SUPREME COURT OF QUEENSLAND

CITATION:	*Sheppard Homes Pty Ltd v FADL Industrial Pty Ltd* [2010] QSC 228
PARTIES:	**SHEPPARD HOMES PTY LTD** **ACN 118 944 246** (applicant) v **FADL INDUSTRIAL PTY LTD** **ACN 106 416 273** (respondent)
FILE NO/S:	BS 6000 of 2010
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 June 2010
DELIVERED AT:	Brisbane
HEARING DATE:	24 June 2010
JUDGE:	Fryberg J
ORDERS:	**1. It is declared that the referral contracts entered into between the Applicant and the Respondent referred to in the affidavit of Leonard Sheppard s the:** **(a) Bennett Contract;** **(b) Hardie Mills Contract;** **(c) Canning Contract; and** **(d) Fosbeary/Kovsninoff Contract;** **are not Construction Contracts within the meaning of the *Building and Construction Industry Payments Act 2004* and that the *Building and Construction Industry Payments Act 2004* does not apply to those contracts.** **2. It is declared that the adjudication decisions of 'Adjudicate Today' based on the documents referred to in 1. as listed below:** **(a) Adjudication Application 1057877_1486 dated 3 June 2010;** **(b) Adjudication Application 1057877_1489 dated 8 June 2010;**

(c) Adjudication Application 1057877_1487 dated 8 June 2010;
(d) Adjudication Application 1057877_1488 dated 8 June 2010;
were made without the jurisdiction of the *Building and Construction Industry Payments Act 2004* and are void for purposes of the *Building and Construction Industry Payments Act 2004*.

3. The respondent to pay the applicant's costs on the standard basis.

CATCHWORDS: Contracts – Building, engineering and related contracts – The contract – Generally – Agreement for the provision of licence to use drawings – Whether a construction contract – Whether a "related service" under the Act

Procedure – Supreme Court procedure – Queensland – Jurisdiction and generally – Generally –Inherent jurisdiction to determine whether an inferior tribunal exceeded its jurisdiction

Statutes – Acts of Parliament – Interpretation – Particular words and phrases - *Building and Construction Industry Payments Act 2004* (Qld), s 3(1), s 11 – "services" and "architectural or design services" – Excludes the supply of a licence to use drawings

Building and Construction Industry Payments Act 2004 (Qld), s 3(1), s 3(2), s 11

Kirk & Anor v Industrial Court of New South Wales & Anor; Kirk Group Holdings Pty Ltd & Anor v WorkCover Authority of New South Wales (2010) 239 CLR 531; [2010] HCA 1, referred to

COUNSEL: P D Dunning SC with D D Keane for the applicant
P L Challen (sol) for the respondent

SOLICITORS: Nyst Lawyers for the applicant
Hawthorn, Cuppaidge & Badgery for the respondent

HIS HONOUR: I order that Leonard Sheppard be substituted as the applicant herein.

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This is an application for declarations relating to an adjudication carried out in connection with four adjudication applications under the *Building and Construction Industry Payments Act 2004*. The applicant was a home builder and entered into a contract with the respondent, Fadl Industrial Pty Ltd, of an unusual nature.

The contract provided by clause 1 that Fadl Industrial, called the consultant, had referred a residential building client to the builder for the purposes of constructing a residence, details of which were described in a contemporaneous building contract identified in the contract.

The agreement provided that the builder would pay the consultant a certain amount calculated by reference to the price payable under the building contract. Payments were to be made at the time of each drawing done by the builder under the building contract. The contract provided that it was an entire agreement and not able to be varied except by written agreement.

In each case of the four cases before me the consultant had located owners willing to enter into contracts, and those persons had entered into building contracts. The building

contracts were to construct domestic dwellings for the owners to rent to other people, and in accordance with plans provided by the consultant.

The evidence is unclear about to whom the plans were to be provided, but it was submitted on behalf of the consultant that Mr Fadl was friendly with the owners, and I would infer from that that he provided the plans to them, or for their benefit.

It appears to be a situation where there was no assignment of the copyright in the plans. The plans themselves refer to the retention of copyright by the Fadl group, so I must infer that what Mr Fadl's company provided was a license to build using the plans.

Mr Fadl's company did not get the amount of money which it was claimed it was entitled to get. It therefore gave what purported to be payment notices under the Act, and when they were not paid, applied for adjudication under the Act. Adjudication duly took place.

The builder submitted to the adjudicator that the contract between the builder and the consultant was not a contract within the meaning of the Act, and was unsuccessful in that submission. It now seeks declaratory relief on the basis that the Act did not apply to the consultancy agreement.

The basis for that claim is put in two ways. First, it is

said that by s 3(1) the Act applies to construction contracts entered into after a certain date. A construction contract is a defined term. It is defined under the Act to mean: "A contract agreement or other arrangement under which one party undertakes to carry out construction work for or to supply related goods and services to another party."

It is not suggested in the present case that the consultancy agreement amounted to a contract or other arrangement for construction work. It is suggested that it was for supply of related services to another party. That submission is based on the proposition that the written agreement does not disclose the whole of the relationship between the parties.

For the consultant, Mr Challen submitted that the relationship clearly involved not just the finding of a person willing to enter into a construction contract, but also the granting of a license to use the drawings and also, though it was not included anywhere in writing, the provision of an employee of the consultant to act as agent for the owner in dealings with the builder.

I must say at once that I reject the submission advanced on behalf of the consultant that there should be implied a term into the contract to this effect. I do so for two reasons. First, it would be very odd indeed for a builder in this situation to agree to pay for the site representative of the owner. It would also be odd for there to be no written agreement if the builder were to be responsible for the provision of the drawings.

Mr Challen for the consultant, however, submitted that in any event, even if a term were not to be implied, the fact remains that what was done was in fact the three types of work which he described. That is, the finding of the owner, the provision of the license and the furnishing of the agent. He submitted that that being done was enough to bring the contract within the meaning of construction contract in the Act.

He submitted that the fact that these things were done was evident from letters sent by the builder in which he sought to recover additional costs from the consultant, letters sent by the builder to the owner regarding the progress of the building and the builder's attempt to terminate the agency relationship of the consultant's employee.

I do not think that the evidence really supports a conclusion that that was part of the contractual obligation, as I have said, but even if it was, I do not think it comes under the Act.

As I have said, a construction contract is defined as a contract, relevantly, to supply related services to another party. Related good and services are defined in s 11 of the Act. In particular services mean, relevantly, "architectural or design services". Nothing in the definition covers the provision of an agent to act on behalf of the owner.

In my judgment the provision of architectural and design services is not something which is done simply by granting a license to use a plan. The purpose of the Act, as Mr Dunning submitted on behalf of the builder, is to provide for instalment contracts for work carried out over a period, and while that would cover, for example, architectural design work, it would not be appropriate to have instalment payments, for example, of a license fee. That sounds like a one-off payment.

I therefore do not think that the supply of a license for the drawings falls within the definition of services. Nothing in the definition covers working as a spotter, and finding people willing to enter into a contract. It therefore follows that in my judgment the work done, even accepting that it was work of the type urged on behalf of the consultant, and even accepting that it was required under the contract, was not the provision of related services within the meaning of the Act. It follows that the work was not construction work as defined and therefore that under s 3(1) of the Act the Act did not apply.

Mr Dunning's submissions in the alternative went further. He submitted that under s 3(2) there was express provision for the Act not to apply. He based that submission on para (c) of that subsection which provides:

> "The Act does not apply to a construction contract under which it is agreed that the consideration payable for construction work carried out under the contract, or for related services supplied under the contract, is to be calculated other than by reference to the value of the services supplied."

Even assuming that the contract in this case was a construction contract, that is, that the consultancy agreement was a construction contract, the amounts to be paid under it were calculated not by reference to the value of the services supplied, but by reference to the amounts payable by the owner to the builder.

There is no evidence before me of what the value of the three types of services relied upon was, and it seems most unlikely that it could in any way be related to the amounts of money prescribed by the consultancy agreement for payment to the consultant. It follows that in my judgment the agreement falls under s 3(2)(c) of the Act and the Act does not apply to it.

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Mr Challen also submitted that the question of jurisdiction had been decided by the adjudicator, and that the adjudicator's decision was binding on this Court unless it was made with an absence of bona fidings. That submission was based on some of the New South Wales' decisions under the equivalent Act in that State. I reject that submission.

This Court always has the jurisdiction to determine whether an inferior tribunal of any sort has exceeded its jurisdiction, and nothing in the Act takes away the power of this Court to ensure that inferior tribunals adhere to their jurisdictional limits.

In my judgment nothing in the Act purports to do so, but were it to be submitted otherwise, that is, were it to be submitted that the Act does intend to remove the jurisdiction of this Court to determine whether adjudicators have jurisdiction, it would likely be the position that the Act would be constitutionally invalid. In that regard I refer to the recent decision of the High Court in *Kirk & Anor v Industrial Court of New South Wales & Anor; Kirk Group Holdings Pty Ltd & Anor v WorkCover Authority of New South Wales* (2010) 239 CLR 531; [2010] HCA 1.

It follows that in my judgment there should be declarations. The form of the declaration will be discussed with counsel.

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The unsuccessful respondent resisted an application for costs. The applicant has been successful. Not everything in the original material was argued, and there was an error in the naming of the applicant. Neither error, in my judgment, significantly affected the amount of the costs, and I do not think that those factors constitute a reason for departing from the usual rule that the unsuccessful party pay the costs.

The order will be that the respondent pay the applicant's costs on the standard basis. I have deleted from the draft the former paragraph 4; made the former paragraph 5, paragraph 3; the former paragraph 3, paragraph 1, and deleted the original paragraph 1. That done, there will be an order in accordance with the draft initialled by me, and placed with the papers.