mean:

> '(a) The erection or construction of a building; or
>
> (b) The renovation, alteration, extension, improvement or repair of a building; or
>
> (c) The provision of lighting, heating, ventilation, air conditioning, water supply, sewerage or drainage in connection with the building; or
>
> (e) Any site work (including the construction of retaining structures) related to work of a kind referred to above; or

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

(fa) Contract administration

(g) The installation, maintenance, or certificate of the installation or maintenance, of a fire protection system for a commercial or residential building; or

(h) Carrying out site testing classification in preparation for the erection or construction of a building on the site; or

(i) Carrying out a completed building inspection; or

(j) The inspection or investigation of a building, and the provision of advice or a report, for the following -

(i) termite management systems in the building;

(ii) termite infestation in the building

but does not include work of a kind excluded by regulation from the ambit of this definition.'

[41] Contract administration is itself defined:

'... In relation to building work designed by a person, includes the following –

(a) preparing tender documentation and calling and selecting tenders;

(b) preparing, or helping the person's clients with the preparation of, contracts;

(c) preparing additional documentation for the person's clients or building contractors;

(d) arranging and conducting onsite meetings and inspections;

(e) arranging progress payments;

(f) arranging for certificates, including certificates from local government, to be issued;

(g) providing advice and help to the person's clients including during the maintenance period allowed under a contract.'

[42] Section 5 of the *Queensland Building Services Authority Regulation* 2003 ('the Regulation') defines 'work that is not building work'. Relevantly work performed by an architect or engineer in their respective professional practices is not building work.

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

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

[45] Section 42(2)(a) provides that a person carries out building work if he carries it out personally or causes it to be carried out, directly or indirectly. For the subsection to apply there must be foundation of fact from which one can say that the person whose conduct is in question 'built' the structure in question, or 'caused' it to be built. He must be the person who brings about the building, or construction.

[46] An understanding of what this phrase means appears in the judgment of McMurdo J in *PJS Development Pty Ltd v Tong* (2003) QSC 337. The case concerned a contract for the purchase of a home unit, a lot in a residential apartment building yet to be constructed when the contract of purchase was executed. By the contract the developer promised to construct or have constructed upon identified land a certain building with specified finishes and to convey an identified lot to the purchaser when the building was finished. The purchaser sought to terminate the contract on the basis of its illegality: the developer did not hold a contractor's licence pursuant to the Act. The purchaser therefore argued that s 42 vitiated the contract. McMurdo J said:

> '[6] ... The expression "carry out building work" has a meaning derived from the Act as a whole, and having regard to the objects of the statute. Where a person is not an actual builder, but is simply engaging a builder to build, it seems curious that the Act would require that person to be the holder of a contracted licence. In such a case, the builder must be a licensed contractor, so that the objects of the Act are apparently served.
>
> [7] ... (The purchaser) relies upon s 42(2)(a) ... . The submission is that ... (the developer) is still causing building work to be carried out, and that the effect of s 42(2)(a) is that if a party causes building work to be carried out, that party carries it out. That is a submission which, if accepted, would have a wide and profound impact ... . As I interpret s 42(2)(a), the reference to causing building work to be carried out is to a context where the person is nevertheless carrying out building work. The paragraph makes it clear that a person could carry out building work by causing it to be carried out; but that is not to say that wherever a person causes work to be carried out, that person must be deemed to be carrying it out. ... Where a building contractor delegates work to a subcontractor, s 42(2)(a) makes it clear that the head contractor is still to be treated as carrying out the work. There must be, however, something done by the relevant person which can be characterised as the carrying out of building

> work in the sense that a building contractor does. The purpose of s 42 in requiring the relevant person to hold a contractor's licence shows a sense in which the term "carrying out" is used.'

[47] I respectfully agree with this analysis. The contract here required the respondent to build the apartments and associated structures. The superintendent had a role in the adjustment of contractual rights between applicant and respondent and in achieving the efficient and timely performance of the contract by the respondent, but his role was not to build. He did not carryout building work in the sense that a building contract would do.

[48] Did the superintendent provide 'advisory services, administration services, management services or supervisory services' in relation to the construction of the apartment block so as to be 'taken' to have carried out building work by reason of s 42(2)(b) of the Act?

[49] There is no statutory definition of 'advisory services', 'administration services', 'management services' or 'supervisory services'.

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

[51] Section 42(1) read with s (2)(b) says:

> '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 the building work is building work.'

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

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

[54] So understood s 42(2)(b) extends the range of activities which a builder may not perform without a licence. The subsection applies to cases in which a person is erecting or designing a structure and in relation to that work provides advisory services, administration services, management services or supervisory services. The subsection does not apply to the provision of such services by someone who is not himself erecting or designing the structure (or causing it to be erected or designed).

[55] This construction perhaps gives the subsection a limited scope for operation but that 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 proscribed is difficult to comprehend and therefore to avoid. See *Beckwith v The Queen* (1976) 135 CLR 569 at 576.

[56] The construction does not deprive the subsection of substance. One of the consequences of contravening s 42(1) is that the builder may not claim payment for his own labour. An unlicensed builder may seek to circumvent that consequence by claiming, not his labour in building, but his time or effort in supervising, managing, or administering the work. Section 42(2)(b) closes off that argument. The subsection extends the range of activities performed by an unlicensed builder for which he may not seek payment. The subsection does not make the giving of advice or management or supervision about, or in relation to, building work performed by someone else a criminal offence.

[57] Of course the facts of a particular case may mean that the person supervising, or advising, or managing, or administering is, in fact, erecting or designing a structure so that he is carrying out building work. But in that case the conduct will be proscribed as s 42(1), not by s 42(2)(b).

[58] It is obvious that the superintendent was not carrying out building work as that term is defined in the dictionary to the Act. It follows, in my opinion, that giving advice to the builder (providing advisory services); or managing the construction (providing management services); or administering the work (providing administration services); or supervising the work (providing supervisory services) would not deem him to be carrying out building work.

[59] Apart from this conclusion which follows from my construction of the subsection it is clear that the superintendent, in performing his contractual role, did not provide any of the four services mentioned in subsection 42(2)(b). The function of the superintendent as revealed by the clauses I identified was to:

- Direct categories of work to be done or done in a particular sequence or not done
- Give the builder the necessary contract documents and resolve any ambiguities in them
- Approve subcontractors selected by the builder
- Ensure that the building complied with relevant legislation and protect the rights of third parties

- Direct rectification of defective work and test for the quality of the builder's work

- Assess the value of variations to the contract and adjust the contract price accordingly

- Assess the amount due to the builder on claims for payment

- Assess the date by which the building should have been completed and assess the financial consequences which followed from the determination of the date

[60] By no stretch of the imagination can the performance of any of these functions be considered as providing advisory, administration or management services to the builder, or supervising his work. The functions are of valuation and measurement of time, and of command to another to build. They are not of building or of providing services to, or in relation to building.

[61] Directing that work, which is to be performed under a building contract, be done in a particular order, or by a particular date, is not carrying out building work, or providing any of the specified services in relation to the building work. It is telling the *builder* to build in a particular sequence or by a particular date. Likewise directing additional work to be done, or some work not be done, or directing that work be done properly, or tested, is not building or advising about building, or supervising building, or administering building, or managing building.

[62] The conclusion that the performance of the superintendent's role does not come within the ambit of s 42 is supported by the fact that there is no 'superintendent's licence' which may be issued to those performing that role. If the Parliamentary draftsmen had intended the work of a superintendent to be building work it is, to say the least, strange that no provision was made for the issue of a licence permitting the work to be undertaken.

[63] Section 14 of the Regulation provides that licences of the classes specified in Schedule 2 may be issued. Section 15 provides that the qualifications and experience necessary for the recipient of a licence are also set out in Schedule 2.

[64] There is no 'superintendent's licence' specified in Schedule 2. Two classes of licence were suggested as being relevant to the work performed by a superintendent appointed under a building contract. The first is 'builder – open licence' which allows the licence holder to undertake the following 'scope of work':

> '(1) Building work on all classes of buildings.
>
> (2) Prepare plans and specifications ...
>
> (a) for the licensee's personal use; or
>
> (b) for use in building work to be performed by the licensee personally.
>
> (3) However, the scope of work does not include -

(a) inspection, or investigation of, and the provision of advice or a report about, completed class 1a or 10 buildings; or

(b) personally carrying out any building work for which -

(i) a fire protection licence is required; or

(ii) an occupation licence is required ...

[65] The second suggested licence is "building design – open licence" which entitles the licence holder to:

(i) prepare plans and specifications for building of any height or floor area;

(ii) contract administration in relation to building work designed by the licensee.'

[66] As I have said, the work of the superintendent under the contract is not building work as defined by the dictionary. The open builder's licence is a licence to perform building work and to draw up plans and specifications for buildings. The scope of the work permitted by that licence is not a superintendents' work. The superintendent under the contract did not draw the plans and draft the specifications for the apartment building. The work permitted by the open building design licence is work of that kind. The licence does not describe the work done by the superintendent.

[67] It follows that there is no licence applicable to the role of the superintendent.

[68] In my opinion s 42 should not be construed so that the work of a superintendent is building work as defined by subsection (2)(b) so that the superintendent commits an offence by performing his role without a licence which does not exist. The preferable construction is that the work of directing and certifying conferred on the superintendent is not building work.

[69] The Act was substantially amended in 2007 and I was referred to some of its amended provisions. The amendments were not retrospective and are not relevant to the construction of the Act as it was during the performance of the building contract and the referral of the dispute to arbitration.

[70] This conclusion is enough to dispose of the application but because the point was argued at length I will consider the second question which presupposes that Mr Jolly, acting as superintendent, contravened s 42(1) by carrying out building work without the requisite licence. The question is what consequence this conduct has for the building contract.

[71] In *Fitzgerald v FJ Leonhardt Pty Ltd* (1996-1997) 189 CLR 215 Kirby J (243-4) reviewed the effect of the authorities:

'Ordinarily, legislation does not expressly deal with the consequence of conduct in breach of its terms upon a contract which has been

> fulfilled in some way in breach of a provision of the law. In such a case .. it is necessary to ask whether the legislation impliedly prohibits such conduct and renders it illegal. Some judges have suggested that courts today are less willing than in the past to derive an implication of illegality from a legislative provision where Parliament has held back from expressly enacting it ... . Certainly, there are plenty of judicial dicta to suggest that courts will be slow to imply, where the applicable legislation is silent, a prohibition which interferes with the rights and remedies given to parties by the ordinary law of contract ... . This reluctance probably grows out of a recognition of the multitude of legislative provisions ... which may nowadays indirectly impinge upon the contractual relations of parties and, if enforced with full rigour, cause harsh and unwarranted deprivation of rights. ... One principle ... which tends to reinforce reluctance of courts to imply a prohibition on a contract, the formation or performance of which involves some breach of the law, is a conclusion which will often be derived from the express terms of the legislation itself. Thus, if the legislation provides in a detailed way for sanctions and remedies for breach of its terms, courts will require good reason to add to those express provisions additional civil penalties, such as the deprivation of contractual rights, which Parliament has not chosen to enact.'

[72] In *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 413 Gibbs ACJ explained that:

> 'There are four mains ways in which the enforceability of a contract may be affected by statutory provision which renders particular conduct unlawful: (1) The contract may be to do something which the statute forbids; (2) The contract may be one which the statute expressly or impliedly prohibits; (3) The contract, although lawful on its face, may be made in order to effect a purpose which the statute renders unlawful; or (4) The contract, though lawful according to its own terms, may be performed in a manner which the statute prohibits.'

[73] Before considering whether the Act has any effect on the contract it is necessary to analyse its terms to see what there is about it that might attract the operation of the Act. The first thing to notice is that the superintendent was not a party to the contract which was made between applicant and respondent, principal and builder, for the construction of the apartment block and associated structures. The contract was not one by which the superintendent, being unlicensed, agreed to build.

[74] The case is not therefore in the first category as mentioned by Gibbs ACJ in *Yango*:

> 'There have been many cases in which statute which imposes a penalty on an unlicensed or unqualified person for acting in a particular capacity has been held to prohibit by implication all contracts express or implied made by such a person to act in that capacity. In those cases the unsuccessful plaintiff did the very thing which the statute forbad him to do unless he was authorised ...'.

[75] The Act does not impose criminal sanctions on parties to a building contract who appoint an unlicensed superintendent. Nor does the Act impose a positive obligation on parties to a building contract to appoint only licensed superintendents. The Act does not therefore impliedly prohibit the contract made between applicant and respondent. See *Yango* at 430-431 per Jacobs J. See also *Fitzgerald* at 226 per McHugh and Gummow JJ. The case is therefore not in the second category described by Gibbs ACJ.

[76] Nor was the contract made in order to effect a purpose which the Act made unlawful. This follows from the fact that the parties may have appointed a licensed superintendent and that, even an unlicensed superintendent could have performed the role without contravening s 42. The contract conferred numerous powers on the superintendent but only one set of obligations. The obligations, the things the superintendent had to do, were to certify the amounts due to the builder by way of progress claims, the final claim and claims for extensions of time. This part of the role did not, on any view of the Act, constitute carrying out building work. Assuming that the exercise of some of the powers would constitute building work, the occasions for the exercise of those powers may never have arisen.

[77] The respondent submitted that the Act impliedly prohibits the appointment of unlicensed superintendents and that the case falls into the second category. The submission should not be accepted because the Act does not mention superintendents, or contracts. It forbids certain acts unless the actor is licensed. An unlicensed superintendent, as I have pointed out, could perform his role without contravening s 42.

[78] The case, if one of illegality at all, falls within the fourth category: a contract the terms of which are lawful, unaffected by statute, but the performance of which may be something the Act prohibits.

[79] The question whether the Act makes the contract or the performance of it illegal and therefore nullifies its terms, or some of them, is to be answered by an examination of the Act itself. Gibbs ACJ said in *Yango* (413-4):

> 'The question whether a statute, on its proper construction, intends to vitiate a contract made in breach of its provisions, is one which must be determined in accordance with the ordinary principles that govern the construction of statutes. "The determining factor is the true effect and meaning of the statute" (*St John's Shipping Corporation v Joseph Rank Ltd* ...). "One must have regard to the language used and to the scope and purpose of the statute" ... As Devlin J said in *St John's Shipping Corporation* ... "the fundamental question is whether the statute means to prohibit the contract. The statute is to be construed in the ordinary way: one must have regard to all relevant circumstances an no single consideration, however important, is conclusive".'

In the same case Mason J said (429):

> 'There is much to be said for the view that once a statutory penalty has been provided for an offence the rule of the common law in determining the legal consequences of commission of the offence is

> thereby diminished ... and ... it would be a curious thing if the offender is to be punished twice, civilly as well as criminally.'

[80] McHugh and Gummow JJ in *Fitzgerald* approved what McHugh J had said in *Nelson v Nelson* (1995) 184 CLR 538 at 613. Their Honours said (230):

> '... Court should not refuse to enforce legal ... rights simply because they arose out of or were associated with an unlawful purpose unless: (a) the statute discloses an intention that those rights should be unenforceable in all circumstances; or (b) (i) the sanction of refusing to enforce those rights is not disproportionate to the seriousness of the unlawful conduct; (ii) the imposition of the sanction is necessary, having regard to the terms of the statute, to protect its objects or policies; and (iii) the statute does not disclose an intention that the sanctions and remedies contained in the statute are to be the only legal consequences of a breach of the statute ...'.

[81] Section 42 itself contains a clear indication that it does not vitiate contracts for the performance of building work by someone who does not hold the requisite licence. This emerges clearly from the terms of subsection (4) which permits the builder to recover part of the consideration for the contract. If the section were intended to vitiate, or avoid, building contracts made with unlicensed builders, the builder could not recover any recompense under the contract. The section expressly allows him to recover part of the contract price, limited to amounts paid to suppliers, subcontractors or employees. It prevents the recovery of monies to recompense the builder for his own work, and prohibits him making a profit. The subsection therefore expressly recognises the validity of a contract made by an unlicensed builder but alters the building rights under it.

[82] Of some importance is the consideration that the section imposes the criminal sanction of a fine for contravention. This is a factor indicating that the statute does not intend to impose an additional penalty by way of invalidating a contract made in contravention of the statute.

[83] It is significant that the financial consequences of holding the contract illegal and invalidating the superintendent's appointment and directions and certifications made by him would fall upon the parties to the contract, not the superintendent who was the one who committed the statutory breaches. This is another reason for construing the statute against making the contract illegal.

[84] The application of these principles means that the Act did not prohibit the appointment of Mr Jolly. His performance of the superintendency, if it involved him in a contravention of s 42, did not vitiate the rights of the parties to the building contract which have been fixed, in part, by the actions of the superintendent.

[85] I answer the three questions of law in these terms:

(1) The superintendent appointed under the building contract between the applicant and the respondent did not carry out or undertake to carry out 'building work' within the meaning of s 42(1) and/or s 42(2) of the

Queensland Building Services Authority Act 1991 as in force as at 5 February 2004.

(2) There was no 'contractor's licence of the appropriate class' relevant to the functions of the superintendent.

[86] It is not necessary to answer question 3. Had it been, my answer to question 3(b) (assuming an affirmative answer to question 3(a)) would have been that the contract was neither illegal nor made unenforceable by the Act.