

SUPREME COURT OF QUEENSLAND

CITATION: *Groupline Constructions Pty Ltd v Queensland Building and Construction Commission & Anor* [2019] QSC 311

PARTIES: **GROUPLINE CONSTRUCTIONS PTY LTD**
(ACN 168 247 621)
(applicant)
v
QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION (ABN 88 568 500 260)
(first respondent)
and
BRETT BASSETT AS THE COMMISSIONER OF THE QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION
(second respondent)

FILE NO/S: No 13486 of 2019

DIVISION: Trial

PROCEEDING: Originating Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 16 December 2019

DELIVERED AT: Brisbane

HEARING DATE: 10 December 2019; further submissions received on 11 and 12 December 2019.

JUDGE: Flanagan J

ORDER: **I will hear the parties as to the form of orders and costs.**

COUNSEL: BE Codd with JP Hastie for the applicant
P Dunning QC with S McNeil for the respondents

CDI Lawyers for the applicant
Holding Redlich for the respondents

- [1] Since 24 January 2018 the applicant has held an open builder's licence with the first respondent, Queensland Building and Construction Commission (QBCC).
- [2] The sole director of the applicant is David Scott Widdicombe. He has had over 20 years' experience in the building industry. Following the incorporation of the applicant it has completed the construction of apartment developments at New Farm and has

acted as the project manager in relation to other developments at Kangaroo Point and Bilinga on the Gold Coast.

- [3] On 30 April 2019 the applicant entered into a contract with a developer to design and construct an apartment complex at Coolangatta. The development involves the construction of an eight level residential apartment building with a two level basement carpark on a site at 1 Coyne Street, Coolangatta (“the Maya Development”). Pursuant to this contract, the applicant is required to complete the works by 12 June 2020, failing which it is required to pay liquidated damages.
- [4] The development site is less than 40 metres from the shoreline of Kirra Beach and adjacent to a three level residential apartment building located at 12-14 Musgrave Street, Coolangatta, called Kirra Vista.
- [5] Gregory Matthews is the Acting Director of Technical Services for QBCC. He oversees QBCC’s Technical Standards Unit. This unit undertakes quality and control audits of building work being performed by licensees in Queensland and ensures the compliance of that building work with the National Construction Code, the Building Code of Australia and other relevant standards, legislation and regulations.
- [6] According to Mr Matthews, when non-compliant building work is identified the Technical Standards Unit notifies the relevant licensee and encourages or directs the licensee to rectify the defective work to avoid further action by QBCC.
- [7] On or about 7 September 2019 Mr Matthews attended Kirra Vista following complaints from the Kirra Vista Body Corporate regarding damage to the building as a result of the applicant’s activities at the Maya Development. Mr Matthews undertook an investigation as to the cause and extent of the damage to Kirra Vista. QBCC received a report prepared by Structural Engineers Pty Ltd, dated 6 September 2019, which detailed the findings of an inspection at Kirra Vista performed on 26 August 2019.
- [8] Following Mr Matthews’ inspection of Kirra Vista he prepared a report. As a result of the findings in his report as well as the findings contained in the report from Structural Engineers Pty Ltd, the second respondent, Brett Bassett, who is the Commissioner of QBCC, on 9 September 2019 issued to the applicant a notice to show cause why a stop work notice should not be issued. Mr Bassett’s power as the Commissioner to issue a stop work notice is found in s 108AI of the *Queensland Building and Construction Commission Act* 1991 (“the Act”). Section 108AI falls within Div 2 of Part 9B of the Act which deals with injunctions and stop work notices. Before a stop work notice to a person can be issued, s 108AI(3) requires the Commissioner to give the person written notice of the Commissioner’s intention to issue the notice and the reasons for issuing the notice and ask the person to show cause why the Commissioner should not issue the notice.
- [9] The notice to show cause alleged that the applicant was in contravention of the Building Code of Australia, Vol 1, Part BP1.1 as:
 - (a) the foundations at Kirra Vista had been undermined by the excavation piling work being carried out by the applicant on the site;

- (b) significant movement and damage had become evident at Kirra Vista which was outside the tolerances allowed in the relevant Australian Standards; and
 - (c) there was a likely possibility of further foundation displacement and damage to Kirra Vista occurring during the further construction of the Maya Development.
- [10] On 13 September 2019 the applicant provided QBCC with its initial response to the notice to show cause. The applicant denied that the damage to Kirra Vista had been caused by the works being carried out by it. On the same day the applicant issued a request for particulars in relation to the stop work notice.
- [11] On 19 September 2019 the Commissioner, on behalf of QBCC, issued a stop work notice to the applicant pursuant to s 108AI of the Act. The stop work notice prohibited the applicant from continuing any building work at the site until QBCC and the Commissioner were satisfied that any future works on the site would not be in contravention to the Building Code of Australia.
- [12] The applicant complied with the stop work notice other than maintaining and operating dewatering pumps.
- [13] On 23 September 2019 the stop work notice was withdrawn by the Commissioner after he and QBCC formed the view on expert advice that:
- (a) the majority of the damage likely to be suffered to the Kirra Vista structure had already occurred;
 - (b) there was unlikely to be additional further movement or subsidence to the footing system at Kirra Vista; and
 - (c) in light of the wording of Building Code of Australia Vol 1, Part BP1.1 and the advice received from the relevant expert, the further imposition of the stop work notice was not warranted.
- [14] Subsequently and between September 2019 and early November 2019, the applicant continued works at the site. However, distress and damage to the Kirra Vista apartments increased noticeably during this time, with additional large cracks and subsidence occurring to the building. QBCC received an expert engineering report on 13 November 2019. This report concluded:
- (a) there had been at least a 50 per cent increase in the subsidence of the eastern footing to Kirra Vista (being the footing closest to the Maya Development site) since the expert's initial inspection at the site on 18 September 2019;
 - (b) the level of distress and damage to units 6, 12 and 18 on the eastern side of Kirra Vista building (being the units closest to the Maya Development site) "far exceeded what would be considered acceptable or cosmetic damage";
 - (c) the loadbearing walls which are supporting the upper level slabs of Kirra Vista had been:
 - (i) cracked, with cracks up to 9.5 millimetres in width having been observed; and
 - (ii) suffered lateral displacement;

- (d) Kirra Vista had suffered structural damage;
 - (e) units 6, 12 and 18 on the eastern side of Kirra Vista building should be vacated until remedial work was carried out to stabilise the eastern end of Kirra Vista.
- [15] On 13 November 2019 QBCC issued a notice of immediate suspension of licence to the applicant. This was issued pursuant to s 49A of the Act, which permits QBCC to suspend a licensee’s licence “without allowing the licensee time to make written representations before the suspension takes effect if the [C]ommission reasonably believes there is a real likelihood that serious financial loss or other serious harm will happen to any of the following if the licence is not immediately suspended –
- (a) other licensees;
 - (b) the employees of other licensees;
 - (c) consumers;
 - (d) suppliers of building materials or services.”
- [16] On 14 November 2019 the applicant also received a prohibition notice from Workplace Health and Safety Queensland, directing it to cease works on the Maya Development site.
- [17] On 14 November 2019 the applicant received from QBCC the expert engineering report, which outlined the damage described in [14] above. The report also stated at paragraph 12.7.2 that:
- “Only when the construction reaches ground level on the neighbouring site will subsidence of the eastern site of Kirra abate.”
- [18] On 15 November 2019 Mr Matthews became aware from his own knowledge that units 6, 12 and 18 at Kirra Vista, being those units most affected by the damage caused by the applicant’s activities were vacated by their respective occupants. As at 9 December 2019 those three units remain vacant.
- [19] Also on 15 November 2019 QBCC issued a notice of proposed conditions to be imposed on the applicant’s building licence.¹ The notice of 15 November 2019 relevantly states:
- “Pursuant to s 48(1) of [the Act] the QBCC may suspend or cancel a licence if –
- ‘(ha) building or other work on a building site under the licensee’s control may have –
 - (i) caused the death of, or grievous bodily harm, to a person; or
 - (ii) involved a serious risk to the health and safety of a person.’

¹ Affidavit of Gregory Matthews filed 9 December 2019 (CD8, page 608), Exhibit GJM-5.

In considering the matters provided for in s 48(1)(ha), the QBCC is further satisfied that in the circumstances, there is reasonable concern that there is a risk the licensee may not have in place safe systems of work for the carrying out of building work across its business (not just the specific site) consistent with legislative obligations.

Pursuant to s 36 of [the Act] the QBCC may propose to impose a condition on a licence if the QBCC has reason to believe –

‘(b) that there is some other proper ground for imposing a condition on a licence’.”

[20] The notice thereafter states that QBCC proposed to impose the following seven conditions on the applicant’s building licence:

- “1. The licensee is to engage, at the licensee’s cost, an independent RPEQ engineer to determine the corrective action needed to make safe the building at 12-14 Musgrave Street, Coolangatta QLD 4225 including the at-risk wall and prepare a report detailing that action. The report must be provided to the QBCC.
2. Upon receipt of written agreement from the QBCC that the correction action stated in the engineer’s report referred to in condition 1 is satisfactory, such agreement not be unreasonably withheld, the licensee must, at the licensee’s cost, engage an appropriately licensed contractor to carry out all necessary work to make safe the building, including the at-risk wall, at 12-14 Musgrave Street, Coolangatta QLD 4225 in accordance with the corrective action stated in the engineer’s report.
3. The licensee must, at the licensee’s cost, provide the QBCC with a report prepared by an independent RPEQ engineer confirming the building, including the at-risk wall, at 12-14 Musgrave Street, Coolangatta QLD 4225 is no longer a risk to the health and safety of others upon completion of condition 2.
4. Building work is not to be carried out or caused to be carried out on the building site of 1 Coyne Street, Coolangatta QLD 4225, other than that required to make safe the building, including the at-risk wall, at 12-14 Musgrave Street, Coolangatta QLD 4225, until conditions 1 to 3 have been complied with and until receipt of written agreement from the QBCC that the building, including the at-risk wall, is no longer a risk to the health and safety of others, such agreement not to be unreasonably withheld.
5. For the duration of any remaining building work carried out at the site of 1 Coyne Street, Coolangatta QLD 4225, the licensee must, at the licensee’s cost, provide the QBCC with an independent RPEQ engineer’s report at the close of business each week confirming the building, including the at-risk wall, at 12-14 Musgrave Street, Coolangatta QLD 4225 remains safe. The report must also state any movement of the at-risk wall or the building at 12-14 Musgrave Street, Coolangatta QLD 4225.

6. Within one month of the building work completion at 1 Coyne Street, Coolangatta QLD 4225, the licensee, at the licensee's cost, must provide the QBCC with an independent RPEQ engineer's report confirming the building, including the at-risk wall, at 12-14 Musgrave Street, Coolangatta QLD 4225 is not a risk to the health and safety of others.
7. The licensee must give the QBCC a safety audit report of the licensee's safety management system which demonstrates compliance with standards of safety as required by the *Work Health and Safety Act 2011*, including any corrective actions implemented by the licensee. The safety audit report must be undertaken by an independent Certified Auditor in OHS Management Systems and provided to the QBCC within 30 days of this condition being imposed."

The conditions, in effect, require the applicant to engage at its cost an independent engineer to determine the corrective action required to make safe the Kirra Vista apartment building. Upon the written agreement of QBCC having considered the engineering report, the applicant is required at its own cost to engage a licensed contractor to carry out the make safe works. Thereafter a further engineering report has to be provided to QBCC by the applicant stating that there is no longer a risk to the health and safety of others. Condition 4 proposes that building work is not to be carried out or caused to be carried out at the Maya Development site until conditions 1 to 3 are complied with and until receipt of written agreement from the QBCC that the building, including the at risk wall, is no longer a risk to the health and safety of others. Conditions 5, 6 and 7 deal with the continuation of any further works at the Maya Development site after the other conditions have been fulfilled.

[21] Mr Widdicombe, having received the notice on behalf of the applicant, instructed his solicitors to consent to the imposition of the proposed seven conditions. He explains at paragraph 51 of his affidavit, filed 9 December 2019 (CD4), why he gave these instructions:

- “(a) I considered that operating with the QBCC’s demands would be the quickest way to ensure that the construction of Maya could continue; and
- (b) I was confident that Groupline could readily undertake the necessary work to make safe Kirra Vista, which is what I understood to be all that the conditions required of Groupline.”

[22] On 18 November 2019 QBCC gave notice to the applicant that it had imposed the proposed conditions on the applicant’s building licence.

[23] On 19 November 2019 the applicant engaged an expert engineer for the purpose of preparing a report in relation to the make safe works. This report was provided on 20 November 2019. Between 19 November 2019 and 22 November 2019 the applicant carried out the make safe works in accordance with the expert engineer’s design. There is some dispute between QBCC and the applicant as to whether these works were carried out in accordance with the conditions of the building licence.

- [24] On 26 November 2019 the applicant sought permission to continue the Maya Development, including the construction of B1 and ground floor slabs. QBCC gave permission for the applicant to carry out the construction of the B1 slab only.
- [25] For reasons detailed in paragraphs 68 to 74 of his affidavit, Mr Widdicombe is of the view that the Body Corporate for Kirra Vista will not, at this stage, permit the applicant to undertake any of the rectification works required by the additional conditions of its building licence.
- [26] The applicant asserts that it is in a situation where it cannot continue with the Maya Development in circumstances where it employs eight full time permanent employees and has engaged around 50 subcontractors and consultants for the construction of the Maya Development.
- [27] It is in the above circumstances that the applicant, by amended originating application, seeks declaratory relief, either pursuant to s 10 of the *Civil Proceedings Act 2011* or, alternatively, pursuant to Part 5 of the *Judicial Review Act* or, alternatively, in the inherent jurisdiction of the Court to the effect that the decision of QBCC made on 18 November 2019 to impose the seven licence conditions on QBCC licence number 15077489 be set aside or quashed or the conditions are otherwise void and of no effect.
- [28] The primary issue is whether QBCC has the power to impose the seven conditions on the applicant's licence pursuant to s 36 of the Act.

Relevant legislative provisions

- [29] The objects of the Act are set out in s 3:

“3 Objects of Act

The objects of this Act are—

- (a) to regulate the building industry—
 - (i) to ensure the maintenance of proper standards in the industry; and
 - (ii) to achieve a reasonable balance between the interests of building contractors and consumers; and
- (b) to provide remedies for defective building work; and
- (c) to provide support, education and advice for those who undertake building work and consumers; and
- (d) to regulate domestic building contracts to achieve a reasonable balance between the interests of building contractors and building owners; and
- (e) to regulate building products to ensure—
 - (i) the safety of consumers and the public generally; and

- (ii) persons involved in the production, supply or installation of building products are held responsible for the safety of the products and their use; and
- (f) to provide for the proper, efficient and effective management of the commission in the performance of its functions.”

[30] Part 3 Div 4 of the Act deals with conditions of licence. Section 35 provides:

“35 Imposition of conditions etc. on grant of licence

- (1) A licence may be granted subject to such conditions as the commission considers appropriate.
- (2) Without limiting subsection (1), a licence for which an occupational licence is required is taken to be subject to the condition that the licensee hold, and continue to hold, for the term of the licence, the occupational licence.
- (3) Without limiting subsection (1), a contractor’s licence is subject to the condition that—
 - (a) the licensee’s financial circumstances must at all times satisfy the minimum financial requirements for the licence; and
 - (b) variations of the contractor’s turnover and assets must be notified, or notified and approved, in accordance with the minimum financial requirements for the licence.”

[31] Section 36 provides:

- (1) If the commission has reason to believe—
 - (a) that a licensee may have insufficient financial resources to meet possible liabilities in relation to building work; or
 - (b) that there is some other proper ground for imposing a condition on the licence;

the commission may notify the licensee of the proposed condition and invite the licensee, within a period specified in the notice, to make written representations on the proposal.

- (2) After considering the written representations (if any) made by the licensee, the commission, if satisfied that the condition is appropriate, may, by notice to the licensee, impose the condition.
- (3) A condition may be imposed preventing the licensee from continuing to carry on business until the licensee has lodged with the commission appropriate security against possible liabilities in relation to building work.
- (3A) A condition may be imposed requiring the licensee to complete a course module included in technical or managerial national competency standards relevant to the building industry.

- (3B) A condition may be imposed requiring the licensee to give to the commission specified documents that relate to the licensee's obligations under part 4 or schedule 1B.
- (3C) Subsections (3), (3A) and (3B) do not limit the power to impose conditions under subsection (2).
- (4) The commission may, by subsequent notice to the licensee, vary or revoke a condition imposed under this section.
- (5) A notice imposing or varying a condition must inform the licensee of the licensee's right to apply for a review of the commission's decision to impose or vary the condition."

[32] Part 6 of the Act deals with rectification of building work and remediation of consequential damage. Div 2 of Part 6 relates to QBCC's power to direct rectification or remediation of defective work. Section 71J provides:

- "(1) A consumer may ask the commission to give a direction to rectify building work the consumer considers is defective or incomplete.
- (2) The owner or occupier of a residential property adjacent to a building site may ask the commission to give a direction to remedy any consequential damage to the property.
- (3) A person making a request under subsection (1) or (2) must give the commission—
 - (a) details of—
 - (i) for a request under subsection (1)—the building work the consumer considers is defective or incomplete; or
 - (ii) for a request under subsection (2)—the consequential damage to the property; and
 - (b) other details the commission reasonably requires to consider the request; and
 - (c) the fee prescribed by regulation.
- (4) Also, a request under subsection (1) or (2) must be made within 12 months after the person becomes aware of—
 - (a) for a request under subsection (1)—the building work the person considers is defective or incomplete; or
 - (b) for a request under subsection (2)—the consequential damage to the property."

[33] Section 72 deals with the power to require rectification of building work and remediation of consequential damage:

- "(1) This section applies if the commission is of the opinion that—
 - (a) building work is defective or incomplete; or

- (b) consequential damage has been caused by, or as a consequence of, carrying out building work.
- (2) The commission may direct the person who carried out the building work to do the following within the period stated in the direction—
 - (a) for building work that is defective or incomplete—rectify the building work;
 - (b) for consequential damage—remedy the damage.
- (2A) The commission must make the direction no later than the end of the period prescribed by regulation.
- (3) In deciding whether to give the direction, the commission may take into consideration all the circumstances it considers are reasonably relevant and, in particular, is not limited to a consideration of the terms of the contract for carrying out the building work (including the terms of any warranties included in the contract).
- (4) The period stated in the direction must be the period prescribed by regulation unless the commission is satisfied that, if the direction is not required to be complied with within a shorter period—
 - (a) a substantial loss will be incurred by, or a significant hazard will be caused to the health or safety of, a person because of the defective or incomplete building work or consequential damage; or
 - (b) the defective or incomplete building work, or consequential damage, will cause a significant hazard to public safety or the environment generally.
- (5) The commission is not required to give the direction if the commission is satisfied that, in the circumstances, it would be unfair to the person to give the direction.

Example for subsection (5)—

The commission might decide not to give a direction for the rectification of building work because an owner refuses to allow a building contractor to return to the owner's home or because an owner's failure to properly maintain a home has exacerbated the extent of defective building work carried out on the home.

- (6) The commission may, before it considers whether building work is defective or incomplete, require the consumer for the building work comply with a process established by the commission to attempt to resolve the matter with the person who carried out the work.
- (7) In subsection (3), a reference to a contract for carrying out building work includes a reference to a domestic building contract for managing the carrying out of building work.

- (8) To remove any doubt, it is declared that the commission may act under this section in relation to consequential damage whether or not an owner or occupier has made a request under section 71J.”

[34] Section 72A deals with the powers and limitations of directions to rectify or remedy and relevantly, subsection (5) provides as follows:

- “(5) The fact that a direction is given under s 72(2) does not prevent the commission from taking additional action against a person under this Act for the building work to which the direction relates.”

[35] Section 72AA falls within Div 3 of Part 6 and deals with offences and defences. Section 72AA creates an offence in the following terms:

- “(1) A person must not, without reasonable excuse, delay rectifying building work that is defective or incomplete, or remedying consequential damage, as required by a direction given to the person under section 72(2).
- (2) A person must not, without reasonable excuse, obstruct another person rectifying building work that is defective or incomplete, or remedying consequential damage, as required by a direction given to the other person under section 72(2).

Note—

Contravention of subsection (1) or (2) is proper grounds for taking disciplinary action against a licensee or former licensee, see section 74B(1)(a).”

[36] I have already referred above to s 108AI, which deals with stop work notices. To reiterate, that section provides:

- “(1) This section applies if the commissioner is satisfied that something is being done, or is about to be done, in contravention of a prescribed provision.
- (2) The commissioner may issue a notice (a stop work notice)—
- (a) prohibiting the person who is doing, or about to do, the thing from starting or continuing the thing; and
- (b) directing the person to take any other action the commissioner considers necessary—
- (i) to give effect to the prohibition under paragraph (a); or
- (ii) to ensure the contravention of the prescribed provision is not repeated or does not happen in the future.
- (3) Before issuing a stop work notice to a person, the commissioner must—
- (a) give the person written notice of the commissioner’s intention to issue the notice and the reasons for issuing the notice; and

- (b) ask the person to show cause why the commissioner should not issue the notice.
- (4) If a person wishes to show cause why the stop work notice should not be issued, the person may make written submissions to the commissioner within 5 days after receiving the notice under subsection (3) from the commissioner.
- (5) The commissioner must consider any written submissions made by a person within the period mentioned in subsection (4) before issuing a stop work notice.
- (6) A person must not contravene a stop work notice.
Maximum penalty—500 penalty units.
- (7) In this section—
prescribed provision means a provision of—
 - (a) this Act; or
 - (b) the *Building Act 1975*; or
 - (c) the Building Code of Australia.”

The applicant’s submissions

[37] The applicant’s primary submission is that the scheme of the Act does not permit the imposition of the seven conditions because the subject matter of those conditions are regulated by specific provisions of the Act. These specific provisions include the issuing of a stop work notice under s 108AI and the issuing of a direction to rectify consequential damage pursuant to ss 71J(2) and 72. “Consequential damage” for the purposes of Part 6 of the Act is defined in s 71H to mean:

“(1) **Consequential damage** is damage -

- (a) caused by, or as a consequence of, carrying out building work at a building site (the relevant site), regardless of any intention, negligence or recklessness of the person carrying out the work; and
- (b) to a residential property at the relevant site, containing the relevant site or adjacent to the relevant site.”

[38] Consequential damage would include any damage caused by the applicant to Kirra Vista. Although the owner or occupier of the residential property adjacent to a building may ask QBCC to give a direction under s 71J(2), s 72(8) provides that:

“To remove any doubt, it is declared that the commission may act under this section in relation to consequential damage whether or not an owner or occupier has made a request under s 71J.”

- [39] The applicant by reference to *R v His Honour Judge McGuire & Hanlon Homes Pty Ltd, ex parte Builders' Registration Board of Queensland*² submits that if QBCC were to exercise its powers under Part 6, those powers are limited to a direction to remedy, including by demolition of building work, any consequential damage, and do not permit QBCC to direct how such remedial work is to be undertaken. In the present case, QBCC has not issued the applicant with any direction to remedy consequential damage under Part 6 of the Act. Rather, it has sought to impose seven conditions on the applicant's building licence. These conditions impermissibly specify how the applicant is to undertake the rectification work for the consequential damage to Kirra Vista. Further, condition 4 operates in effect as a stop work notice.
- [40] The applicant submits that the difficulty with the conditions is that they require the applicant to undertake work on the adjacent property to which it has no legal right of access.
- [41] According to the applicant the seven conditions "do no more than attempt to sidestep the operation of Part 6 of the Act, whilst insisting upon a supervisory involvement in the work required to comply with a direction to rectify which is not permitted under Part 6." As Part 6 of the Act effectively "covers the field" for the rectification of consequential damage to an adjoining property and as a matter of construction does so in a manner that is exclusive of the powers under s 36 to impose conditions upon a licensee, the applicant submits that the imposition of the seven conditions is *ultra vires*.
- [42] The applicant further submits that s 36 of the Act does not authorise the imposition of conditions regulating the performance of work at a specific site. The power conferred by s 36(2) is not unlimited. It must be exercised by reference to the objects of the Act. Reference is made by the applicant to the decision of Walsh J (with whom Barwick CJ, Menzies and Windeyer JJ agreed) in *Allen Commercial Constructions Pty Ltd v North Sydney Municipal Council*³ that such a power:
- "... ought to be understood (quite apart from the limitation contained in its opening words) not as giving an unlimited discretion as to the conditions which may be imposed, but as conferring a power to impose conditions which are reasonably capable of being regarded as related to the purpose for which the function of the authority is being exercised, as ascertained from a consideration of the scheme and of the Act under which it is made."
- [43] Under the Act it is necessary for a person to have a licence for the purposes of lawfully performing building work. The applicant therefore submits that the evident purpose behind the licensing provisions in the Act is to regulate and control those persons who may lawfully perform building work and, by doing so, to protect potential consumers of building services.
- [44] The applicant makes the following submissions in respect of s 36:
- "There is nothing in the text of the structure of the QBCC Act which suggests that a condition may be imposed on a licence requiring work to be

² [1986] 1 Qd R 61 at 83 per Derrington J.

³ (1970) 123 CLR 490, 499.

undertaken on a specific site on which the holder of the licence is presently performing building work. Indeed, for the reasons developed above, there are strong contra indication from the structure of the Act, that such ends are to be achieved by utilising the processes and devices found in Part 6 of the Act.

A condition may only be imposed under s 36(1)(b) of the Act where the first respondent has reason to believe that there is ‘some other proper ground for doing so’. It is evident from consideration of the notice of proposed conditions issued by the respondent that the proper ground here was a concern about a risk to the health and safety of persons being posed by the damage to Kirra Vista allegedly caused by the Project.

Once the conditions are seen in that way, it is apparent that they were directed entirely to specific activities of the applicant relating to the Project. They were not related to the applicant’s general entitlement to carry out building work under the licence. The power to impose conditions under s 36 of the Act is, when construed in its statutory context, not one directed toward imposing detailed, supervisory requirements on the performance of particular building work at a particular site. Rather, consistently with the definition of a condition as being something which includes a ‘limitation or restriction’, a lawful condition is properly to be understood as something which controls, limits or regulates the rights conferred by a licence, that is, the right to carry out building work.”

[45] As to condition 4, the applicant submits that this condition caused the cessation of the whole of the building work not until a breach of a “prescribed provision” as contemplated by s 108AI of the Act had been abated, but until the consequences of the alleged past breach of a “prescribed provision” had been partially remedied to the satisfaction of QBCC. It follows that if s 36 operated in the manner contended for by QBCC, there would be no need for Parts 4, 4A, 5, 6 and s 108AI of the Act. QBCC could apply conditions to a licence such as:

- (a) the licensee not undertake any more work on a particular project;
- (b) the licensee not undertake any more work until it rectifies a latent defect in a building it completed in the past or pays money for the rectification: cf Part 5;
- (c) the licensee carry out the work on a particular project in a particular sequence;
- (d) the licensee not carry out any work on any project until the respondents had received a copy of the engineering designs and certifications for the work, and the licensee had received the respondents’ consent to proceed: cf sections 48 and 49 suspension;
- (e) the licensee not comply with a particular condition of a building contract.

QBCC’s submissions

[46] QBCC identifies that the present application involves a matter of statutory construction in regards to its power under s 36 concerning the imposition of conditions on a licence. As a matter of statutory construction, s 36(2), which permits QBCC to impose a condition “if satisfied that the condition is appropriate”, should not be “construed as

subject to a limitation not appearing in the words of that grant”.⁴ By reference to one of the objects of the Act, namely to regulate the building industry, QBCC submits that the provisions of the Act, particularly s 36, should, as far as possible, be construed so as to enable QBCC to achieve this object.

- [47] QBCC submits that the words of s 36(1), which expressly enables QBCC to impose subsequent conditions upon a licence where it has reason to believe that there is “some other proper ground” to do so, convey a broad discretion in regards to the imposition of conditions. While some examples are provided for in subsections 36(3), (3A) and (3B), by the effect of subsection 36(3), those examples do not limit the power to impose conditions under subsection (2). The specific examples given in subsections (3), (3A) and (3B) require the licensee to do a specific act – the lodgement of appropriate security, the completion of a module of study and giving certain documents.
- [48] QBCC further highlights that there is no section in the Act that expressly prohibits the imposition of the subject conditions.
- [49] QBCC submits that while it has the power under Part 6 to issue a direction to rectify works, that power cannot be applied, nor construed to operate, so as to preclude or restrict (by reading down) the effect and operation of the broad power conferred upon it under s 36:
- “To construe the effect of section 36 so as to preclude the QBCC from imposing any conditions in respect of matters which can otherwise be the subject of a direction to rectify under section 72, is to restrict the operation of s 36 in circumstances where there is otherwise a wide discretion in regards to the imposition of such conditions by subsections 36(1)(b) and 36(3C).”
- [50] As to condition 4, QBCC submits that a stop work notice under s 108AI operates solely to achieve the cessation of a breach, or continuing breach, of a prescribed provision. It does not supply a power to direct works on a certain basis or in a particular order. This power according to QBCC is supplied by s 36(1)(b), which allows QBCC in respect of an existing licence to deal with that licensee and impose a condition on the licensee to achieve the conduct of the work on a certain basis or in a particular order. Condition 4 therefore operates in a way provided for in s 36(1)(b) but does not operate in a way prescribed in s 108AI. This is because condition 4 did not absolutely prohibit the applicant from engaging in certain conduct, but rather, conditioned its right to conduct the building works upon a certain basis and in a certain order, being that the applicant complied with conditions 1 to 3.

Consideration

- [51] I am of the view that QBCC does not have the statutory power to impose the seven conditions on the applicant’s building licence.

⁴ *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 205.

- [52] The wording of the conditions and their effect covers the same subject matter as either a stop work notice under s 108AI or a notice to rectify or remedy consequential damage under Part 6 of the Act. The circumstances in which QBCC can issue such notices is expressly limited to the circumstances identified in s 108AI and in Part 6 of the Act. Nothing in Part 6 of the Act permits QBCC to instruct a licensed builder as to how to comply with a notice to remedy consequential damage. As observed by McPherson J (as his Honour then was) in *R v His Honour Judge McGuire & Ors*:⁵

“It is possible to conceive of reasons why the Board was not invested with power to make orders specifying the particular means or method to be used in rectifying faulty work. Apart from difficulties of supervision well known to other branches of the law, it is builders to whom orders under s 59(1) are directed. It may well have been intended that they should use their own judgment as builders with respect to the performance of rectification work.”

- [53] The applicant’s submission, namely that the scheme of the Act does not permit the conditions by reason that the relevant matters are regulated by specific provisions of the Act, is supported by authority.

- [54] In *Anthony Hordern & Sons Ltd v Amalgamated Clothing & Allied Trades Union of Australia*⁶ Gavan Duffy CJ, Dixon and McTiernan JJ observed:

“When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power.”

- [55] To similar effect in *Leon Fink Holdings Pty Ltd v Australian Film Commission*, Mason J (as his Honour then was) refined the principle in stating:⁷

“It is accepted that when a statute confers both a general power, not subject to limitations and qualifications, and a special power, subject to limitations and qualifications, the general power cannot be exercised to do that which is the subject of the special power.”

- [56] The power to be exercised under s 36 by QBCC is quite separate and distinct to the power to be exercised under either s 108AI or Part 6 of the Act. The power to impose conditions on a licence is to be exercised in order to regulate and control those persons who may lawfully perform building work in Queensland. If in the course of conducting that building work the Commissioner is satisfied that something is being done or about to be done in contravention of a prescribed provision, it may issue a stop work notice pursuant to s 108AI. In doing so the Commissioner must follow the steps mandated by s 108AI(3) and (5) and the Commissioner must be satisfied in terms of s 108AI(1). Similarly, if a licensed builder in the course of conducting building work causes

⁵ *R v His Honour Judge McGuire & Hanlon Homes Pty Ltd, ex parte Builders’ Registration Board of Queensland* [1986] 1 Qd R 61, 71-72.

⁶ (1932) 47 CLR 1 at 7.

⁷ (1979) 141 CLR 672 at 678. See also *Australian Education Union v Department of Education and Children’s Services* (2012) 248 CLR 1 and *R v Smith* (1994) 181 CLR 338.

consequential damage, including to an adjacent owner, QBCC may exercise its powers under Part 6 of the Act, including the power to require remediation of consequential damage to an adjacent owner. The exercise of these specific powers are governed by provisions that set out a number of matters, which include QBCC forming the necessary opinion under s 72(1), as well as time and procedural requirements under s 72(2A), (3) and (4). It is, in my view, impermissible for QBCC to impose conditions on a licence that have the effect of either enlarging or circumventing the requirements of either Part 6 or s 108AI of the Act. To do so would undermine the powers in ss 108AI and s 72 and the requirements that attend their exercise.

- [57] Resort to the objects of the Act does not, in my view, support such an expansive construction of the power granted to QBCC under s 36. The objects of the Act which include both regulating the building industry and providing remedies for defective building work, are sought to be achieved by QBCC and the Commissioner holding various powers. These powers not only include imposing conditions on a licence, but also the power to cancel or suspend a licence and to issue notices to stop work and to direct remedial work in respect of consequential damage. The fact that each of these powers are conferred on QBCC and the Commissioner in order to achieve the objects of the Act does not mean that the general power to impose conditions on a licence should be exercised in such a way as to override the requirements of specific sections permitting the issuing of directions to stop work and remedy consequential damage.

Disposition

- [58] I will hear the parties as to the form of orders and costs.