**QUEENSLAND CIVIL AND
ADMINISTRATIVE TRIBUNAL**

CITATION:

*Number One Quality Homes Pty Ltd v Murphy & Anor* [2020] QCAT 339

PARTIES:

**Number one quality homes pty ltd**

(applicant)

**v**

**daniel murphy**

(first respondent)

**judith murphy**

(second respondent)

APPLICATION NO/S:

BDL364-18

MATTER TYPE:

Building matters

DELIVERED ON:

7 September 2020

HEARING DATE:

On the papers

HEARD AT:

Brisbane

DECISION OF:

Senior Member Brown

ORDERS:

**The Tribunal declines to determine the preliminary issue as framed by Daniel Murphy and Judith Murphy.**

CATCHWORDS:

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – SUMMARY JUDGMENT FOR PLAINTIFF OR APPLICANT – GENERALLY – where respondents seek determination of a preliminary issue – whether utility, economy and fairness to the parties of a separate question is beyond issue – where factors tell against the making of an order for the determination of a preliminary issue – where it is not just and convenient to determine the preliminary issue

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – THE CONTRACT – GENERALLY – where the parties entered into a contract for the construction of a dwelling - where applicant seeks payment of an amount owing under the contract- where the respondents counterclaim damages for defective work and misleading and deceptive conduct

*Queensland Building and Construction Commission Act* 1991 (Qld), s 3(a)(ii), s 3(d), s 67AZN, sch 1B, s 7(1)(b), s 15, s 18, s 35, s 37, s 38, s 44, s 46(1)

*Uniform Civil Procedure Rules* 1999 (Qld), r 483

*Arnold v Attorney-General (Vic)* (Unreported, Federal Court of Australia, Sundberg J, 8 September 1995)

*Blackman v Milne* [2007] 1 Qd R 198

*Collis v Currumbin Investments Pty Ltd* [2009] QSC 297

*Cook's Construction P/L v SFS 007.298.633 P/L (formerly trading as Stork Food Systems Australasia P/L)* [2009] QCA 75

*Day Ford Pty Ltd v Sciacca* [1990] 2 Qd R 209

*GMB Research & Development Pty Ltd v Commonwealth* [1997] FCA 934

*Marchesi v Viridian Noosa Pty Ltd* [2010] QSC 324

*MJ Arthurs Pty Ltd v Isenbert* [2017] QDC 85

*Orknie Pty Ltd v Body Corporate for Paloma CTS 9524* [2010] QCATA 52

*Prider v Bond University Ltd* [2019] QSC 197

*Reading Australia Pty Ltd v Australian Mutual Provident Society* (1999) 217 ALR 495

*Roberts v Australia and New Zealand Banking Group Ltd* [2006] 1 Qd R 482

*Sultana Investments P/L v Cellcom P/L* [2008] QCA 357

*Tepko Pty Ltd v Water Board* (2001) 206 CLR 1

APPEARANCES:

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld)

**REASONS FOR DECISION**

[1] On 14 July 2020 I declined to determine a preliminary issue as framed by the Murphys, Mr and Mrs Murphy. These are the reasons for my decision.

**The determination of preliminary issues in proceedings**

[2] Preliminary issues may involve questions of law, questions of fact or questions of mixed law and fact. While the determination of a preliminary issue may result in savings in costs and delay, a separate determination should only be ordered if the utility, economy and fairness to the parties of a separate question is beyond issue.

[3] The *Uniform Civil Procedure Rules* 1999 (Qld) (‘UCPR’) do not apply in the tribunal however the various cases dealing with the application of r 483 of the UCPR are of assistance in considering the present matter.

[4] Rule 483 provides:

The Court may make an order for the decision by the court of a question separately from another question, whether before, at, or after the trial or continuation of the trial of the proceeding.

[5] The discretion conferred by r 483 has been held to be a wide one, to be exercised having regard to what is just and convenient.

[6] In *Reading Australia Pty Ltd v Australian Mutual Provident Society* it was held that a number of factors tell against the making of an order for the determination of a preliminary issue and specifically where the separate determination may:

(a) give rise to significant contested factual issues both at the time of the hearing of the preliminary question and at the time of trial;

(b) result in significant overlap between the evidence adduced on the hearing of the separate question and at trial – possibly involving the calling of the same witnesses at both stages of the hearing of the proceeding. This factor will be of particular significance if the court may be required to form a view as to the credibility of witnesses who may give evidence at both stages of the hearing of the proceeding; or

(c) prolong rather than shorten the litigation.

[7] These are useful guiding principles in approaching whether in tribunal proceedings it is appropriate to determine a preliminary issue.

**The proceedings**

[8] While noting that the tribunal is not a pleadings jurisdiction, the parties have approached the preparation of the application, response and counter application and reply generally in the form of pleadings.

[9] Number One has filed an application for domestic building disputes and an amended application. The Murphys have filed a response, an amended response and a further amended response. Number One has filed a reply and answer to the amended response and a reply and answer to the further amended response and counter application.

[10] The following issues do not appear to be contentious:

(a) A cost plus contract was entered into between the parties pursuant to which Number One undertook building work for the Murphys;

(b) The building works commenced on 31 July 2017 and were substantially complete by 16 May 2018;

(c) The Murphys took possession of the dwelling on or around 10 June 2018;

(d) The Murphys paid to Number One a total of $651,440.32 under the contract.

[11] The following issues are in dispute:

(a) On 3 October 2018 the Murphys withdrew from the contract on the basis that Number One had failed to provide the Murphys with:

(i) A copy of the signed building contract; and

(ii) A copy of the consumer building guide;

(b) Number One engaged in misleading and deceptive conduct in representing to the Murphys that the sum of $462,000.00 would ‘more than cover the cost’ of constructing the dwelling;

(c) Number One undertook unapproved variation works;

(d) The building work undertaken by Number One was defective.

[12] A compulsory conference was conducted in May 2019. The tribunal subsequently made directions for the parties to file their statements of evidence including expert evidence. There have been significant ongoing delays in the progress of the litigation.

[13] At a directions hearing on 30 April 2020 the Murphys submitted that the question of whether they had validly withdrawn from the contract be determined as a preliminary issue. The Murphys were directed to file submissions including framing the preliminary issue for determination.

**The preliminary issue**

[14] The preliminary issue has been drawn by the Murphys thus:

Did the Murphys withdraw from the building contract that they entered into with Number One dated 26 September 2017, pursuant to schedule 1B, section 35(3) of the Queensland Building and Construction Commission Act 1991 (Qld), on 3 October 2018? If so, are the Murphys entitled to a refund from Number One of $28,373.92?

**The statutory framework – withdrawing from a building contract**

[15] Before turning to the submissions by the parties it is necessary to examine the relevant statutory framework.

[16] The contract between the parties is governed by the *Queensland Building and Construction Commission Act* 1991 (Qld) (‘QBCC Act’). Domestic building contracts are regulated under schedule 1B of the QBCC Act. The provisions of schedule 1B apply to domestic building contracts and the parties to those contracts. It is uncontentious that the dispute between the parties is a domestic building dispute.

[17] Section 15 of schedule 1B requires a building contractor to provide to a building owner a signed copy of the building contract within 5 business days after the contract is entered into, including any plans and specifications. If the building contract is a level 2 regulated contract, the building contractor must give to the building owner a copy of the consumer building guide before the owner signs the contract. A level 2 regulated contract includes a cost plus contract for which the total amount payable for the contracted services is reasonably estimated to be equal to or more than $20,000.

[18] The consumer building guide is a statement prepared and published by the QBCC under s 46(1) of schedule 1B.

[19] Section 35 of schedule 1B provides:

**35 Right of building owner to withdraw from contract in cooling-off period**

(1) The building owner under a regulated contract may withdraw from the contract within 5 business days after the day on which the owner receives a copy of the signed contract from the building contractor.

(2) Also, if the building owner under a level 2 regulated contract does not receive the consumer building guide before receiving a copy of the signed contract, the owner may withdraw from the contract within 5 business days after the day on which the owner receives the consumer building guide.

(3) If 5 business days have elapsed from the day the contract was entered into and the owner has not received from the building contractor a copy of the signed contract and, for a level 2 regulated contract, the consumer building guide, the owner may withdraw from the contract.

(4) Nothing in subsection (3) affects the right of the building owner to withdraw from the contract under subsection (1) or (2) if the owner subsequently receives from the building contractor a copy of the signed contract and, for a level 2 regulated contract, the consumer building guide.

[20] The procedure for withdrawing from a contract is set out in s 37:

**37 Withdrawal procedure**

(1) To withdraw from a regulated contract under schedule section 35, the building owner must, within the time allowed under the section for the withdrawal—

(a) give a withdrawal notice to the building contractor; or

(b) leave a withdrawal notice at the address shown as the building contractor’s address in the contract; or

(c) serve a withdrawal notice on the building contractor in accordance with any provision in the contract providing for service of notices on the building contractor by the building owner.

(2) In this section—

*withdrawal notice* means a written notice signed by the building owner under a regulated contract stating—

(a) that the building owner withdraws from the contract; and

(b) the section of this schedule under which the withdrawal is made.

[21] The rights and obligations of the parties following withdrawal are set out in s 38:

**38 Rights and obligations of parties following withdrawal in cooling-off period**

(1) This section applies if a building owner withdraws from a regulated contract under schedule section 35.

(2) If there is a prepaid amount for the contract that is not less than the retainable amount, the building contractor—

(a) may keep an amount equal to the retainable amount out of the prepaid amount; and

(b) must refund any balance of the prepaid amount to the building owner.

(3) If there is a prepaid amount for the contract that is less than the retainable amount, the building owner must pay the building contractor an amount equal to the difference between the retainable amount and the prepaid amount.

(4) If there is no prepaid amount for the contract, the building owner must pay the building contractor an amount equal to the retainable amount.

(5) If an amount is not paid by a person as required under this section, the person to whom it is payable may recover the amount from the other person as a debt.

(6) Except as provided under subsection (3) or (4), the building owner is not liable to the building contractor in any way for withdrawing from the contract.

(7) In this section, a reference to the prepaid amount for the contract is a reference to the amount paid to the building contractor under the contract by the building owner before the building owner withdrew from the contract.

(8) Also, in this section, a reference to the retainable amount for the contract is a reference to the sum of—

(a) an amount equal to any out-of-pocket expenses reasonably incurred by the building contractor before the building owner withdrew from the contract; and

(b) if the building owner withdraws from the contract under schedule section 35(1)—$100.

**What do the parties say?**

[22] The Murphys say the preliminary issue involves the determination of a question of law only.

[23] The Murphys say that the building contract is a level 2 regulated contract and, as such, Number One was required to provide to the Murphys:

(a) a signed copy of the contract within 5 business days after the contract was signed; and

(b) a copy of the consumer building guide prior to the contract being signed.

[24] The Murphys say that the right of a building owner to withdraw from a contract can only be waived in limited circumstances and that, absent those circumstances, the right of a building owner to withdraw from a contract cannot be waived.

[25] The Murphys say that a building owner cannot be estopped from withdrawing from a contract and that the right to withdraw can be exercised at any time including after practical completion has been achieved.

[26] The consequences of withdrawal are, say the Murphys, that Number One is entitled to retain only the amount of its reasonably incurred out of pocket expenses. The Murphys say that if a building owner validly withdraws from a contract they are not liable for damages for breach of contact nor does the building contractor have any cause of action for money payable under the contract.

[27] Contrary to the assertions pleaded by Number One, the Murphys say they did not refuse to accept a copy of the consumer building guide or the signed contract. Regardless, say the Murphys, an estoppel cannot arise against them by operation of the provisions of schedule 1B of the QBCC Act.

[28] The Murphys say that the notice of withdrawal from the contract complied with the requirements of the Act and the contract.

[29] The Murphys say that there is utility in the determination of the preliminary issue:

(a) If resolved in the Murphys’ favour, Number One’s claim will be dismissed;

(b) If answered in the Murphys’ favour, the Murphys will succeed on their counter application.

[30] The Murphys say that if the preliminary issue is determined in their favour then they will abandon any claim in respect of the amount paid by the Murphys to Number One which exceeds the value of the work undertaken by Number One.

[31] In response to Number One’s assertion that an estoppel arises as pleaded, the Murphys say that an estoppel cannot be set up in the face of the statute. The Murphys say that even if Number One is successful in making out its estoppel case, that argument cannot succeed to prevent the Murphys from exercising their statutory right to withdraw.

[32] Number One says that the preliminary issue as formulated by the Murphys fails to address the real issue between the parties, that is, the availability of an estoppel argument which in turn raises questions of fact.

[33] Number One says that even if the estoppel issue is resolved in the Murphys’ favour that leaves for determination their claims for damages for defective work and for misleading and deceptive conduct.

[34] In any event, says Number One, the resolution of the estoppel issue in the Murphys’ favour would not materially alter the length of the hearing.

[35] Number One says that the preliminary issue as framed by the Murphys:

(a) Does not properly frame the issue in a way which meaningfully identifies the real issues;

(b) Does not pose a question amenable to determination by the tribunal without seeking to engage a hypothetical determination;

(c) There is a likely factual overlap between questions of fact bearing upon the estoppel issue and the questions of fact bearing upon the claims by the Murphys for damages for defective work and for misrepresentation.

[36] In reply the Murphys say that their claim for damages for defective work is raised only in response to Number One’s quantum meruit claim. If the proceedings brought by Number One are dismissed as a result of the determination of the preliminary issue, the Murphys say that their claim for defective work falls away as will the claim for misleading and deceptive conduct.

**Consideration**

[37] As I have observed, a separate determination should only be ordered if the utility, economy and fairness to the parties of a separate question is beyond issue. It must be just and convenient to do so.

[38] Contrary to the submission by the Murphys, the determination of the preliminary issue involves questions of both law and fact.

[39] The Murphys say that Number One cannot raise an estoppel in the face of the statute. As a matter of general principle an estoppel will not ordinarily arise in the face of a statute. Whether a party may rely on an estoppel in the face of a statute depends upon the nature of the enactment, the purpose of the provision and the social policy behind it.

[40] The Murphys rely upon the decision in *MJ Arthurs Pty Ltd v Isenbert*. McGill DCJ considered the provisions of the *Domestic Building Contracts Act* 2000 (Qld) (‘DBC Act’) which are broadly analogous to the provisions presently under consideration.

[41] The facts of the dispute in *MJ Arthurs Pty Ltd* were complex. The plaintiff builder engaged in an arrangement with a developer (Optima) to sell newly constructed houses. McGill DCJ observed:

[47] There is also the consideration that the effect of the arrangement between the plaintiff and Optima was essentially to bring into existence a series of contracts between the plaintiff and those who were sufficiently gullible to be taken in by Optima’s sales technique, under which the amount to be paid to the plaintiff to build the house that was to be built on their land, and hence presumably the value of that house, had been substantially, and perhaps fraudulently, inflated. The customers were thereby cheated out of the difference, since they were never told the amount that was being paid as a kickback to Optima. Mr Arthurs conceded that there were in the order of 60 to 70 of these contracts involved (p 70), and if the kickback of over $57,000 paid in this case was typical, the customers overall were cheated out of about $4 million. Someone who would be willing to participate in this sort of industrial scale deception is unlikely to be above a little perjury.

[42] In *MJ Arthurs Pty Ltd* the defendant building owners were not given a copy of the signed building contract. They withdrew from the contract pursuant to s 72 of the DBC Act. Section 72(3) of the DBC Act provided that if 5 business days had elapsed after the contract was entered into and the building owner was not given, inter alia, a copy of the signed contract, the building owner was entitled to withdraw from the contract.

[43] The plaintiff building contractor asserted that the defendants were estopped from withdrawing from the contract. McGill DCJ stated:

[119] Paragraph 38 then purported to plead an estoppel against the defendants, against their denying that they received a copy of the contract by July 2013, or reliance on s 72 of the Act. There are several things I would say about this. In the first place this is a statutory right which exists as a form of consumer protection for those who enter into regulated building contracts, and accordingly this is one of those cases where in my view no estoppel will run against the exercise of a statutory right by the defendants. This is consumer protection legislation, and by s 93 the parties cannot contract out of this provision, which suggests that there can be no estoppel against it.

[120] The second thing is that, as a pleading, this is not a proper pleading of an estoppel, because it does not identify the representation made by the defendants to the plaintiff which it is alleged the plaintiff relied on to its detriment. This is not just a deficiency of pleading, as there was no evidence of any representation by the defendants to the plaintiff at any time that they had received a copy of the signed contract, or for that matter that they would not exercise any right under s 72 of the Act. There was also no evidence that the plaintiff relied upon anything which might have been relevant to an estoppel.

[121] What was pleaded was that the plaintiff relied on the notification that finance was approved and that title to the land had been acquired, which it had not been told by or on behalf of the defendants, and which could not amount to a representation that the defendants had received a copy of the signed contract, or would not exercise their rights under s 72, and the matters pleaded in paragraph 36, most of which have not been proved, and none of which amounted to such a representation. There was also no evidence from Mr Arthurs that he in fact relied upon anything in particular in a way which would be relevant to paragraph 38. Finally, paragraph 38(e) does not properly plead detriment, since what is relevant is any detriment the plaintiff would suffer from the failure of the defendants to act in the way alleged to be subject to the estoppel, rather than incurring expense which would not have been incurred had the true situation been known. (footnotes omitted)

[44] The provision in the DBC Act referred to by McGill DCJ prohibiting contracting out is now found in s 108D of the QBCC Act.

[45] In response, Number One relies upon the decision of Douglas J in *Blackman v Milne* where the court was required to consider whether s 365(2)(c)(ii) of the *Property Agents and Motor Dealers Act* 2000 (Qld) (‘PAMDA’) created a private right for the benefit of an individual or whether the provision reflected a public policy for the benefit of the community. The section under consideration involved the requirement for a buyer’s attention to be directed to a warning statement. Douglas J stated:

[20] It seems to me, therefore, that the right in this case to have the buyers' attention directed to the warning statement was a statutory right created for the buyers' private benefit which they can, by their conduct, waive. That the performance of that obligation also permits sellers to clarify when the parties are bound to a contract does not stop the sellers' breach of the obligation from being characterised as a breach of a statutory right created for the buyers' private benefit.

[46] In *Marchesi v Viridian Noosa Pty Ltd* Douglas J again considered the provisions of the PAMDA requiring a seller to give a warning statement to a buyer, this time coming to a somewhat different conclusion to that reached in *Blackman*. His Honour stated:

[17] In the circumstances it is unnecessary to express any concluded view in this case but the distinction drawn by me in *Blackman v Milne* related to whether the statutory provision said to have been waived created a private right merely for the private benefit of an individual or was a provision reflecting a public policy for the benefit of the community which could not be waived. Mr Douglas SC submitted that the possible penal consequences of the failure to attach a warning statement found in s 366B(3) also warranted the conclusion that these provisions of the Act could not be waived by the buyer.

[18] The public policy reflected in the requirements for the provision of warning statements appears to be directed at the benefit of the community generally so that, if it were necessary to decide the issue, I would have been inclined to the view that the proper performance of the statutory provisions could not have been waived by Number One in circumstances such as these. As I have formed the view that there has been no failure to comply with the Act, however, I do not need to discuss these issues further.

[47] In *Collis v Currumbin Investments Pty Ltd* de Jersey CJ (as he then was) also considered issues of waiver and estoppel involving the operation of the disclosure provisions under the PAMDA. Without finally determining the issue (the application being one for summary disposition of the matter), de Jersey CJ concluded that it was arguable the plaintiff had acted in a way consistent with waiving his statutory right to have a warning statement drawn to his attention. His Honour appears to have agreed with *Blackman*, stating:

[15] Mr O’Shea referred in response to the comparable case of *Blackman v Milne* [2006] QSC 350, paras 14 and 20. I conclude that by his conduct in October 2008, Mr Collis waived his “statutory right … to have the buyer’s attention directed to the warning statement”, that being “a statutory right created for the buyer’s private benefit” (para 20).

[48] In *Day Ford Pty Ltd v Sciacca* the Court of Appeal stated:

A number of cases consider the place of estoppel in supporting the enforcement of a contract which would otherwise be void for illegality. In *Kok Hoong v. Leong Cheong Kweng Mines Ltd* [1964] A.C. 993 reference is made to the familiar rule which in its ordinary form is stated in this fashion: a party cannot set up an estoppel in the face of a statute. At 1016 the Privy Council suggested that a test to apply in the type of case before it namely one involving the laws of money lending was to ask “whether the law that confronts the estoppel can be seen to represent a social policy to which the court must give effect in the interests of the public generally or some section of the public”. A similar approach had been adopted in *Maritime Electric Co. v. General Dairies Ltd* [1937] A.C. 610 especially at 620 where it was said that in deciding whether an estoppel might be set up against the operation of a statute “the Court should first of all determine the nature of the obligation imposed by the statute, and then consider whether the admission of an estoppel would nullify the statutory provision”. At 621 the Court declared that it was “unable to see how the Court can admit an estoppel which would have the effect pro tanto and in the particular case of repealing the statute”. There is no need to multiply examples by the citation of authorities since the appropriateness of this approach based on consideration of social and statutory policy is so amply supported. In the present case we see that the statute by s. 8 imposed an unconditional prohibition upon the very type of sale which the written contract of May 1988 provided for. The plaintiffs’ claim so far as they rely upon estoppel should be rejected. (footnotes omitted)

[49] The Murphys say that the decision of McGill DCJ in *MJ Arthurs Pty Ltd* compels the conclusion that Number One’s argument in relation to the estoppel issue must fail. There are a number of points to be made about this submission. Firstly, *MJ Arthurs* is a decision of a single District Court judge and not binding upon the tribunal notwithstanding its persuasiveness. Secondly, *MJ Arthurs* dealt with the DBC Act which does not apply in the present case despite the similarity in the relevant legislative provisions. Thirdly, the statements by McGill DCJ in the judgement might be seen as somewhat equivocal at least insofar as his Honour proceeded to deal in some detail with the inadequacy of the plaintiff’s pleading relating to the alleged estoppel. Relevantly, his Honour also found that the plaintiff had not relied upon any evidence relevant to an estoppel and the general inadequacy of the evidence on the issue of estoppel.

[50] In *Sultana Investments P/L v Cellcom P/L* the Court of Appeal, considering the application of the PAMDA legislation, stated:

[53] PAMDA legislation is principally for the benefit of consumers. In so far as real estate agents are concerned, those consumers may be buyers or sellers. There is a wider public interest in regulating the activities of real estate agents beyond the particular party or parties to any transaction, for example, into the security of the agent’s trust account and to disclosure of interests which may conflict with those of a buyer or seller. The fees collected for a real estate agent’s licence are directed to the Claims Fund established under the Act to which certain consumers may have resort. There are special provisions which will govern particular contracts, the benefit of which may be waived as in *Blackman v Milne*. However, s 140 is couched in absolute terms. It is very like provisions in the Queensland Building Services Authority Act 1991 considered by this court in *Marshall v Marshall*. In that case McPherson JA referred to the public purpose of the legislation in protecting the public from poor workmanship by unlicensed builders by penalising them, and to provide for a fund for claims. On the facts of this case it might be supposed that the consumers to be protected are the investor clients. They make no complaint. There is no reward which the respondent seeks to recover from them. But notwithstanding the disclosure of the fee earned by the successful sale, the respondent was in a position of conflict with its investor clients, something which the Code of Conduct made under PAMDA condemned. The appellant had the benefit of the work done by the respondent in introducing 14 buyers who completed. It lost nothing on the termination of the contracts as the appellant kept the forfeited deposits and subsequently sold those apartments at a higher price. The clear language of the Act, together with the public purpose of the legislation, would, however, dictate that the respondent could not raise an estoppel against the appellant. It may seem an unattractive outcome, but that is the consequence of a legislative decision to require those who act as real estate agents to be licensed, and, if not, to be penalised.

[51] In the present case, there is no suggestion that the contract between the parties was prohibited or otherwise illegal. Indeed s 44 of schedule 1B provides that, unless a contrary intention appears in the Act, a failure by a building contractor to comply with a requirement under the Act in relation to a domestic building contract does not make the contract illegal, void or unenforceable. The present circumstances are not analogous with those in *Marshall* and subsequent cases and the broad prohibition under the QBCC Act in relation to unlicensed persons undertaking to perform building work, performing building work or receiving any form of consideration in respect of the performance of building work. As the Court of Appeal has made clear, such contracts are illegal.

[52] In my view it is at least arguable that the provisions of Part 5 of schedule 1B are significantly confined, or predominantly confined, to the homeowner and building contractor. The QBCC Act may be distinguished for example from the legislative provisions considered in *Roberts v Australia and New Zealand Banking Group Ltd*, which the Court of Appeal found formed ‘part of an elaborate scheme with a broad public orientation, embracing its financial viability and flow-on features like CTP insurance premium levels. Tightly regulating the circumstances in which claims may be pursued in court cannot be characterized as of concern only, or even primarily, to the parties immediately affected.’

[53] Whilst the QBCC Act may be considered consumer legislation, the main object of which is to protect consumers from incompetent or dishonest builders, the objects of the Act also include achieving a *reasonable* balance between the interests of building contractors and building owners by regulating the building industry and domestic building contracts.

[54] If the interpretation I have posited is open, then Number One may be able to establish on a contested hearing that the Murphys were experienced in building construction projects and that Number One acted to its detriment in undertaking the construction work absent the provision of a copy of the signed contract and consumer building guide to the Murphys. Had the Murphys requested the documents at an earlier point in time, Number One could have done so. It follows that Number One may have an argument that it would be unconscionable for the Murphys to resile from the position that there was on foot an enforceable contract pursuant to which Number One undertook building work. Number One may therefore be entitled to assert that the Murphys should be estopped from denying that they waived compliance with the requirements of the QBCC Act to receive a copy of the contract and the consumer building guide.

[55] The proposed preliminary issue requires the determination of the statutory construction issue to which I have referred and, if the issue is determined in Number One’s favour, a (presumably) contested hearing to determine whether, as a matter of law and fact, an estoppel arises.

[56] This of itself raises the very real prospect that the determination of the preliminary issue will give rise to significant contested factual issues both at the time of the hearing of the preliminary question and at the time of the final hearing and result in overlap between the evidence adduced on the hearing of the preliminary issue and at the final hearing. There is also the very real possibility that this will lead to the prolongation rather than the shortening of the proceedings.

[57] The Murphys ‘invite the tribunal to assume that the facts underlying the estoppel case are made out.’ Tempting as that invitation may appear at first blush, there is nothing in the submissions by the parties that lead me to conclude that there is any agreement as to the relevant facts. It might be a different matter if the parties had presented to the tribunal an agreement on the relevant facts. They have not however done so.

[58] There are other reasons for declining to determine the preliminary issue.

[59] The preliminary issue, as framed, requires the determination of whether the Murphys are entitled to a refund from Number One of $28,373.92. The drafting of this aspect of the preliminary issue is somewhat curious. Presumably if the question is answered in the negative, the matter will still require a further hearing as to the amount to which the Murphys may be entitled. As framed, the preliminary issue does not allow for the determination of a different amount to that stated.

[60] The Murphys say that if the preliminary issue is determined in their favour, they will confine their counterclaim to the amount of $28,373.92 being the difference between the total amount paid by the Murphys to Number One and the expenses claimed by Number One. The Murphys also say that their counterclaim for defects will fall away if the preliminary issue is determined in their favour. They say that this is because the counterclaim for damages for defective work is pleaded as a set off only, referring to the fact they have now in fact sold the property.

[61] In order to understand this submission it is necessary to examine the response and counter application more closely.

[62] In their response, the Murphys say that Number One’s evidence is that the actual out of pocket expenses incurred by Number One, before the Murphys withdrew from the contract, were $623,066.40 (I will refer to this as ‘Number One’s estimate of the out of pocket expenses’). The evidence of Number One is that this amount represents ‘the total gross costs for the construction work’. The Murphys also say in their response that Number One’s out of pocket expenses ought not to have exceeded $598,000.00 (I will refer to this as ‘the expert evidence in relation to the out of pocket expenses’). The Murphys assert that they paid a total of $651,440.32 to Number One.

[63] The difference between the amount paid by the Murphys and Number One’s estimate of the out of pocket expenses is $28,373.92. The difference between the amount paid by the Murphys and the expert evidence in relation to the out of pocket expenses is $53,440.32.

[64] The Murphys’ counterclaim refers to the cost of rectifying defective work in the amount of $77,069.50 comprising $5,069.50 relating to the relocation of a stormwater discharge point and $72,000.00 for other rectification works.

[65] The Murphys also claim damages for misleading or deceptive conduct. This relates to what the Murphys say were representations by Number One as to the cost of the building works. The amount claimed in respect of the alleged misleading or deceptive conduct is $53,440.32 (which is the expert evidence in relation to the out of pocket expenses).

[66] In its reply, Number One says that the actual out of pocket expenses it incurred in undertaking the building work totalled $654,234.41 which includes an amount for administration expenses. The administration expense claim by Number One is disputed by the Murphys.

[67] It is clear that, even if the preliminary issue is determined in the Murphys’ favour and Number One’s estoppel argument fails, there is a dispute as to what flows from such a determination in respect of any amount to which the Murphys may be entitled.

[68] There is also some force in Number One’s submission that if the Murphys do not intend to press certain aspects of their claim they should do so categorically. If the claim by the Murphys for the difference between the amount paid to Number One and the expert evidence in relation to out of pocket expenses is pressed, there will no doubt be a contest in relation to the expert evidence relied upon by the Murphys. At the very least, based on the Murphys’ submissions, there is a dispute as to whether the administration expenses should form part of Number One’s out of pocket expenses.

[69] These are all matters on which the evidence will be tested at a hearing.

[70] All of the foregoing leads me to conclude that the litigation will not be shortened or the cost to the parties minimised by the determination of the preliminary issue.

[71] I am not persuaded that it is just and convenient to determine the preliminary issue. The tribunal declines to determine the preliminary issue.