SUPREME COURT OF QUEENSLAND

CITATION:	*Queensland Building and Construction Commission v Turcinovic* [2017] QCA 77
PARTIES:	**QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION** (appellant) **v** **HAJRUDIN TURCINOVIC AKA HARRY TURCINOVIC** (respondent)
FILE NO/S:	Appeal No 4234 of 2016 DC No 4602 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane – [2016] QDC 66
DELIVERED ON:	28 April 2017
DELIVERED AT:	Brisbane
HEARING DATE:	12 August 2016
JUDGES:	Morrison and Philippides JJA and North J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal is allowed;** **2. The orders made below be set aside and in lieu it be ordered as follows:** **(a) Judgment for the appellant against the defendant in the sum of $214,464.55 together with the interest thereon from 27 October 2011 pursuant to the Civil Proceedings Act 2011;** **(b) The respondent pay the appellant's costs of and incidental to the claim, including the application for summary judgment, to be assessed on the standard basis;** **3. The respondent pay the appellant's costs of and incidental to the appeal to be assessed on the standard basis.**
CATCHWORDS:	PROFESSIONS AND TRADES – BUILDERS – STATUTORY INSURANCE SCHEME – where application by appellant for summary judgment refused – where appellant sought recovery – where respondent carried out residential construction work – where there was a policy of

insurance – where appellant made payments to the respondent as payments on a claim under the insurance policy – where respondent claimed payment was not a payment under the insurance scheme – whether payment was made on a claim under the insurance scheme – whether payment made under insurance policy – whether liability of a building contractor to pay – whether judge erred in refusing summary judgment – whether the reasonableness of a payment under the scheme was a ground of liability under s 71(1) *Queensland Building and Construction Commission Act* 1991 – interpretation of "payment on a claim under the insurance scheme"

Queensland Building and Construction Commission Act 1991 (Qld), s 71(1)
Uniform Civil Procedure Rules 1999 (Qld), r 292

Bellgrove v Eldridge (1954) 90 CLR 613; [1954] HCA 36, cited
Dupois v Queensland Television Ltd & Ors [2015] QCA 160, cited
Lange v Queensland Building Services Authority [2012] 2 Qd R 457; [2011] QCA 58, cited
Mahony v Queensland Building Services Authority [2013] QCA 323, approved
Namour v Queensland Building Services Authority [2015] 2 Qd R 1; [2014] QCA 72, cited
Queensland Building and Construction Authority v Lifetime Securities (Australia) Pty Ltd & Anor [2014] QCA 161, cited
Queensland Building and Construction Commission v Turcinovic [2016] QDC 66, related
Queensland Building and Construction Commission v Watkins [2014] QCA 172, cited
Samimi v Queensland Building and Construction Commission [2015] QCA 106, cited
Tabcorp Holdings Ltd v Bowen Investments Pty Ltd (2009) 236 CLR 272; [2009] HCA 8, cited

COUNSEL: T Matthews QC, with N Cooke, for the appellant
S Nguyen (*sol*) for the respondent

SOLICITORS: Rostron Carlyle Lawyers for the appellant
Essen Lawyers for the respondent

[1] **MORRISON JA:** I have had the advantage of reading the draft reasons of North J. I agree with those reasons, and wish to add some comments of my own.

[2] The summary judgment application was resisted on the basis that there was such a disparity between the price at which the rectification works on three properties were carried out, and the price put into evidence via a quantity surveyor, Mr Horn, that the only inference that could be drawn was that the costs claimed were so unreasonable as to make the monies paid out not "a payment on a claim" under the insurance scheme.

[3] The three quotes by Mr Horn showed these disparities:

(a) Second Carina property – quote $4,024 – contract price $12,639;

(b) Tarragindi property – quote $23,079.05 – contract price $45,499.05; and

(c) Coorparoo property – quote $45,233 – contract price $130,596.

[4] In her assessment of the statement of the evidence, the learned primary judge found that the differences between Mr Horn's quotes and the tenders for the work "are of such a magnitude to suggest enquiry is warranted".[1] Her Honour went on to find that there was sufficient evidence to raise a real and not fanciful prospect of defending the claim in whole or part.

[5] In my respectful view, her Honour erred in making that assessment of the available evidence. True it is that to resist an application for summary judgment one does not need to adduce evidence of the quality, or to the extent, that might be applicable at a trial, but there has to be some degree of cogency about the state of the evidence that takes it beyond mere assertion. Here Mr Horn's evidence suffered in a number of ways, including the fact that his affidavit merely stated that he was a quantity surveyor who had been asked to do quotes for the rectification work. Nothing was said to justify the rates adopted, whether the rates that were applied were the rates in 2012, the assumptions made by him, whether he had followed the Scope of Works in each case,[2] and whether the costs were necessary or reasonable. Further, it seems apparent that his pricing does not cater for the amount that the Commission seeks to recover, insofar as it concerns variations under the contracts let for the rectification work.

[6] An example of that is in relation to the Coorparoo property, where two things happened, neither of which are accounted for in Mr Horns' quote:

(a) there was a variation in the original contract for removal of structural ply, costing $6,500;[3] and

(b) a second part of the contract was let to deal with extra drainage works which were required, at a cost of $11,424; there was a variation under this contract of $650, taking the total to $12,074.[4]

[7] Further, all of the quotes obtained by the Commission under their set Scope of Work for the Coorparoo property were well in excess of the quote by Mr Horn.[5] When the work was approved the price was $112,022, and that was the amount on the insurance claim.[6] There is no obvious or compelling reason to assume that the difference points to Mr Horn's quote being correct. Indeed, where three builders all come in with a price well in excess of the quote by Mr Horn one might be tempted to think that something has gone amiss in his calculation, and look for some substantiation of his quote. That was not present here.

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1 *Queensland Building and Construction Commission v Turcinovic* [2016] QDC 66, at [35].

2 One is left to simply compare the Commission's Scope of Works for each of the three properties with Mr Horn's listed items, which do not always match.

3 AB 530-532.

4 The report as to the extra drainage works is at AB 535, the assessment by the Commission at AB 549, and the Scope of Works at AB 553. The price of $11,424 appears at AB 555, the variation at AB 562, and the total at AB 564.

5 The quotes varied between about $112,022 and $222,000: AB 519, 521 and 523.

6 AB 524.

[8] As for the Tarragindi property, the issue concerned flooding of the lower levels of the building because a water tank overflowed. Two quotes were obtained after the Scope of Works,[7] and the lower of the two quotes was accepted by the Commission.[8] That contract resulted in a variation of $11,500[9] which is not covered by Mr Horn's quote.

[9] The substantive difference between Mr Horn's quote and the price quoted by the successful tenderer was a difference in the item for removal and replacement of tiles to the rear balcony floor. The tenderer quoted $18,600, whereas Mr Horn allowed $7,457. However, in respect of several other items in the Scope of Works Mr Horn's quote was higher than that of the tenderer. The net result was (leaving aside the variation) that Mr Horn's quote was $23,079 as against the tenderer's price of $31,500. That difference was not, in my respectful view, of such a magnitude to suggest that enquiry was warranted. Furthermore, as things transpired, the Commission only sought $5,654 of the total contract price of $31,500.55.[10] That makes any difference between Mr Horn's quote and the amount sought to be recovered as a payment on a claim of little or no consequence.

[10] As for the Second Carina property, the difference was between Mr Horn's quote of $4,024, as against the contract price of $12,639. Reference to Mr Horn's quote[11] and the two Scopes of Work which are relevant to the contract[12] reveals that Mr Horn's quote did not cover all of the items included in the Scope of Works for the contract.

[11] The nature of that work was to rectify damage done to a bathroom because water had escaped. Mr Horn quoted on the basis that the damage could simply be repaired without a complete rebuild of the bathroom.[13] As is apparent from the quote by the contractor who eventually was retained to carry out the work, the bathroom needed a complete rebuild essentially because the existing waterproof membrane could not be repaired or patched.[14] Further, the total price that the Commission sought to recover included variations of $4,831.36.[15]

[12] These matters seriously diminished the reliability of Mr Horn's quote as demonstrating any unreasonableness on the part of the costs incurred in repairing the building work. Further, those matters render any suggested difference between Mr Horn's quote and the contract price the Commission seeks to recover of no persuasive value.

[13] In my respectful view, Mr Horn's affidavit did not provide any basis to refuse summary judgment, quite apart from the question of law dealt with by North J in his reasons.

[14] I agree with the orders proposed by North J.

[15] **PHILIPPIDES JA:** I agree for the reasons given by North J that the appeal should be allowed. The respondent's defence to the claim against him was no more than an attempt to seek a merits review of the payment made by the respondent under the

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7 AB 377.
8 The price was $31,500.55: AB 385.
9 $11,500 for replacing 28 handrail spigots: AB 394.
10 *Queensland Building and Construction Commission v Turcinovic* [2016] QDC 66 at [15].
11 AB 663.
12 Scope of Work 3-898-11 at AB 177, and Scope of Work 3-3708-11 at AB 199.
13 AB 663.
14 AB 177.
15 AB 209.

insurance scheme. Section 71(1) of the *Queensland Building and Construction Commission Act* 1991 (Qld) should not be construed so as to permit a backdoor judicial review or a merits review of the appellant's decision to make a payment under the statutory insurance scheme set up under the Act. Such an approach would be contrary to the statutory framework of the Act as interpreted by the authorities referred to by North J, especially *Samimi v Queensland Building and Construction Commission*[16] and would not be consonant with notions of finality of decision making.

[16] **NORTH J:** This is an appeal from an order of Kingham DCJ refusing an application by the appellant for summary judgment.[17] The appeal involves the interpretation and application of s 71(1) of the *Queensland Building and Construction Commission Act* 1991 ("the Act") and some decisions of this court concerning the Act and s 71(1) and in particular the meaning or interpretation of the phrase "payment on a claim under the insurance scheme" found within that section.

[17] Under the claim and statement of claim as originally filed, the appellant sought recovery from the respondent of $255,294.55 under s 71(1) of the Act.[18] But by an amended statement of claim[19] the appellant reduced its claim to $214,464.55.[20] The defendant filed a defence to the claim[21] which was poorly drafted. As a consequence the appellant, not without justification, asserted that there were deemed admissions of much of the statement of claim. The appellant promptly applied for summary judgment under *UCPR* 292.[22] The respondent filed an amended defence in advance of the hearing for summary judgment,[23] the effect of which was to purport to withdraw a number of deemed admissions and to raise issues concerning payments made by the appellant, the subject of the claim. For the reasons given by her Honour she granted leave to the respondent to amend his defence and proceeded to determine the application for summary judgment by reference to the matters raised by the amended defence.[24]

[18] The appellant appealed against both her Honour's ruling to grant leave to the respondent to file an amended defence withdrawing the deemed admissions and the refusal of the application for summary judgment, but at the hearing of the appeal the appellant abandoned the ground involving the deemed admissions with the consequence that this appeal involves only the ground concerning the refusal of summary judgment.[25]

[19] It was admitted on the amended pleadings, or not in issue between the parties, that at the times alleged in the amended statement of claim:

(a) the respondent had carried out residential construction work (within the meaning of that term used in the Act) on three properties at Carina, a property at Tarragindi and properties at Coorparoo and Springfield Lakes;

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16 [2015] QCA 106 per Boddice J at [30]-[38].
17 See *Queensland Building and Construction Commission v Turcinovic* [2016] QDC 66.
18 AR 664.
19 AR 676.
20 Together with interest and costs.
21 AR 691.
22 AR 693.
23 AR 719.
24 AR 773; *Queensland Building and Construction Commission v Turcinovic* [2016] QDC 66 at [10].
25 Appeal transcript 1-19 l 2.

(b) there was in existence in respect of the residential construction work carried out on each of the properties a certificate of insurance within section 68(3) of the Act;

(c) there was in existence in respect of each of the properties a policy of insurance in respect of each of the properties under the Act;

(d) in respect of each of the properties the owners made claims on the respective insurance policies about the residential construction work.

[20] In the proceedings the appellant sought to recover from the respondent $214,464.55 being payments made by it in respect of the claims as payments on a claim under the insurance within section 71(1) of the Act.[26] The respective payments were:

• First Carina Property	-	$ 385.00
• Second Carina Property		
First payment	-	$ 7,324.50
Second payment	-	$ 5,314.50
• Third Carina Property	-	$ 13,746.50
• Tarragindi Property		
First payment	-	$ 450.00
Second payment	-	$ 5,654.00
Third payment	-	$ 39,395.05
• Coorparoo Property		
First payment	-	$ 5,601.10
Second payment	-	$ 26,420.90
Third payment	-	$ 86,500.00
Fourth payment	-	$ 12,074.00
• Springfield Property	-	$ 11,599.00
Total payments	-	$214,464.55

[21] In his amended defence the defendant pleaded in respect of the claimed amounts, that the costs claimed were "so unreasonable so as to make the monies paid out not a payment on a claim under the insurance scheme". No particulars accompanied any of the assertions. But in an affidavit sworn by the defendant in response to the application for summary judgment he maintained that "some" of the payments made to rectify defects were grossly exaggerated and he contended they were "wholly unreasonable". In support of that contention the defendant relied upon an affidavit of a quantity surveyor, Mr David Horn.[27] Mr Horn swore that he was asked to provide quotes for rectification works at three properties and in respect of the properties his quote for the work was:

• Second Carina Property	-	$ 4,024.00
• Tarragindi Property	-	$23,079.05

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26 Amended statement of claim; AR 676.

27 AR 653.

- Coorparoo Property - $45,233.00

The defendant's evidence thus directly concerned only three of the six properties.

[22] In her reasons for dismissing the application for summary judgment, her Honour, after addressing some issues no longer relevant to the determination of this appeal, noted three decisions of this court concerning section 71(1) of the Act.[28] Her Honour continued:[29]

> "[35] Mr Turcinovic does not have to prove his defence at summary judgment; but he must lead sufficient evidence to indicate a real not fanciful prospect of success. Whilst it could not be said that his evidence is comprehensive, the differences between the quotes and the tenders are of such a magnitude to suggest enquiry is warranted.
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> [36] I am satisfied there is sufficient evidence to raise a real, not fanciful, prospect of defending the claim in whole or in part. The quotes demonstrate there is a question to be tried, at least in relation to those 3 properties: whether the payments were so unreasonable as not to amount to payments under the scheme.
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> [37] That involves two determinations in relation to each payment. Firstly, a factual finding about is reasonableness. Secondly, a legal finding about whether it was so unreasonable as to render it a payment outside the scope of the policy.
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> [40] The power to enter summary judgment must be exercised with care. The claim is a considerable one for an individual to bear. Some factual disputes are justiciable in recovery proceedings. Mr Turcinovic has led evidence to question the reasonableness of some of the payments made by QBCC. Although this related to only 3 of the properties, I was not asked to enter judgment for only part of the claim. It is possible that Mr Turcinovic will be able to establish some of the payments were so unreasonable that they did not amount to payments on a claim under the scheme. This calls for both factual enquiry and proper argument about the legal test the Court should apply. I do not have the necessary high degree of certainty that Mr Turcinovic could not establish his defence, if the claim is allowed to go to trial in the ordinary way."

[23] In *Mahony v Queensland Building Services Authority*[30] Gotterson JA, with whom Margaret McMurdo P and Douglas J agreed, said concerning recovery proceedings under the Act:

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28 *Mahony v Queensland Building Services Authority* [2013] QCA 323; *Namour v Queensland Building Services Authority* [2014] QCA 72; *Samimi v Queensland Building Services Authority* [2015] QCA 106. See *Queensland Building and Construction Commission v Turcinovic* [2016] QDC 66 at [25], [31] and [32].

29 See *Queensland Building and Construction Commission v Turcinovic* [2016] QDC 66 at [35] – [37] and [40].

30 [2013] QCA 323.

"[31] The appellant submits that in a recovery proceeding under s 71(1), it is open to a defendant to defend the claim by challenging the legal efficacy of any step taken by the authority in the assessment of the claim. Taken to its full extent, that approach would allow the defendant to challenge matters such as an inspection report, a decision to direct rectification of work, a decision that rectification work had not been satisfactorily attended to, and a decision to accept a particular tender from those submitted for rectification work.

...

[33] The submission invites consideration of whether such matters are justiciable in s 71(1) recovery proceedings. In my view, they are not for the following reasons.

[34] Section 71(1) confers a right to recover as a debt from any of the designated persons 'any payment on a claim under the insurance scheme'. It is sufficient for recovery under the section that the authority have made a payment on a claim under the insurance scheme. The statutory right to recover is not conditioned upon the legal quality of a determination by the authority to make the indemnity payment or of any anterior step taken by the authority that he led to the decision to pay.

[35] That is not to say that a decision to make an indemnity payment or any anterior step is not reviewable. At the relevant time, Division 3 of Part 7 of the QBSA Act conferred a review jurisdiction on the Commercial and Consumer Tribunal ('the Tribunal') with respect to the following decisions by the authority: to direct or not direct rectification or completion work on a building; that work undertaken at the direction of the authority was not of a satisfactory standard; about the scope of works to be undertaken under the statutory insurance scheme in order to rectify; and to disallow a claim under the scheme wholly or in part. A decision by the authority to recover an amount under s 71(1) was not reviewable by the Tribunal. However, it was a decision which was judicially reviewable in the Supreme Court of Queensland pursuant to the provisions of the *Judicial Review Act* 1991. So, too, for other anterior decisions of the authority. The availability of review of those kinds and at those stages provides a sound rationale for a legislative intention that the types of decisions to which I have referred, not be justiciable in s 71(1) debt recovery proceedings. Another indicator of such an intention is that s 71 itself specifies certain defences which may be raised in proceedings under the section. None of these are relevant to the kind of defence that the appellant would wish to agitate in these proceedings.

[36] The view I take of this aspect of the construction and application of s 71(1) finds support in the following observations of Margaret Wilson AJA in *Lange v Queensland Building Services Authority*:

'[72] Sections 71 and 111C provide for recovery of the amount of a "payment on a claim under the insurance scheme" rather than the recovery of the amount of a "payment under the insurance scheme". For this reason, I do not accept counsel for the appellant's submission that the triggering circumstance on which the respondent relies does not apply.

[73] The administrative decision sought to be reviewed is one about entitlement to indemnity under the statutory policy. The appellant is a person aggrieved by that decision because, in consequence of it, a payment was made to the owners and he was exposed to recovery proceedings pursuant to s 111C. He is entitled to seek judicial review of that decision pursuant to s 20 of the *Judicial Review Act* 1991.'

The triggering circumstance to which her Honour was referring was the payment by the authority of the claim.

[37] I agree with these observations. I note that, in that case, McMurdo P and Ann Lyons J did not express a concluded view on the matter because it had not been fully argued before them. In so far as the learned President observed that it seems unlikely that Parliament would have intended for the authority to recover from building contractors payments wrongly made to those insured by the authority on policies entered into under Part 5 of the QBSA Act, I understand her Honour to be referring to any payment that may have been made wrongly in the sense that it was not in fact made upon a claim made validly under the Act. The language of s 71(1) would leave open scope for a defence that the payment sought to be recovered was not made upon a claim and a defence that the claim was not validly made under the Act. To my mind, the position was accurately summarised by Henry J in *Queensland Building Services Authority v Orenshaw & Anor* as follows:

"At the other extreme, it is unlikely that s 71 could be avoided by a building contractor disputing discretionary factual conclusions occurring as part of the professional judgment exercised by the QBSA in deciding whether and how much to pay in respect of a claim. It would not be enough to avoid the statutory liability imposed by s 71 for a defendant to point merely to any error of fact connected with the claim process. It must logically have been a factual error of such a nature that the claim was not, on the facts as correctly known, a claim under the insurance scheme or that the payment sought to be recovered was not a payment on such a claim."

(Footnotes omitted.)

[24] The review options Gotterson JA canvassed in his reasons[31] were available to the respondent to this appeal. The provisions of the Act and other legislation touched upon by Gotterson JA were materially indistinguishable from those relevantly applying here. It may be noted in passing, though this is not decisive, that the High Court refused leave to appeal the decision in *Mahony*.[32]

[25] The significance of the review avenues was again emphasised by Fraser JA in *Namour v Queensland Building Services Authority*:[33]

> "[14] The appellant relied upon Gotterson JA's observation in *Mahony* that s 71(1) left open scope for a defence that the payment which was sought to be recovered 'was not in fact made upon a claim made validly under the Act'. That reflects the text of s 71(1), but the extent of the matters which are thereby made justiciable in s 71(1) recovery proceedings was relevantly settled by the decision in *Mahony*. For the following reasons, matters upon which the appellant relied could not justify a conclusion in relation to any of the payments made by the respondent that the payment was not a 'payment on a claim under the insurance scheme' for the purposes of s 71(1).
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> [18] …The Act conferred jurisdiction upon the Tribunal to review decisions to suspend or cancel a licence, a decision about the scope of works to be undertaken under the statutory insurance scheme to rectify or complete the relevant work, and a decision that a domestic building contract had been validly terminated having the consequence of allowing a claim for non-completion under the statutory insurance scheme. The right of review for each decision was required to be exercised within 28 days of receiving written notice of the decision. As Gotterson JA observed in *Mahony*, the availability of those rights of review provides a sound rationale for a legislative intention that some decisions are not to be justiciable in debt recovery proceedings under s 71(1). That is consistent with the literal meaning of s 71(1) and, as Gotterson JA also pointed out in the same passage, the defences allowed by subsections 71(4), (5), and (6) concern different matters.
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> [19] The scheme of the Act is that a building contractor or other interested person who wishes to challenge such decisions should make the challenge before the respondent pays under the policy. A building contractor who does not make such a challenge is liable under s 71(1) whether or not one of those anterior decisions might have been the subject of a challenge."
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> (Footnotes omitted.)

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31 At [35].

32 *Mahony v Queensland Building Services Authority* [2014] HCASL 93.

33 [2014] QCA 72 at [18] & [19]; Margaret McMurdo P and Douglas J agreeing.

[26] In *Namour* Fraser JA considered the question of whether the reasonableness of a payment under the scheme was a ground of liability under s 71(1). His Honour said:[34]

> "[24] Neither the reasonableness of a payment made by the respondent nor the amount owing by a claimant under the insurance scheme to the contractor is made a criterion of liability under s 71(1). Those criteria would be relevant in a recovery action under s 71(1) only if they were relevant to the determination of the question whether the amount sought to be recovered by the respondent is the amount of the "payment on a claim under the insurance scheme" …
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> [25] Because there is no reason to doubt that each claim was paid in accordance with the terms of the policy, it is not necessary to decide whether or to what extent these matters might be justiciable in a recovery action under s 71(1). The detailed affidavit evidence of the respondent was not challenged; the amount paid by the respondent to each owner was the cost of completing the work reduced by the amount which remained owing to the Company under the construction contract. The exhibited documents supplied detailed particulars of each claim. The cost of completing the contract work was fixed by competitive quotes. The appellant did not identify any material which suggested that there might be reason to doubt either the amounts shown in the documentary exhibits as being owing to the Company under the contracts or that the quoted cost of completion was reasonable (beyond an unspecified complaint that the respondent had not particularised how it took into account amounts owing to the Company and whether the payments made were reasonable)."

[27] In *Samimi & Anor v Queensland Building and Construction Commission*[35] the Commission's own material at first instance revealed a substantial inconsistency which was unexplained. It went to a circumstance of great significance and relevance to the issue of whether the money paid by the Commission was a payment "on a claim under the insurance scheme" being a payment in excess of the liability under the policy.[36] It was in this context that Boddice J (with whom Margaret McMurdo P and Morrison JA agreed) said:[37]

> "[30] The Act contains a number of mechanisms for merit reviews of decisions made by the respondent in its administration of the statutory scheme. Those review rights are wide ranging and extensive. It is unsurprising, against that background, that s 71(1) of the Act has been interpreted as providing the respondent with a right of recovery, as a debt, of payments made by it on a claim under the insurance scheme which is not dependent upon the respondent establishing the legal correctness of a determination made by it to make that payment or any anterior step taken by it that has led to the

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34 *Namour v Queensland Building Services Authority* [2014] QCA 72 at [24] & [25].
35 [2015] QCA 106.
36 *Samimi & Anor v Queensland Building and Construction Commission* [2015] QCA 106 at [26] & [27].
37 *Samimi & Anor v Queensland Building and Construction Commission* [2015] QCA 106 at [30] – [38].

decision to pay. It is also not enough to avoid liability for a builder to point to a mere error of fact connected with the claim process.

[31] However, it does not follow that no factual error can be the subject of a proper defence to a claim for recovery made pursuant to s 71(1) of the Act. The inclusion of the words 'on a claim under the insurance scheme', in s 71(1) of the Act, indicate a legislative intention to require the right of recovery to pertain to payments made 'on' claims under the insurance scheme. The use of those words connotes a requirement the payment made by within the policy. If that were not so, the legislature could simply have provided that the respondent could recover under s 71(1) of the Act any payment it had made pursuant to the insurance scheme.

[32] This conclusion is consistent with the proper approach to statutory interpretation enunciated by the High Court in *Lacey v Attorney-General for the State of Queensland*, as 'giving the words of a statutory provision the meaning which the legislator is taken to have intended them to have'. The interpretation contended for by the respondent would render unnecessary the inclusion of the words 'on a claim' in s 71(1) of the Act.

[33] Support for this conclusion is also derived from a number of authorities of this Court. In *Mahony*, Gotterson JA (with whose reasons the President and Douglas J agreed) observed at [37]:

'The language of s 71(1) would leave open scope for a defence that the payment sought to be recovered was not made upon a claim and a defence that the claim was not validly made under the Act. To my mind, the position was accurately summarised by Henry J in *Queensland Building Services Authority v Orenshaw & Anor* as follows:

> "At the other extreme, it is unlikely that s 71 could be avoided by a building contractor disputing discretionary factual conclusions occurring as part of the professional judgment exercised by the QBSA in deciding whether and how much to pay in respect of a claim. It would not be enough to avoid the statutory liability imposed by s 71 for a defendant to point merely to any error of fact connected with the claim process. It must logically have been a factual error of such a nature that the claim was not, on the facts as correctly known, a claim under the insurance scheme or that the payment sought to be recovered was not a payment on such a claim".'

[34] In agreeing with Gotterson JA's reasons for dismissing the appeal with costs, the President particularly noted her agreement with these observations. The President further observed:

'In *Lange*, the builder contended at trial and on appeal that he was not liable under the insurance scheme created by Pt 5 *Queensland Building Services Authority Act* 1991 (Qld) because his clients

were excluded from claiming under the scheme by cl 1.9 of the statutory insurance policy. I agreed, for the reasons given by Wilson AJA, that the primary judge rightly rejected that argument. My observations, on which the present appellant placed reliance at trial and in this appeal, should be understood in that context. Where the statutory insurer has made payments to those who were not entitled to claim under the scheme, I presently remain unpersuaded that parliament intended, in enacting s 71(1) *Queensland Building Services Authority Act*, to allow the insurer to recover the amount of such payments from the builder.' (citations omitted)

[35] Further support for factual matters properly founding a defence to a claim for recovery under s 71(1) of the Act is derived from the observations of Fraser JA (with whose reasons the President and Douglas J agreed) in *Namour v Queensland Building Services Authority*:

'Neither the reasonableness of a payment made by the respondent nor the amount owing by a claimant under the insurance scheme to the contractor is made a criterion of liability under s 71(1). Those criteria would be relevant in a recovery action under s 71(1) only if they were relevant to the determination of the question whether the amount sought to be recovered by the respondent is the amount of the "payment on a claim under the insurance scheme".'

[36] Whilst Fraser JA, in *Namour*, found the matters sought to be raised by way of defence were not justiciable under s 71(1) of the Act, that conclusion occurred in circumstances where there was "no reason to doubt that each claim was paid in accordance with the terms of the policy'. A different conclusion may follow where there is reason to question whether the payment was made in accordance with the terms of the policy.

[37] Gotterson JA, in *Queensland Building and Construction Commission v Lifetime Securities (Australia) Pty Ltd & Anor* also recognised that a matter of relevance to a recovery action under s 71(1) of the Act may include if the payment was not a valid payment under the scheme.

[38] Contrary to the respondent's submission, the consideration of whether a payment sought to be recovered under s 71(1) of the Act was a valid payment under the scheme does not merely raise an element of the respondent's administrative processes anterior to that payment. That issue raises whether the payment was made 'on a claim under the insurance scheme', a condition for recovery of the payment under s 71(1) of the Act."

(Footnotes omitted).

[28] The review of the decisions in this court referred to by her Honour below, and the parties before us since the decision of *Mahony v Queensland Building Services Authority*, confirm that *Mahony* remains an authoritative statement of the law and of the

liability of a building contractor to pay to the Commission the amount of any payment made "on a claim under the… scheme" under s 71(1). Neither parties suggested to the contrary and it should be noted that *Mahony* has been referred to and applied with express approval in other decisions of this court.[38] Further, neither the judgment in *Namour* nor *Samimi* suggest, let alone establish, any qualification or modification to the interpretation or operation of s 71(1). The availability of both internal and external review of decisions made under the Act given by Division 3 of Part 6 of the Act and of judicial review under the *Judicial Review Act* 1991[39] suggests that there is limited scope for complaint about the legal quality of the decision-making in making a payment or the decisions anterior to it. As much was expressly emphasised by Gotterson JA (with whom Margaret McMurdo P and Ann Lyons J agreed) in *Queensland Building and Construction Authority v Lifetime Securities (Australia) Pty Ltd & Anor*.[40] In this case there is reason to infer that the respondent or his legal advisers were aware of his rights of review because he unsuccessfully sought a review in QCAT of the scope of the works decision in respect of the third Carina property.[41]

[29] In the respondent's outline of submissions and in submissions at the hearing, the respondent drew attention to and relied upon para [31] of her Honour's reasons below:

> "[31] In *Namour v QBSA*, Fraser JA identified the *reasonableness* of a payment as relevant to a recovery action only if relevant to the question whether the amount sought to be recovered is the amount of the *payment on a claim under the insurance scheme*. In that case, the appellant could not identify any material which suggested there might be reason to doubt the quoted cost of completion was reasonable. Mr Turcinovic submitted the case supported his proposition that, with relevant evidence the defence is arguable."
>
> (Footnotes omitted)

He submitted that the evidence of the quotes raised an issue that should be tried.

[30] It is plain that her Honour was referring to the reasons of Fraser JA in *Namour*[42] but there is an obvious distinction to be drawn between, on the one hand, a contention that a payment was "so unreasonable so as to make the [payment] not a payment on a claim under the insurance scheme" and, on the other hand, the assessment of the reasonable and necessary costs of defective building work.[43] This distinction is at the forefront of the reasoning of Fraser JA relied upon by the respondent. Further, his Honour's reasoning maintains the distinction drawn by Margaret Wilson AJA in *Lange v Queensland Building Services Authority*[44] between the recovery of the amount of the "payment on a claim under the insurance scheme" and the recovery of the amount of a "payment under the insurance scheme". What role the question of the reasonableness of a

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38 *Queensland Building and Construction Commission v Lifetime Securities (Australia) Pty Ltd & Anor* [2014] QCA 161 and *Queensland Building and Construction Commission v Watkins* [2014] QCA 172.

39 See also *Lange v Queensland Building Services Authority* [2012] 2 Qd R 457 at [73].

40 [2014] QCA 161 at [29].

41 See Amended Statement of Claim at para 20; AR679.

42 Quoted at [26] above.

43 As to the latter, see *Bellgrove v Eldridge* (1954) 90 CLR 613 and *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at [17]ff.

44 [2012] 2 Qd R 457 at [72].

payment might play in the determination of the recovery of a payment of the first mentioned class did not require elaboration in *Namour* because each claim had been paid in accordance with the terms of the policy. But that issue was central to the ultimate decision in *Samimi* because the evidence on behalf of the Authority was contradictory, it was not clear that the claim paid was one in accordance with the terms of the policy. Another hypothetical instance of a circumstance when it might be demonstrated that a claim was not paid under the scheme was touched upon by Gotterson JA in *Queensland Building and Construction Commission v Lifetime Securities (Australia) Pty Ltd & Anor*[45] where His Honour posited a failure of the authority to call tenders when required to under the Act.

[31] In the circumstances of this matter, s 71AC of the Act controlled the tendering of rectification work. The evidence before her Honour was that tenders were obtained in respect of the rectification work for each of the six properties. In respect of four of the properties, tenders were received in the exact amounts claimed in the proceedings.[46] In respect of the Coorparoo property, four tenders were received and exhibited to affidavits.[47] Two of the tenders exceeded the total of the payments claimed for this property. For the Tarragindi property, the total of any one of the three tenders[48] when added to a variation claim in respect of that property[49] exceeds the payment claimed. On the evidence that was before her Honour, there is no reason to doubt that to the extent s 71AC required the authority to seek tenders for rectification work this was done. There is no other basis asserted for any doubt that the Act was complied with and that payments were made on claims under the scheme.

[32] The evidence of the quantity surveyor Mr Horn, concerning three properties, only serves to remind us that minds might differ upon the question of reasonable and necessary costs of rectifications. But as has been repeatedly emphasised by this court the money s 71(1) authorises recovery of as a debt is the payment made on the claims s 71(1) specify. The evident purpose and intent of s 71(1) in the statutory context identified by Gotterson JA in *Mahony* is that the recovery of the debt authorised by the section is not to become bedevilled by the factual convolutions that can emerge in actions in courts, tribunals or arbitrations for recovery of reasonable and necessary costs of defective work. The Act contains provisions which the Parliament determined are appropriate to establish a scheme that balances the interests of homeowners and building contractors, and provides for debt recovery after the claim process established by Parliament has culminated in a payment. The pleaded defence, that the payments were "so unreasonable so as to make the monies paid out not a payment on a claim under the insurance scheme" is, in relation to each payment, no more than a rhetorical assertion designed to enliven an adjudication at the stage of debt recovery inconsistent with the operation of s 71(1). It should not be overlooked that, in respect of each payment the appellant seeks to recover, it was open to the respondent to apply for judicial review of the decision to make the payment on the ground now belatedly pleaded.[50]

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45 [2014] QCA 161 at [34].

46 First Carina property see AR148; second Carina property see AR199 & AR177; third Carina property see AR320; Springfield Lakes property see AR590.

47 See AR555; AR518; AR520; AR522.

48 See AR382; AR448; AR451.

49 See AR394.

50 See s 4(a) and s 20 *Judicial Review Act* 1991; recall also *Mahony v Queensland Building Services Authority* [2013] QCA 323 at [35] and *Lange v Queensland Building Services Authority* [2012] 2 Qd R 457 at [73].

[33] The error in her Honour's reasoning can be seen from para [37] of her reasons[51] where, in the context of a claim under s 71(1) of the Act, she focuses attention upon a factual enquiry into reasonableness without inquiry whether the payment was made on a claim under the scheme.

[34] The principles governing the exercise of the power to summarily determine a matter and, as in this matter, give judgment for a plaintiff are well settled.[52] It is not suggested that her Honour erred in any way in misunderstanding or misapplying the enquiry required by *UCPR* 292. Rather, for the reasons I have given, she erred in not properly giving effect to s 71(1) of the Act as that section should be understood. For the reasons I have given I accept the appellant's submission that the respondent has "no real prospect of defending" the appellant's claim nor has it been demonstrated that there is any need for a trial and there should be judgment for the appellant.

[35] The orders I would make are:

1. The appeal should be allowed;
2. The orders made below be set aside and in lieu it be ordered as follows:
   (a) Judgment for the appellant against the defendant in the sum of $214,464.55 together with interest thereon from 27 October 2011 pursuant to the Civil Proceedings Act 2011;[53]
   (b) The respondent pay the appellant's costs of and incidental to the claim, including the application for summary judgment, to be assessed on the standard basis.
3. The respondent pay the appellant's costs of and incidental to the appeal to be assessed on the standard basis.

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51 *Queensland Building and Construction Commission v Turcinovic* [2016] QDC 66.
52 See, for example, *Dupois v Queensland Television Ltd & Ors* [2015] QCA 160 at [13]-[14].
53 See Notice of Appeal at AR 781.