Building

Queensland Building Tribunal Update - Unlicensed Builders, Oral Variations and Arbitration. What is the Present Position?

- **Stephen Pyman, Partner, Barwicks Lawyers, Brisbane.**

With the recent inquiry into, inter alia, the Queensland Building Tribunal announced by the Minister for Housing, it is an opportune time to consider some of the more significant decisions of the Tribunal, the District Courts and the Supreme Court of Queensland regarding the *Queensland Building Services Authority Act* and the Tribunal.

In particular, the most recent decisions by the Supreme Court on the jurisdiction of the Tribunal regarding high-rise home units and the decisions regarding the ability of unlicensed builders to recover the cost of the contract works should be of interest to all practitioners.

UNLICENSED BUILDERS - DO THEY GET PAID?

The debate regarding unlicensed builders and their entitlement to payment continues. Section 42(3) of the *Queensland Building Services Authority Act* provides that an unlicensed builder is not entitled to *"any monetary or other consideration"*. The Queensland Building Tribunal has held on at least two occasions that an unlicensed builder cannot claim the contract sum but can recover the costs of materials, subcontractors' costs and other outlays.1 Recently, in the decision of *Midpacific Constructions (Aust) Pty Ltd v Bromley Investments Pty Ltd*[2], Wensley QC held that an unlicensed builder could recover not only the costs of materials and other outlays, but also damages for breach of contract or the reasonable cost of any work carried out and beneficially accepted by the owner. This decision is contrary to earlier Tribunal decisions.

Subcontractors' Charges Notices - Do They Apply to Domestic Building Work?

In the landmark decision of *Watpac Australia Pty Ltd v K-Crete Industries Pty Ltd*[3], Williams J, held that subcontractors' charges notices do not apply to the construction of high-rise home units. Section 110 of the *Queensland Building Services Authority Act* provides that the *Subcontractors' Charges Act* does not apply to domestic building work and Williams J, was of the view that a high-rise unit is "a home" and thus domestic building work. As a result, a subcontractors' charges notice can only be used for commercial and industrial work.

What is the Level of Supervision Required Under the *Queensland Building Services Authority Act?*

The Tribunal decided in *Queensland Building Services Authority v Power*[4] that supervision connotes the overseeing or direction of some activity, not the inspection of some finished or partly finished product. A supervisor is not expected to inspect or examine every part of the work but is required to examine the execution of substantial or important matters.

Are Oral Variations Recoverable?

The debate about whether builders can recover oral variations has now been put at rest by the District Court in Brisbane. Notwithstanding that section 59 of the *Queensland Building Services Authority Act* provides that a variation not in writing could not be relied upon by the builder or the owner, Healy QC, DCJ, in *Panton v Johnston*[5] held that if the variation is carried out and the owners receive the benefit of that work then, notwithstanding there is no written variation, the owners have an obligation to pay the builder the reasonable cost of that work.

Liquidated Damages - Owners Need to be Careful

Where a contract stipulates an amount of "nil" as liquidated damages arising from a delay, then this may preclude, not only liquidated damages, but any general damages, related to delay. This is so because the completion of such a clause may be an exhaustive agreement as to the damages payable in the event of failure to complete on

time, thereby leaving no room for the implication of a term allowing claims for damage at large: *Walker v Freedom Homes (Qld) Pty Ltd*[6].

When is a House Practically Complete?

Where furniture has been placed in a house for the purpose of storage only, then it is quite inequitable for a builder to seek to rely on the terms of a contract to show that the owner had "used the premises" with the result of a deemed practical completion. Storage of furniture does not amount to a use of the dwelling as there has been no occupation. There must be some enjoyment derived by the owner of the house for the purpose of which the house was intended to be used, such that the owner has exercised dominion over the dwelling: *Mitchell Construction v Gear*[7].

Can the Queensland Building Services Authority Direct a Builder as to the Manner and Method of Rectifying Defective or Incomplete Work?

There is nothing in section 72 of the *Queensland Building Services Authority Act* which authorises the Authority to do more than to direct a person to rectify defective or incomplete work. The Authority has no power to direct the manner and method of rectification: *Hanlon Homes Pty Ltd - Ex Parte: Builders' Registration Board (Q)*[8].

Fines in Tribunal Reach Record Heights

There have been a number of large fines in the Tribunal for breaches of the *Act.* In *Queensland Building Services Authority v Kaminski*[9], an unlicensed builder was fined a total of $24,000 for unlicensed building on six different sites.

A licensed builder was fined the sum of $5,000 for loaning his card to an unlicensed builder in *Queensland Building Services Authority v Slogrove*[10].

In the much publicised case of *Queensland Building Services Authority v Homelodge Pty Ltd*[11], an unlicensed builder was fined a total of $240,000 for carrying out building work on 80 sites without holding the appropriate license under the *Act.*

In the landmark decision of *Queensland Building Services Authority v Ivywing Corporation Pty Ltd*[12], the directors of an unlicensed building company were fined personally for breaches of the *Fair Trading Act* by the company.

Builders and Incorrect or Defective Engineering/ Architectural Plans - Where Does the Buck Stop?

The courts have also shown an increasing tendency to hold builders responsible where plans are **obviously** incorrect or in error. A short summary of the most recent cases is as follows:

(a) in *Small v Building Services Corp (NSW)*[13] the Tribunal held that there was no excuse for poor quality work for a builder to blindly follow architect's drawings where those drawings are obviously (in the eyes of a competent builder) wrong;

(b) the Queensland Building Tribunal in *Queensland Building Services Authority v Tuttle*[14] held that even where the defective work is the result of a design matter, and even where there was some engineering supervision, the builder could not escape responsibility for it and must rectify it.

(c) in *D & L Homes Pty Ltd v Queensland Building Services Authority*[15] the builder was found responsible, notwithstanding he followed engineering plans, but the engineer was ordered to reimburse the builder.

(d) in *Binnici v Building Services Corp (NSW)*[16] the New South Wales Building Tribunal held that blind adherence to plans that are obviously defective is not good practice and the builder is in breach for not carrying out the work in a good and workmanlike manner;

(e) in *Vasilopoulos v Building Services Corp (NSW)*[17] the New South Wales Building Tribunal again held a builder responsible if the builder knows, or ought to know, that it is unreasonable to build strictly in accordance with the plans. The Tribunal went on to say that the failure by the builder to bring the difficulties presented by the plans to the attention of the owners so as to give them the opportunity to decide the manner in which the difficulties should be dealt with, represented departure from good building practice.

Don't Get Caught!

If builders perceive that there is a problem with the plan then that problem should be brought to the attention of the architect/engineer and the owner. If the builder recommends against construction in accordance with those plans, then he should put his recommendations in writing and obtain a response in writing. If, against the builder's recommendation, the works are constructed in accordance with the plans and defects result, then, in those circumstances, the builder has a much stronger chance of defeating any claim for defects - this is particularly so where the owner or the architect/engineer instructs the builder to use a particular type of material against the builder's recommendations: R*V Miller & Builders' Registration Board (Q) Ex Parte: Graham Evans & Co Pty Ltd*[18].

ARBITRATION AND DOMESTIC BUILDING DISPUTES - IS THE ARBITRATOR MAKING A COMEBACK?

Home Building Review

In November 1990 the Home Building Review Report reached the following conclusions concerning arbitration in the home building industry:

(a) there was a perceived lack of impartiality as most arbitrator nominations were made by either the QMBA or the HIA:

(b) arbitration had prohibitive costs and delays;

(c) unsatisfactory abuses of procedure occurred in

arbitration; and

(d) arbitration was not an appropriate means of resolving home building disputes and arbitration clauses in home building contracts and other arbitration agreements in respect of home building disputes should be void. (Home Building Review Report, November 1990, page 54.)

Implementation of the Home Building Review Recommendations

In July 1992 the *Queensland Building Services Authority Act* ("the Act") was proclaimed and substantially implemented the Home Building Review recommendations as follows:

- Section 67 provided that a contractual provision requiring the reference of a dispute under a domestic building contract to arbitration was void; and
- Section 110 provided that the *Commercial Arbitration Act* 1990 did not apply to domestic building work.

These sections appeared to have sounded the death knell for arbitration in relation to contracts for domestic building work.

What is domestic building work?

It is submitted that the Queensland Building Tribunal and the Courts have interpreted the definition of "domestic building work" far more widely than the legislature originally anticipated. Domestic building work will include:

- construction of swimming pools: per Wiley DCJ in *Precision Pools Pty Ltd v Berteaux*[19];
- landscaping such as pergolas, paving, boulder walls and earthworks: *Lickeen Pty Ltd v Barber*[20];
- construction of over 20 individual dwellings under one contract for an aboriginal council: per Demack J in *Woorabinda Aboriginal Council v Ealesrose Pty Ltd*[21];
- apartment units where a substantial number of units in the apartment building are used for holiday letting: *Habjen v Eclat Painters & Decorators*[22].

Because any contracts for the above type of work are contracts for domestic building work, then pursuant to the terms of the *Act,* clauses requiring the reference of a dispute to arbitration are void and the *Commercial Arbitration Act* does not apply.

Accordingly, given the wide interpretation that the Tribunal and the Courts were applying to "domestic building work" the death knell for arbitrators rang louder and longer.

The 1994 Amendments

On 20 May 1994, substantial amendments were made to the *Act.*

One of the amendments, Section 56A, provided that Part 4 of the *Act* (requirements of domestic building contracts) only applied to a duplex or a single detached dwelling. Section 67 comes within Part 4 of the *Act.*

Thus, as and from 20 May 1994, contractual provisions requiring the reference of a dispute under a domestic building contract to arbitration are void only if that contract is about a duplex or a single attached dwelling. Contracts for the many other types of building work referred to above can, it would seem, make reference to arbitration.

However, Section 110 does not come within Part 4 of the *Act* and while parties to such disputes appear to be able to arbitrate, the *Commercial Arbitration Act* will not apply to those disputes.

Conclusion

Parties to contracts for domestic building work that are not about a duplex or a single detached dwelling can still arbitrate but must do so without the aid of the *Commercial Arbitration Act.* That *Act* lays down procedures for the appointment of arbitrators and the conduct of arbitration proceedings.

It would seem then that the parties will need to reach agreement as to the appointment of the arbitrator and the conduct of any arbitration proceedings themselves without reference to the *Commercial Arbitration Act.* There does not seem to be any reason why the parties could not agree, for instance, to apply the equivalent Arbitration Act in New South Wales.

There is an argument that it was only ever mandatory clauses that "required" the reference of a dispute under a domestic building contract to arbitration that were void and the parties were free to agree to go to arbitration by consent. That interpretation has never been tested by the Tribunal but, in any event, as outlined above, even contracts that have a mandatory requirement for disputes to be referred to arbitration in contracts for domestic building work other than for a duplex or a single detached dwelling will not be void.

ORAL VARIATIONS - THE DISTRICT COURT ENDS THE DEBATE

Section 59(2) of the *Queensland Building Services Authority Act* 1991 ("the Act") provides that a variation that is not in writing and signed by the parties to a contract may not be relied on by the consumer or the builder contractor.

There have been a number of decisions in the Queensland Building Tribunal which have held that, notwithstanding the terms of this section, a builder is still able to recover on the basis of the principles of restitution for unjust enrichment. For instance:

- In *Torti v Holsheimer*[23] the Tribunal held that notwithstanding a variation was not in writing, there was an obligation on the owner to pay a fair and just compensation for variations carried out by the builder.
- In *Ybarzabal v Gumban*[24] the Tribunal again held that even though a variation was not in writing and signed by the parties, the builder may be entitled to the amount claimed for the variation on the basis of the doctrine of restitution.
- Similar results were received in *Reid v Queensland*

Building Services Authority[25] where the contract was varied to achieve a just result and in *Thompson Houlalin v Hambledon Nominees Pty Ltd*[26] where the Tribunal held that an owner was estopped from relying upon the requirement of written notification for variations when the conduct of the owner had led the builder to continue to its detriment.

On the other hand, there have been some cases in the Tribunal that have upheld the strict interpretation of this section:

- In *Bilowol v Wilder*[27] variations claimed by the builder were not allowed. The Tribunal held that in the event that the contract remains enforceable, the builder loses his right to rely upon a variation if the same is not in writing (subject to any defence of waiver, acquiescence or estoppel). That is, in the absence of an implied promise to pay or any waiver by the owner of the requirement for compliance of written variations, it is clear that the builder is unable to obtain payment for variations unless they are in writing.
- Similarly, in *Barrett v Wood*[28] Mr Wensley QC also found on the facts of that case that variations that were not in writing were not enforceable.

Against the backdrop of these Tribunal decisions is the decision of Beach J in *Sevastopoulos v Spanos*[29]. In relation to the equivalent Victorian Act, it was held that unless a variation was in writing and signed by both parties, personally or by an agent, the builder could not recover in contract, indebitatus assumpsit or otherwise.

Recently, His Honour Judge Healy QC, DCJ had occasion to consider Section 59 of the *Act* in *Johnston v Panton*[30]. His Honour held that Section 59 was not worded as an absolute prohibition as was Section 45 of the New South Wales Act which did not prevent a licensed builder from bringing an action based on quantum meruit for the value of work done and materials supplied pursuant to an oral building contract.

His Honour held that Section 59 does not negate the operation of the principles of law relating to additional implied promises or a claim to restitution or one based on unjust enrichment in a quantum meruit claim.

Footnotes

1. *Lester v Layton* (unreported, Qld Bldg Trib, 16/05/95) and *Pillar v Wrightson* (unreported, Qld Bldg Trib, 29/06/94)
2. (unreported, Qld Bldg Trib, 14/02/96)
3. (unreported, Sup Crt of Qld, 17/10/95)
4. (unreported, Qld Bldg Trib, 08/08/95)
5. (unreported, Dist Crt Brisbane, 04/05/95)
6. (unreported, Qld Bldg Trib, 02/06/95)
7. (unreported, Qld Bldg Trib, 27/06/95)
8. [1986] 1QdR 61
9. (unreported, Qld Bldg Trib, 13/02/95
10. (unreported, Qld Bldg Trib, 03/02/95)
11. (unreported, Qld Bldg Trib, 17/01/96)
12. (unreported, Qld Bldg Trib, 31/01/96)
13. (1988) 7 BCL 109
14. (unreported, Qld Bldg Trib, 21/06/93)
15. (unreported, Qld Bldg Trib, 15/04/94)
16. (1993) 1 NSW BLR 151
17. (1993) 1 NSW BLR 134
18. [1987] 2 QdR 446
19. (unreported, Dist Crt, Brisbane, 18/02/94)
20. (unreported, Qld Bldg Trib, 11/11/93)
21. (unreported), Sup Crt Qld, Rockhampton, 22/11/93)
22. (unreported, Qld Bldg Trib, 04/08/94)
23. (unreported, Qld Bldg Trib, 28/10/93)
24. (unreported, Qld Bldg Trib, 26/11/93)
25. (unreported, Qld Bldg Trib, 06/07/93)
26. (unreported, Qld Bldg Trib, 08/03/93)
27. (unreported, Qld Bldg Trib, 08/12/94)
28. (unreported, Qld Bldg Trib, 15/10/94)
29. [1991] 2 VR 194
30. (unreported, Dist Crt, Brisbane, 04/05/95)