06/09; [2009] VSC 76

SUPREME COURT OF VICTORIA

DIRECTOR OF CONSUMER AFFAIRS (VIC) v GLENVILL PTY LTD

Kaye J

5, 13 March 2009

STATUTORY INTERPRETATION – DOMESTIC BUILDING CONTRACT – AGREEMENT BETWEEN BUILDER AND HOMEOWNERS TO CARRY OUT DOMESTIC BUILDING WORK – AGREEMENT TO PREPARE PLANS AND SPECIFICATIONS AND OTHER THINGS – AGREEMENT TO PAY $20333 FOR WORK DONE – WHETHER A DOMESTIC BUILDING CONTRACT – IN VIEW OF AMOUNT BEING MORE THAN $5000 WHETHER AGREEMENT WAS A MAJOR DOMESTIC BUILDING CONTRACT – BUILDER FAILED TO COMPLY WITH REQUIREMENTS OF THE ACT – BUILDER CHARGED WITH OFFENCES – FINDING BY MAGISTRATE THAT THE AGREEMENT WAS NOT A MAJOR DOMESTIC BUILDING CONTRACT IN THAT THE CONTRACT DID NOT APPLY TO PREPARATION OF PLANS AND SPECIFICATIONS – CHARGES DISMISSED – PRINCIPLES FOR CONSTRUING A STATUTE – WHETHER MAGISTRATE IN ERROR: *DOMESTIC BUILDING CONTRACTS ACT* 1995, SS5(1), 31(1).

1. The starting point for construing a statute is the principle that, ordinarily, the words of a statutory provision are to be construed according to their plain and grammatical meaning. It is not the role of the Court to re-write, or amend, a statutory provision. Essentially, the words of an Act of Parliament are assumed to mean what they say. However, the principle that the words be accorded their plain and ordinary meaning is not applied inflexibly, so as to arrive at a construction which might be contrary to the manifest intention and purpose of the Act, as revealed by the terms of the statute or by a source recognised by law. Accordingly, it may be necessary to modify, or depart from, the literal grammatical meaning of the words of a statutory provision where such a construction will yield a capricious or absurd result, where it would lead to an inconsistency within the statute in which the provision occurs, or where it would render another part of the statute nugatory or ineffective. In such a case, the Court is justified in departing from, or modifying, the literal meaning of the words chosen by Parliament, but only to the extent necessary to avoid such a result.

***Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355; 153 ALR 490; 72 ALJR 841; (1998) 8 Leg Rep 41; and**

***Grey v Pearson* [1857] EngR 335; [1843-60] All ER 21; (1857) 6 HLCases 61; 10 ER 1216, applied.**

2. In accordance with those principles, the starting point for construing s31(1) of the *Domestic Building Contracts Act* 1995 ('Act'), is the plain words of the statute. The term "major domestic building contract" is defined in s3 of the Act to mean a "domestic building contract", in which the contract price is more than $5,000. The term "domestic building contract" is defined, by the same section, to mean a "contract to carry out, or to arrange or manage the carrying out of domestic building work". That definition brings into play the concept "domestic building work", which is defined in s3 to mean "any work referred to in s5" which is not excluded from operation of the Act by s6. Section 5(1) provides that the Act applies to (*inter alia*) "(g) the preparation of plans or specifications for the carrying out of work referred to in paragraphs (a) to (f)". On the plain language of the statute, the preparation of plans or specifications constitutes domestic building work. A contract to prepare plans or specifications is a domestic building contract. Where (as in this case) the contract price exceeded $5,000, the contract was a major domestic building contract and accordingly the builder was required to comply with s31(1) of the Act. In those circumstances, the magistrate was in error in holding that the contract was not a major domestic building contract and dismissing the charges.

KAYE J:

1. The appellant, the Director of Consumer Affairs, appeals against a decision of the Magistrates' Court at Melbourne made on 24 June 2008 dismissing a charge brought by the appellant against the respondent, Glenvill Pty Ltd pursuant to s31(1) of the *Domestic Building Contracts Act* 1995 ("the Act").

2. The resolution of this appeal involves one short point of law. It is not necessary, accordingly, to set out in detail the background facts to the charge brought by the appellant against the respondent.

3. By a written agreement entitled "Preliminary Agreement 2" dated 30 September 2004 between the respondent and Kirpal Kaur and Ravi Kumar ("the owners"), the respondent agreed to carry out certain "preliminary work" for the commencement of a new Glenvill Home at 15 Teddington Road, Hampton. On 26 January 2007, the appellant issued a summons, containing seven charges against the respondent, alleging a number of breaches by the respondent of the Act. The hearing of those charges proceeded for six days in the Magistrates' Court. In the course of the proceeding, a number of the charges were dismissed, when the magistrate upheld a no case submission made on behalf of the respondent. The remainder of the charges were dismissed following final submissions made on behalf of the respondent. The appeal to this Court concerns the dismissal by the magistrate of the first charge, which alleges that the respondent entered into a "major domestic building contract" with the owners to carry out domestic building work at 15 Teddington Road, Hampton, without that contract complying with the requirements of, and containing the information required by, s31(1) of the Act.

The Agreement

4. Clause 1 of the agreement between the plaintiff and the owners specified the work which the respondent agreed to perform in the following terms:

> (1) Glenvill will undertake or arrange for the following works:-
> (i) Undertake full working drawings, details and design required to construct the home.
> (ii) Obtain structural engineering computations and design drawings as required.
> (iii) Submit and obtain Building Approval.
> (iv) Submit and obtain Town Planning approval (if required & included in the quotation).
> (v) Apply for and obtain sewer drainage information and water tapping approvals.
> (vi) Undertake colour consultancy selection for the home.
> (vii) Documentation and supervision for the completion of the above items and provide a HIA/MBA contract to the client for the construction on (sic) the home to their individual requirements.

5. The agreement further provided that the price payable by the owners for the work under the agreement was $20,333.

The Act

6. The central issue in the appeal is whether the agreement between the respondent and the owners constituted a "major domestic building contract". Section 31 of the Act provides that a builder must not enter into a "major domestic building contract", unless the contract complies with the requirements of s31(1)(a) to (s). In the proceedings in the Magistrates' Court, it was not in dispute that the contract did not comply with the requirements of a number of the sub-paragraphs of s31(1). However, the magistrate dismissed the first charge against the respondent, on the grounds that the contract did not constitute a major domestic building contract.

7. The term "major domestic building contract" is defined in s3 of the Act to mean a "domestic building contract", in which the contract price for carrying out the domestic building work is more than $5,000. The term "domestic building contract" is defined to mean a contract to carry out, or to arrange or manage the carrying out of, "domestic building work" (other than a contract between a builder and a sub-contractor). Section 3 defines "domestic building work" to mean any work referred to in s5, which is not excluded from the operation of the Act from s6.

8. It is necessary to set out s5(1) in full. It provides:

> (1) This Act applies to the following work:
> (a) The erection or construction of a home including—
> (i) any associated work including, but not limited to, landscaping, paving and the erection or construction of any building or fixture associated with the home (such as retaining structures, driveways, fencing, garages, carports, workshops, swimming pools or spas); and
> (ii) the provision of lighting, heating, ventilation, air-conditioning, water supply, sewerage or drainage to the home or the property on which the home is, or is to be;
> (b) the renovation, alteration, extension, improvement or repair of a home;
> (c) any work such as landscaping, paving or the erection or construction of retaining structures, driveways, fencing, garages, workshops, swimming pools or spas that is to be carried out in conjunction with the renovation, alteration, extension, improvement or repair of a home;
> (d) the demolition or removal of a home;
> (e) any work associated with the construction or erection of a building—
> (i) on land that is for residential purposes under a planning scheme under the *Planning and*

Environment Act 1987; and
(ii) in respect of which a building permit is required under the *Building Act* 1993;
(f) any site work (including work required or required to gain access, or to improve impediments to access, to a site) related to work referred to paragraphs (a) to (e);
(g) the preparation of plans or specifications for the carrying out of work referred to in paragraphs (a) to (f).

The Magistrate's decision

9. In the proceedings in the Magistrates' Court, it was common ground that the contract between the respondent and the owners did not comply with the requirements of s31(1) of the Act in a number of respects. However, the learned magistrate accepted a submission made on behalf of the respondent that the contract was not a major domestic building contract, and accordingly it was not required to comply with s31 of the Act.

10. In reaching that conclusion, the magistrate upheld the argument by counsel on behalf of the respondent that the matters specified in s31(1) demonstrated that Parliament had not intended that that sub-section applied to a contract which "dealt purely with the preparatory works … leading to the construction of a house". Rather, the magistrate held that Parliament intended that s31(1) apply only to the "ultimate contract for the construction of a house in question". His Honour reached that conclusion because, he considered, a number of sub-paragraphs of s31(1) are incapable of applying to a contract which deals solely with the preparation plans or specification for carrying out building works. In particular, he referred to s31(1)(d), which requires that a major domestic building contract include "the plans and specifications for the work" and that "those plans and specifications contain enough information to enable the obtaining of a building permit." The magistrate also referred to sub-paragraph (l) (which requires that the contract set out details of the required insurance under the *Building Act* 1993) and sub-paragraph (q) (which requires that the contract set out the warranties implied into it by ss8 and 20 of the Act), as other instances in which s31(1) could not be readily applied to a contract, which only provides for the preparation of plans and specifications for the construction of a building. For those reasons, the magistrate concluded that the contract between the respondent and the owners was not a major domestic building contract, and thus it was not required to comply with s31(1) of the Act.

Submissions

11. The appellant has appealed on the ground that the magistrate erred in holding that the agreement between the respondent and the owners was not a major domestic building contract within the meaning of the Act. Mr C. Caleo SC, who appeared with Mr J.P. Moore on behalf of the appellant, commenced his submissions by referring to the principle that the primary object of statutory interpretation is to construe the provision in question, so that it is consistent with the language, and the purpose, of the provisions of the statute. He submitted that it is well established that, consistently with that principle, the courts have adhered to the grammatical and ordinary sense of the words, unless that approach would produce a construction which is either absurd or inconsistent with the balance of the statute, in which case the literal meaning of the words may be modified, but only to the extent necessary to avoid the absurdity or inconsistency. In support of that proposition he referred to a number of authorities including *Grey v Pearson*;[1] *Australian Boot Trade Employees Federation v Whybrow and Co*;[2] and *Project Blue Sky Inc v Australian Broadcasting Authority*.[3]

12. Mr Caleo referred to the reasons given by the magistrate, in which His Honour concluded that s31 could not apply to the contract in this case, since a number of its provisions are patently inapplicable to it. Mr Caleo submitted that, in accordance with established principle, the appropriate response to that consideration should be to imply, into s31, the phrase "where applicable", rather than to render the whole of the provisions of that section inapplicable to the contract in question. He submitted that, in an appropriate case, a court will "read words into" a legislative provision, if Parliament has failed to deal with a particular eventuality.[4] He further submitted that the approach adopted by the magistrate ignored the clear provisions of ss3 and 5 of the Act, which have the effect that a contract for the preparation of plans or specifications, of the kind entered into by the respondent with the owners in this case, is a domestic building contract.

13. In response, Mr Aghion, who appeared for the respondent, accepted that the preparation of plans and specifications by the builder, as prescribed by the contract between the respondent

and the owners in this case, constituted "domestic building work" within the meaning of s5(1)(g) of the Act. However, he submitted that a contract to undertake those works does not constitute a "domestic building contract". He commenced by referring to a number of authorities which, he submitted, support the principle that penal legislation, of the kind under consideration in this case, should be construed strictly, so that any ambiguity be resolved in favour of the accused. [5] He submitted that a proper analysis of the provisions of the Act leads to the conclusion that, while the works, for which the respondent contracted, correspond with the definition of domestic building works in s5(1)(g), it was not intended by Parliament that a contract solely to undertake those works would constitute a domestic building contract.

14. In support of that submission, Mr Aghion referred to a number of sub-paragraphs of s31(1) which, he submitted, are either plainly inapplicable to a contract which provides solely for the preparation of plans or specifications, or which would only have a limited, or strained, application to such a contract. In particular, he referred to s31(1)(i) (which requires a major domestic building contract to state the date when the work will be finished), s31(1)(l) (which requires the contract to set out details of the required insurance under the *Building Act* 1993, s31(1)(q) (which requires the contract to set out warranties implied into the contract by ss18 and 20 of the Act), and s31(1)(r) (which requires the contract to contain a checklist in a form approved by the Director). In support of his submission that s31(l) would be unlikely to apply to a contract of the kind entered into by the respondent with the owners, he referred me to the Ministerial order, which prescribes a number of clauses which must be contained in an insurance contract under the *Building Act* 1993. He submitted that such a contract of insurance could not, self-evidently, apply in a significant number of respects to a contract, in which the sole obligation of a builder is to prepare plans and specifications for a building work. Mr Aghion also referred to other provisions of the *Domestic Building Contracts Act*, such as ss8, 37, 38 and 40, which, he submitted, could only have limited, or strained, application, to a contract for the preparation of plans and specifications. Thus, he submitted that when a number of provisions of the Act are considered in totality, it is apparent that Parliament did not intend that a contract, solely for the preparation of plans and specifications, should constitute a domestic building contract, so as to attract the provisions of the Act applicable to such a contract, including s31 (where the contract is a major domestic building contract).

15. In that way, Mr Aghion submitted that the interpretation contended for by the respondent would require that the phrase "where applicable" be read, not only into s31(1)(d) of the Act, but, rather, into a significant number of the provisions of the Act, if the contract in this case were to be considered a domestic building contract, and thus a major domestic building contract. While he conceded that the Director's construction of the Act may be "open", nonetheless he contended that the preferable construction is that contended for by the respondent, namely, that a contract for the provision of plans and specifications alone does not constitute a domestic building contract.

16. In reply, Mr Caleo submitted that, by conceding that the preparation of plans or specifications is "domestic building work" within s5(1)(g), but contending that the contract to carry out such works is not a "domestic building contract", the respondent was contending for a construction of the Act which is directly contrary to the express words of the Act, and in particular the definition of "domestic building contract" in s3. He further submitted that, notwithstanding that some parts of s31(1) may not be applicable to a contract only for the preparation of plans and specifications, nevertheless a number of the paragraphs of that sub-section are of potential benefit to consumers. He contended that the appellant is not seeking to rely on a construction of the Act which widens its scope as a penal provision. Rather, the implication of the words "where applicable" would have the contrary effect, as only requiring a builder to comply with those parts of the Act which are applicable to the particular contract in question. Further, he submitted that the radical approach contended for by the respondent would involve a substantial re-writing of the definition of "domestic building contract" in s3. By contrast, the construction contended for by the respondent would conform with the principle, referred to in the authorities, that words of an Act may be "modified, so as to avoid … absurdity or inconsistency, but no farther".[6]

17. Before considering those submissions, I should note a further submission raised in written submissions filed on behalf of the respondent. Those submissions included a "notice of contention". In effect, they foreshadowed a contention that, if the appellant's submissions are accepted, so that a contract for the preparation of specifications may constitute a domestic building contract,

nevertheless the prosecution of the respondent should fail, because, on the evidence before the magistrate, s6(e) of the Act applied. That provision states that the Act does not apply to design work carried out by an architect or a building practitioner registered under the *Building Act* 1993 as an engineer or draftsperson. The written submissions referred to parts of the transcript to the proceedings before the magistrate which, it was contended, establish that the exclusion contained in s6(e) applies in this case. However, in the course of submissions, Mr Aghion did not press that submission. Rather, he expressly foreshadowed that, should the appeal in this case succeed, and the matter be remitted to the magistrate, the respondent would seek leave, before the magistrate, to re-open its case, so as to adduce further evidence relevant to the application of s6(e). Mr Caleo indicated to me that if the matter were remitted to the magistrate, he does not have instructions, at this stage, to accede to an application by the respondent to re-open its case. Nonetheless, it was common ground that if the appeal succeeds, the proceeding should be remitted to the magistrate for determination of the case on the evidence before him.

Legal principles

18. The starting point for construing the statute is the principle that, ordinarily, the words of a statutory provision are to be construed according to their plain and grammatical meaning. It is not the role of the Court to re-write, or amend, a statutory provision. Essentially, the words of an Act of Parliament are assumed to mean what they say.[7]

19. Fundamentally, a statutory provision is construed according to its ordinary English terms, so as to give effect to the intention of the legislature, as revealed in the terms of the statute.[8] However, the principle that the words be accorded their plain and ordinary meaning is not applied inflexibly, so as to arrive at a construction which might be contrary to the manifest intention and purpose of the Act, as revealed by the terms of the statute or by a source recognised by law. In *Project Blue Sky v Australian Broadcasting Authority*,[9] McHugh, Gummow, Kirby and Hayne JJ stated:

> ... The duty of a court is to give the words of a statutory provision the meaning that the Legislature has taken to intend them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.

20. Accordingly, it may be necessary to modify, or depart from, the literal grammatical meaning of the words of a statutory provision where such a construction will yield a capricious or absurd result, where it would lead to an inconsistency within the statute in which the provision occurs, or where it would render another part of the statute nugatory or ineffective. In such a case, the Court is justified in departing from, or modifying, the literal meaning of the words chosen by Parliament, but only to the extent necessary to avoid such a result. The principle is clearly stated in the speech of Lord Wensleydale in *Grey v Pearson*,[10] to which Mr Caleo referred. There his Lordship stated:

> I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the Courts of Law ... , that in construing rules and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity or inconsistency, but no farther.[11]

21. Thus, where the literal construction of the words of a statutory provision might undermine or nullify the statute, the Court will adopt a construction of those words which renders them workable. That approach is described in the authorities by reference to the Latin maxim *ut res valeat quam pereat* ("it is better for a thing to have effect than to be made void"). One example of such a proposition occurs where a statutory provision assumes the existence of a power or obligation, for which no express provision is made. In such a case, the courts will construe the statute, so as to contain that implied power or obligation.[12] In an appropriate case, the Court will treat particular words as surplusage, in order to give effect to the balance of the statutory provision.[13] Where necessary, a court will avoid an absurd or extraordinary result by "amending" a phrase in a statutory provision. Thus in *Adler v George*,[14] the Court of Queen's Bench, in a penal provision, construed the phrase "in the vicinity" to mean "in or in the vicinity". In an extreme

case, a court may construe a word or phrase of a statute contrary to its literal meaning, if it is manifest that the particular word or phrase was selected by mistake by the draftsman. A classic example of that proposition is the decision of the majority of the High Court in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation.*[15]

22. Another example of the approach to construction, to which I have just referred, has closer application to the present case. Where necessary, a court will construe a statutory provision to be subject to a qualification, so that the provision can be made workable and given sensible meaning. In *Hinton v Lower (No. 2)*,[16] the appellant was convicted for an offence against the *Road Maintenance (Contribution) Act* 1963, which required the owner of a vehicle to keep an accurate daily record of all journeys of the vehicle along public roads in South Australia. The appellant submitted that it was impossible to keep an accurate daily record of journeys on public roads in South Australia, and accordingly no-one could be convicted of failing to keep or deliver such a record or pay charges dependent upon it. That submission was rejected by the Court of Appeal. Wells J responded to it in the following terms:

> The answer to these contentions, in my opinion, is that an Act of Parliament must be construed *ut res valeat quam pereat*, and that no legislation should be read as imposing a duty impossible of performance – more especially if non-performance vitiates the entire operation of the Act – unless the language cannot be given any other meaning. It seems to me that the Act must be read as if controlled, where necessary, by the phrase 'so far as is reasonably practicable'. It is only in that way that the Act can take effect at all, and it is not to be supposed that the Legislature intended to enact a *brutum fulmen.*[17]

Conclusion

23. In accordance with those principles, the starting point, for construing s31(1), is the plain words of the statute. As I have already stated, the term "major domestic building contract" is defined in s3 of the Act to mean a "domestic building contract", in which the contract price is more than $5,000. The term "domestic building contract" is defined, by the same section, to mean a "contract to carry out, or to arrange or manage the carrying out of domestic building work" (subject to an exception which has no relevance to this case). That definition brings into play the concept "domestic building work", which is defined in s3 to mean "any work referred to in s5" which is not excluded from operation of the Act by s6. Section 5(1), which I have set out in full in paragraph 8 above, provides that the Act applies to (*inter alia*) "(g) the preparation of plans or specifications for the carrying out of work referred to in paragraphs (a) to (f)". Pausing there, on the plain language of the statute, the preparation of plans or specifications constitutes domestic building work. A contract to prepare plans or specifications is a domestic building contract. Where (as in this case) the contract price exceeds $5,000, the contract is a major domestic building contract. Section 31(1) specifies that a major domestic building contract must comply with the requirements stated in sub-paragraphs (a) to (s) of that provision. Thus, on the plain language of the Act, a contract for the preparation of plans and specifications is required to comply with s31(1), where the contract price exceeds $5,000.

24. Although Mr Aghion pointed to some difficulties in the application of s31(1), and other provisions, should a contract for the preparation of plans constitute a major domestic building contract, he did not contend that that result led to any manifest absurdity, or internal inconsistency in the Act. Rather, his fundamental submission was that a number of provisions, applying to major domestic building contracts, are either incapable of application to a contract for the preparation of plans and specifications, or do not readily apply to such a contract. He submitted that, therefore, there could be discerned a statutory intention that a contract for the preparation of plans and specifications does not constitute a domestic building contract, and thus would not constitute a major domestic building contract where the contract price exceeds $5,000.

25. In support of that submission, Mr Aghion contended that s31(1)(d) and (r) are not capable of applying to a major domestic building contract. Further, he argued, s31(1)(i), (l) and (q) could only be applied in either an artificial or strained manner. Similarly, he submitted that ss37 and 38 (which refer to the variation of plans and specifications set out in a major domestic building contract) are incapable of application to a contract solely for the preparation of plans and specifications. He submitted that a number of the implied warranties under s8 of the Act are incapable of application to a contract for the preparation of plans or specifications either wholly or in part.

26. Mr Caleo submitted that some of the provisions to which Mr Aghion referred me are, in fact, capable of sensible application to a contract for the preparation of plans and specifications. He accepted that some of them are incapable of application to such a contract. However, he submitted that that consideration is insufficient to displace the plain language of ss3 and 5 of the Act. Rather, he submitted, the question whether a particular statutory provision applies to a contract depends upon the type of work prescribed by the contract. The fact that certain provisions of the Act are not "engaged" by a contract for the preparation of plans and specifications is not a sufficient basis for concluding that there may be derived from the provisions of the Act such a clear statutory intention that a contract for the preparation of plans and specifications is not a domestic building contract, such as to override the clear specific provisions of ss3 and 5 of the Act.

27. In my view, the submissions advanced by Mr Caleo in this respect are correct. It is true that s31(1)(d) and (i) are incapable of application to a contract for the preparation of plans and specifications. It may well be that, similarly, other paragraphs of s31(1), such as paragraph (r), and, to a lesser extent, parts of paragraphs (l) and (q), could only apply with some modification and difficulty. Nevertheless, there are a significant number of paragraphs contained in s31(1) which are capable of sensible and ready application to a contract for the preparation of plans and specifications. For example, paragraphs (b), (c), (e), (f), (g), (j) (as to part), (k), (m), (n), (o) and (p) are all susceptible of simple application to such a contract. Those provisions are designed to provide appropriate protection to the consumer in a major domestic building contract. The inapplicability, or doubtful applicability of some of the paragraphs of s31(1) is not a sufficient basis on which to override the clear statutory intention, contained in ss3 and 5 of the Act, that a contract for the preparation of plans is a domestic building contract, so that such a contract for more than $5,000 contains the protections specified in the balance of s31(1).

28. Similarly, the fact that some parts of s8, which prescribes the warranties which are implied into each domestic building contract, may not be applicable to a contract for the preparation of plans and specifications, is not an adequate basis for the implication of a statutory intention that none of s 8 should apply to a contract for the preparation of plans and specifications. As Mr Caleo correctly pointed out, a number of the paragraphs in s8 are capable of ready application to such a contract, and are therefore capable of providing important protection to the consumer.

29. In the course of his submissions, Mr Aghion referred in some detail to the Domestic Building Insurance Ministerial Order No. S98 of 23 May 2003 by the Minister for Planning pursuant to ss135, 137(A) and 137(D) of the *Building Act* 1993, specifying the insurance which a builder is required to be covered by in order to carry out, manage or arrange domestic building work under a domestic building contract. He submitted that a substantial number of the provisions of the insurance, specified in that order, are irrelevant, or have no application, to work carried out by a builder in the preparation of plans and specifications. Section 31(1)(l) of the Act requires that a major domestic building contract set out the details of the insurance required under the *Building Act* 1993. Accordingly, he submitted that the contents of the insurance, specified in the order, are a further indication of a statutory intention that a contract for plans and specifications is not a domestic building contract (or, in an appropriate case, a major domestic building contract) under the Act.

30. In my view there are two responses to that submission. First, as contended by Mr Caleo, there a number of parts of the insurance, prescribed by the Ministerial Order, which are capable of sensible and useful application to a contract for the preparation of plans and specifications. Indeed Mr Aghion did not submit that all of the provisions, prescribed by the Order, could not apply to such a contract. Secondly, the Ministerial Order comprises delegated legislation made under the *Building Act* 1993. In general, it is not permissible to have regard to the contents of delegated legislation made under an Act of Parliament in order to interpret that statute itself. [18] That proposition has even greater force where, as here, the delegated legislation, relied on, is made, not under the statute which is to be interpreted, but under another statute.

31. Thus, in my view, the provisions to which Mr Aghion referred do not evidence, in a cogent manner, a legislative intention that a contract for the preparation of plans and specifications should not be deemed a domestic building contract, so as to override the express provisions of ss3 and 5 of the Act. To the contrary, in my view, the clear intention of the legislation is that such a

contract is a contract for domestic building work. That intention is spelt out in the clearest terms in ss3 and 5(1)(g). Further, s6(e) provides that the Act does not apply to design work carried out by an architect or to a building practitioner registered under the *Building Act* 1993 as an engineer or draftsman. The existence of that limited exclusion adds further strength, if it is needed, to the proposition that, on its clear terms, a contract for the preparation of plans – other than work excluded under s6(e) – constitutes a domestic building contract.

32. Most of Mr Aghion's submissions were directed to establishing a contrary legislative intention from the provisions in the Act relating to a major domestic building contract, and in particular ss31, 37 and 38. A fortiori, they have less direct, if any, application to the question whether a contract for the preparation for plans, for a contract price of less than $5,000, constitutes a domestic building contract. Yet the foundation of Mr Aghion's submissions is that no contract for preparation of plans and specifications constitutes a domestic building contract, and therefore a contract for such works would not constitute a major domestic building contract, where the contract price exceeds $5,000. The only provision to which Mr Aghion directed his attention, which is applicable to all domestic building contracts (whether major or not), is s8. As I have already pointed out, the paragraphs of that section, which are capable of application to a contract for plans and specification, would provide substantial protection to a consumer. Standing alone, there could not be discerned from s8 any statutory intention that it not apply to such a contract.

33. In his submissions, Mr Aghion called in aid the line of authorities relating to the approach which a court should adopt in construing a penal statute. However, as I have already indicated, the proposition, set out in those authorities, is to the effect that a penal statute should be construed strictly, so that any ambiguity should be resolved in favour of the accused. Thus, in construing a penal statute, where the choice is between a broad or a narrow construction of a particular provision prescribing an offence, the court should favour the narrower construction.[19] The implication of the phrase "where applicable" in s31(1) of the Act would not expand the operation of that provision. Rather, as submitted by Mr Caleo, it would tend to narrow it and make it more specific. Accordingly, the construction contended for by Mr Caleo would not offend, but rather would be consistent with, the orthodox approach to introduction of a penal provision.

34. Mr Aghion further submitted that if s31(1) were qualified in the manner contended for by Mr Caleo, namely, by the addition of the words "where applicable", such a construction would constitute judicial re-drafting of the statute. In my view, there are two answers to that proposition. First, such a construction would not constitute proscribed judicial re-drafting of the statute. Rather, it would derive from a process of construction, by which it might be concluded that s31(1) necessarily contains an implied qualification of the type contended for by Mr Caleo. Such a qualification is similar to that implied by the Full Court of South Australia in *Hinton Demolitions Pty Ltd v Lower (No. 2)*,[20] to which I have already referred. That approach is consistent with the approach discussed in the authorities to which I have referred, namely, the recognition of a qualification which is necessarily implicit in a statutory provision.

35. On the other hand, if the construction contended for by the respondent were accepted, such a construction would, in my view, constitute unwarranted, impermissible judicial re-drafting of the statute in a radical manner. Essentially, it would involve the re-writing of the definition of "domestic building contract" in s3 of the Act, in order to specifically exclude from that definition a contract for the preparation of plans and specifications. Such an exclusion would fly directly in the face of the plain meaning of ss3 and 5(1)(g). It would ignore the circumstance that Parliament had already specifically addressed, in s6(e), the question of what design work is to be excluded from the definition of "domestic building work", and thus from the definition of "domestic building contract" in s3. In that way, the construction relied upon by the respondent in this appeal would do violence to the plain language of the statute, and would be contrary to the clear intention of the Legislature as expressed in the words of the Act.

36. For the foregoing reasons, I therefore conclude that a contract for the preparation of plans and specifications, such as the contract in the present case, constitutes a domestic building contract under s3 of the Act. In this case, the contract price exceeded $5,000, and accordingly the contract was a major domestic building contract. Section 31(1) applies to such a contract, subject to the implied qualification that the underlined paragraphs of s31(1) apply, where applicable.

37. Accordingly, in my view the learned magistrate erred in holding that the contract in this case was not a major domestic building contract. That error constitutes an error of law under s 92(1) of the *Magistrates' Court* Act. It follows that, subject to hearing from counsel on the precise form of the words, I shall make orders in this appeal in the following terms:

1. The appeal be allowed.
2. The order of the Magistrates' Court dated 24 June 2008, dismissing the first charge contained in the charge and summons dated 26 March 2007, and ordering that the appellant pay the respondents' costs fixed at $50,590.96, be quashed.
3. The proceeding be remitted to be determined by the magistrate in accordance with the reasons for judgment in the appeal.

38. I shall hear counsel on the question of costs.

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[1] [1857] EngR 335; [1843-60] All ER 21; (1857) 6 HLCas 61, 106; 10 ER 1216.
[2] [1910] HCA 53; (1910) 11 CLR 311, 341-2; 16 ALR 513 (Higgins J).
[3] [1998] HCA 28; (1998) 194 CLR 355, 381-2; 153 ALR 490; 72 ALJR 841; (1998) 8 Leg Rep 41.
[4] *Birmingham v Corrective Services Commission of New South Wales* (1988) 15 NSWLR 292, 302; (1988) 38 A Crim R 412; *Kingston and anor v Keprose Pty Ltd* (1987) 11 NSWLR 404, 422; (1988) 12 ACLR 609; 6 ACLC 226 (McHugh J, diss).
[5] *Ex parte Purcell* (1907) 7 SR (NSW) 432, 434; 24 WN (NSW) 84 (Cohen J); *R v Adams* [1935] HCA 62; (1935) 53 CLR 563, 567-8; [1935] ALR 421; 8 ABC 97; *Beckwith* [1976] HCA 55; (1976) 135 CLR 569, 576; (1976) 12 ALR 333; 51 ALJR 247; 28 ALT 39 (Gibbs J); *Krakouer v R* [1998] HCA 43; (1998) 194 CLR 202, 223; (1998) 155 ALR 586; (1999) 13 Leg Rep C1; (1998) 72 ALJR 1229; (1998) 102 A Crim R 490 (McHugh J).
[6] *Grey v Pearson* (above), 106 (Lord Wensleydale).
[7] See, for example, *Amalgamated Society of Engineers v Adelaide Steamship Co Limited* [1920] HCA 54; (1920) 28 CLR 129, 161-2; 26 ALR 337; 30 FLC 91-101 (Higgins J); *Pye v Minister for Lands (NSW)* [1954] UKPCHCA 3; (1954) 90 CLR 635, 648-9.
[8] *Wear Commissioners v Adamson* (1877) 2 AC 743, 763; [1874-80] All ER 1 (Lord Blackburn); *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1981] HCA 26; (1981) 147 CLR 297, 320; (1981) 35 ALR 151; (1981) 11 ATR 949; (1981) 55 ALJR 434 (Mason and Wilson JJ).
[9] [1998] HCA 28; (1998) 194 CLR 355, 381-2; 153 ALR 490; 72 ALJR 841; (1998) 8 Leg Rep 41.
[10] [1857] EngR 335; [1843-60] All ER 21; (1857) 6 HLCases 61, 106; 10 ER 1216, 1234.
[11] See also, for example, *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* [1981] HCA 26; (1981) 147 CLR 297, 321; (1981) 35 ALR 151; (1981) 11 ATR 949; (1981) 55 ALJR 434 (Mason and Wilson JJ); *Nokes v Doncaster Amalgamated Collieries Limited* [1940] AC 1014, 1022; [1940] 3 All ER 549 (Lord Salmon); *Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, 381-2 [70] (McHugh, Gummow, Kirby and Hayne JJ); 153 ALR 490; 72 ALJR 841; (1998) 8 Leg Rep 41; *Footscray City College v Ruzicka* [2007] VSCA 136, [16]; (2007) 16 VR 498 (Chernov JA).
[12] *Norton v Long* [1968] VicRp 23; [1968] VR 221, 223 (Winneke CJ); *Herald and Weekly Times v Victorian Civil and Administrative Tribunal* [2006] VSCA 7 [24]; (2006) 24 VAR 174 (Maxwell P).
[13] *Stone v Yeoval Corporation* (1876) 1 CPD 691, 701 (Brett J); *McMonagle v Westminster City Council* [1990] 2 AC 716, 726-7; [1990] 2 WLR 823 (Lord Bridge).
[14] [1964] 2 QB 7; *Saraswati v R* [1991] HCA 21; (1991) 172 CLR 1, 23; (1991) 100 ALR 193; 65 ALJR 402; 54 A Crim R 183 (McHugh J).
[15] [1981] HCA 26; (1981) 147 CLR 297, 305-6 (Gibbs CJ), 310-13 (Steven J), 321 (Mason and Wilson JJ); (1981) 35 ALR 151; (1981) 11 ATR 949; (1981) 55 ALJR 434.
[16] [1971] 1 SASR 512.
[17] *Ibid*, 528; see also 519-20 (Bray CJ, with whom Mitchell J agreed).
[18] *Hunter Resources Ltd v Melville* [1988] HCA 5; (1988) 164 CLR 234, 244; (1988) 77 ALR 8; 62 ALJR 88 (Mason CJ, Gaudron J); *Great Fingal Consolidated Ltd v Sheehan* [1905] HCA 43; (1906) 3 CLR 176, 184 (Griffith CJ); *Webster v McIntosh* [1980] FCA 128; (1980) 49 FLR 317; (1980) 32 ALR 603, 606; (1980) 3 A Crim R 455; (1980) 32 ALJR 24 (Brennan J, with whom Deane and Kelly JJ agreed); *John Burke Ltd v Insurance Commissioner* [1963] Qd R 587; *Jomal Pty Ltd v Commercial & Consumer Tribunal* [2009] QSC 3, [37] (Douglas J).
[19] See for example *Beckwith v R* [1976] HCA 55; (1976) 135 CLR 569, 576; (1976) 12 ALR 333; 51 ALJR 247; 28 ALT 39 (Gibbs J); *Krakouer v R* [1998] HCA 43; (1998) 194 CLR 202, 223 [62]; (1998) 155 ALR 586; (1999) 13 Leg Rep C1; (1998) 72 ALJR 1229; (1998) 102 A Crim R 490 (McHugh J); *R v Adams* [1935] HCA 62; (1935) 53 CLR 563, 567-8; [1935] ALR 421; 8 ABC 97 (Rich Dixon Evatt and McTiernan JJ); *Ex parte Fitzgerald; re Gordon* (1945) 45 SR (NSW) 182, 186; 62 WN (NSW) 121 (Jordan CJ); *R v Dowlan* [1998] 1 VR 123, 137; (1997) 92 A Crim R 305 (Charles JA).
[20] [1971] 1 SASR 512; see paragraph [22], above.

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