JUDGEMENT : WILSON J. SUPREME COURT OF QUEENSLAND, BRISBANE, CIVIL JURISDICTION. 30th April 2007.

1. There is a house property at 7 Manning Street, South Brisbane owned by the plaintiff and her late husband as tenants in common. Next door at 9 - 11 Manning Street, the defendants commenced construction of a high-rise apartment building in 2003. This involved excavation works which caused subsidence of the plaintiff's land, and distress to the plaintiff's house and other structures on the land.

2. The plaintiff alleges that remedial works estimated to cost approximately $77,250 are necessary. She commenced this proceeding in the Supreme Court for damages for nuisance, alternatively, a mandatory injunction or equitable damages, as well as damages for negligence, damages for trespass and damages for breach of section 179 of the Property Law Act 1974.

3. The defendant wishes to have the proceeding heard and determined in the Commercial and Consumer Tribunal and has applied for orders setting aside or staying the proceeding in this Court and requiring the plaintiff to start again in the Tribunal.

4. The issue for determination is whether the Tribunal has jurisdiction to hear and determine this claim. If it does, the Court must transfer it to the Tribunal pursuant to section 40(1) of the Commercial and Consumer Tribunal Act 2003 which provides,

> *"40 Transfer of proceedings between tribunal and the courts*
> *(1) If a proceeding is started in a court and the proceeding could be heard by the tribunal under this Act, the court must order the entity who started the proceeding to start the proceeding again before the tribunal under section 31."*

5. In order to determine the question of jurisdiction, it is necessary to follow through a series of legislative provisions. By section 8(1) of the Commercial and Consumer Tribunal Act,

> *"8 Jurisdiction of tribunal*
> *(1) The tribunal has jurisdiction to deal with the matters it is empowered to deal with under this Act or an empowering Act."*

6. The Queensland Building Services Authority Act 1991 and the Domestic Building Contracts Act 2000 are *"empowering Acts"* for this purpose. See the dictionary in schedule 2 to the Commercial and Consumer Tribunal Act.

7. Section 77 of the Queensland Building Services Authority Act provides,

> *"77 Tribunal may decide building dispute*
> *(1) A person involved in a building dispute may apply to the tribunal to have the tribunal decide the dispute.*
> *(2) Without limiting the tribunal's powers to resolve the dispute, the tribunal may exercise 1 or more of the following powers-*
> *(a) order the payment of an amount found to be owing by 1 party to another;*
> *(b) order relief from payment of an amount claimed by 1 party from another;*
> *(c) award damages, and interest on the damages at the rate, and calculated in the way, prescribed under a regulation;*
> *(d) order restitution;*
> *(e) declare any misleading, deceptive or otherwise unjust contractual term to be of no effect, or otherwise vary a contract to avoid injustice;*
> *(f) avoid a policy of insurance under the statutory insurance scheme;*
> *(g) order rectification or completion of defective or incomplete tribunal work;*
> *(h) award costs."*

8. Clearly subsection (2) of section 77 is not a source of jurisdiction. What it does is set out the powers of the Tribunal in matters in which it has jurisdiction.

9. *"Building dispute"* is defined in the dictionary in schedule 2 to the Queensland Building Services Authority Act as meaning (a) a domestic building dispute, or (b) a minor commercial building dispute, or (c) a major commercial building dispute if the parties to the dispute consent to the dispute being heard by the Tribunal under section 79.

10. Here, the applicant submitted that the dispute is a *"building dispute"* within either (a) or (b). I reject the contention that this is a minor commercial building dispute (that is, within (b)). The definition of a *"minor commercial building dispute"* in the dictionary in schedule 2 to the Queensland Building Services Authority Act turns on the size of the claim or counterclaim if there is one. It is only if there is a commercial building dispute where the size of neither the claim nor the counterclaim exceeds $50,000 that there is a minor commercial building dispute. Here the claim is in the sum of $77,254.20. It is not to the point that at a time before the proceeding was commenced, the remedial works then said to be necessary were estimated to cost only $28,567.

Is this a "domestic building dispute"?

11. Paragraph (c) of the relevant definition in the dictionary in schedule 2 to the Queensland Building Services Authority Act is,

> *"Domestic building dispute means-*
> *(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."*

"Reviewable domestic work" is defined as meaning -
"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. In defining "*domestic building work"* the Domestic Building Contracts Act draws a distinction between new construction and renovation. New construction is within the definition only if it is construction of a detached dwelling, while renovation is within the definition if it is renovation of a *"home"*, that is, any residential premises including a home unit.

13. This distinction is apparent in subsection (1) of section 8 which provides,

"8 Meaning of domestic building work
(1) Each of the following is domestic building work-
(a) The erection or construction of a detached dwelling;
(b) the renovation, alteration, extension, improvement or repair of a home;
(c) removal or resiting work for a detached dwelling."

14. Subsection (3) extends the meaning of "domestic building work" to include "associated work".

Domestic building work includes-
(a) work (associated work) associated with the erection, construction, removal or resiting of a detached dwelling; and
(b) work (associated work) associated with the renovation, alteration, extension, improvement or repair of a home."

And by subsection 4,

"(4) Without limiting subsection (3), associated work includes-
(c) landscaping; and
(d) paving; and
(e) the erection or construction of a building or fixture associated with the detached dwelling or home.

Examples of buildings and fixtures for subsection (4)(c)Retaining structures, driveways, fencing, garages, carports, workshops, swimming pools and spas."

15. In the present case, the excavation works are not disputed. They consisted of: (a) excavation of 9 - 11 Manning Street along its boundary with the plaintiff's property, according to the plaintiff to a depth of six metres, and according to the defendant to a depth of four metres; (b) installation of reinforced concrete bored piers along the boundary between 9 - 11 Manning Street and the plaintiff's property at intervals of approximately 2.7 metres; (c) installation of approximately 20 horizontal screw piers or screw piles at a depth of approximately three metres below natural ground level encroaching into the subsurface of the plaintiff's property by approximately five metres in each case. See the statement of claim, paragraph 7 and the defence paragraphs 7.1 - 7.3.

16. The solicitor for the defendant submitted that this work, in particular the installation of the retaining structure and what he called the screw anchors, was work associated with the alteration of the detached dwelling at 7 Manning Street - the alteration, occurring when there was movement of the property, being the erection of a fixture associated with the detached dwelling in the nature of a retaining structure. Thus he invoked section 8(1)(b), section 8(3)(b) and section 8(4)(c).

17. Counsel for the plaintiff ably demonstrated why this submission should be rejected. After explaining the distinction drawn between detached dwellings and other residential premises, he submitted that paragraph (b) of subsection (1) refers to activities belonging to a genus of work to a home and that interference with another's property is not within that genus.

18. He submitted that section 8(1) is concerned with a contractor carrying out work by willed acts and the nature of the work carried out. I accept that the paragraph focuses on the work rather than its consequences. In my view, damage to another's property is not "alteration" within the paragraph.

19. Further, "associated work" in subsection (3)(b) is necessarily work having some association or connection with the renovation, alteration, et cetera, work on a home. Excavation work and the insertion of screw anchors as part of the construction of a high-rise apartment building on 9 - 11 Manning Street was not work associated with the alteration of 7 Manning Street.

20. For these reasons, I have concluded that this was not "*domestic building work"* under the Domestic Building Contracts Act or "reviewable domestic work" under the Queensland Building Services Authority Act.

21. Accordingly, this is not a *"domestic building dispute"* within the Queensland Building Services Authority Act and the Commercial and Consumer Tribunal does not have jurisdiction to hear and determine it.

22. Moreover, the Tribunal clearly does not have jurisdiction to deal with the claim under the Property Law Act. The application is dismissed.

23. The plaintiff/respondent to the application has asked for costs on the indemnity basis. The usual order is of course for costs on the standard basis and the case must be shown to be an exceptional one before an order for

indemnity costs will be made. The relevant principles were summarised by Justice White in Di Carlo v. Dubois [2002] QCA 225 at paragraphs 37 and 38.

24. While the categories of cases in which indemnity costs may be ordered are not closed, there needs to be a special or unusual feature and there is a well known list of examples given by Justice Sheppard in ***Colgate-Palmolive Company v. Cussons Pty Limited*** (1993) 46 FCR 225.

25. In the present case, counsel for the respondent submitted that the conduct of the applicant/defendant in the litigation had been unreasonable. He submitted that it went so far as being vexatious and an abuse of process, at the same time submitting that it was not necessary for me to make such a finding in order to conclude that indemnity costs are appropriate. He referred to the passage in ***Rozniac v. Government Insurance Office*** 1997, 41 NSWLR 608, (cited by Justice White in ***Di Carlo v Dubois***) where the NSW Court of Appeal said that the discretion to depart from the usual party and party basis is not confined to the ethically or morally delinquent party. (The NSW Court of Appeal cited ***Botany Municipal Council v. Secretary, Department of the Arts*** (1992) 34 FCR 412 at 415 per Gummow J).

26. He relied upon delay. The proceeding was commenced in October 2005. Pleadings closed in December 2005. In October 2006 the solicitors for the applicant/defendant wrote to the solicitors for the respondent/plaintiff foreshadowing a third party notice addressed to an insurer and advising that apart from disclosure they did not intend any other interlocutory steps.

27. It was not until 3 April 2007 that the solicitors for the respondent/plaintiff filed an application for particulars and disclosure. Approximately three weeks later on 23 April 2007 the applicant/defendant filed this application seeking to transfer the proceeding to the Commercial and Commercial Tribunal. No warning of such an application had been given.

28. In the event I dismissed the application. While I do not think that the argument put forward in support of the application could be called a strong one, I would not go so far as to say that it was an unarguable application.

29. I have also had my attention directed to a letter written on 24 April 2007 by the solicitors for the respondent/plaintiff arguing that the application for transfer had to fail and indicating a willingness to consent to an order that the application be dismissed with costs on the standard basis. The letter went on to indicate that, if the matter proceeded to hearing, costs on the indemnity basis would be sought. I note that 25 April 2007 was a public holiday, and the application was herd on 26 April 2007.

30. Because costs on the standard basis are the usual outcome of the dismissal of such an application, I do not regard the "offer" in that letter as being a meaningful one, and certainly not in itself a foundation for ordering indemnity costs.

31. In all of the circumstances, the respondent/plaintiff has not satisfied me that there is a sufficiently special or unusual feature in the applicant/defendant's conduct to justify an order for indemnity costs. Accordingly, I make an order dismissing the application with costs, including reserved costs, to be assessed on the standard basis.

32. The application filed on 3 April 2007 for particulars and disclosure will be adjourned to a date to be fixed, with costs reserved.