

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Van Eyk v Queensland Building and Construction Commission* [2020] QCAT 278

PARTIES: **GERARD VAN EYK**
(applicant)

v

QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION
(respondent)

APPLICATION NO/S: OCR087-18

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 8 July 2020

HEARING DATE: 7 June 2019

HEARD AT: Southport

DECISION OF: Member Holzberger

ORDERS:

- 1. The decision of QBCC made on 8 March 2018, that Mr Van Eyk engaged in six instances of unsatisfactory professional conduct and as a consequence professional misconduct is set aside.**
- 2. The Tribunal substitutes a decision that Mr Van Eyk engaged in three instances of unsatisfactory professional conduct.**

CATCHWORDS: PROFESSIONS AND TRADES – BUILDERS – DISCIPLINARY PROCEEDINGS – CERTIFIER – where the QBCC issued a Decision Notice finding that the applicant engaged in professional misconduct – where the applicant sought review of that decision - whether the decision should be upheld

Building Act 1975 (Qld), s 83(1), sch 2
Building Regulation 2006 (Qld), s 27, s 29, s 35B(1)
Queensland Building and Construction Commission Act 1991 (Qld), s 87
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 19, s 20

Blundell v QBCC [2018] QSC 58
Kehl v Board of Professional Engineers of Queensland [2010] QCATA 58

APPEARANCES &
REPRESENTATION:

Applicant: Self-represented
Respondent: T C Schmitt, Counsel

REASONS FOR DECISION

- [1] Gerard Van Eyk, a private certifier, has applied to the Tribunal for a review of an internal review decision by the Queensland Building and Construction Commission ('the Commission') that he engaged in professional misconduct ('the IR decision').¹
- [2] The IR decision relates to three separate building development approvals assessed and approved by Mr Van Eyk relating to a dwelling situated at 8 Pall Mall Avenue, Currumbin ('the dwelling') owned by Luke Jordan and Lucy Jordan.²

Background

- [3] Russell Clark ('the complainant') and Jacquelyn Boucaut are the owners of 10 Pall Mall Avenue, Currumbin, a neighbouring property immediately to the south of the dwelling.
- [4] In December 2016, they returned from six months overseas to find 'an excessive and illegal extension' to the dwelling constructed during their absence.
- [5] They initially contacted the Gold Coast City Council ('the Council'), the relevant local authority, and were advised 'there was no documentation in the GCCC computer for the subject constructions' and commenced an 'objection process' with the Council which is ongoing.³
- [6] They subsequently made a complaint to the Commission against the builder, Richard Johnson, but were advised that the Commission could not do anything as the work had been completed. On the advice of the Commission, they then lodged a complaint against the private certifier, Mr Van Eyk, on 16 February 2017 ('the complaint').
- [7] A decision in respect of the complaint ('the original decision') was made on 6 November 2017.
- [8] In the period between the complaint and the original decision the complainant, Ms Boucaut and Mr Van Eyk provided a quantity of documents relating to it. This included two surveyors' reports, the first provided by the complainant and Ms Boucaut from Alan Sullivan Consulting Surveyors⁴ and the second provided by Mr Van Eyk from McIntyre & Associates Consulting Surveyors.⁵
- [9] At the end of the process, the complainant and Ms Boucaut had nine specific complaints namely:

¹ Application to review a decision filed 6 April 2018.

² Application 2482 – swimming pool application; Application 2461 – alteration to dwelling including decks, stairs and ramp; Application 2696 - roof over middle level deck.

³ Respondent's bundle of documents filed 8 June 2018, BOD-1 – Complaint dated 21 February 2017, 7.

⁴ Ibid BOD-2 – Email from complainant and Ms Boucaut dated 6 March 2017, 25-26.

⁵ Ibid BOD-6 – Applicant's response to complaint dated 28 March 2017, 41-43.

- (a) No site plan prepared before start of work;
 - (b) Build over maximum allowable nine metres (approximately 11.4 metres);
 - (c) No relaxations applied for;
 - (d) Stormwater illegally diverted. No defined point of discharged for storm and other water on site;
 - (e) No notice of engagement issued;
 - (f) No plans or engineering approvals lodged with GCCC;
 - (g) No compliance certificate lodged;
 - (h) Three levels of living space to over nine metres in height; and
 - (i) No amenity and aesthetics assessment done.⁶
- [10] The original decision dealt with each individual complaint in turn and concluded that Mr Van Eyk had not engaged in unsatisfactory conduct or professional misconduct.
- [11] On 4 December 2017, the complainant applied for an internal review of the original decision. The resulting IR decision is the subject of this review.

Jurisdiction

- [12] Section 87 of the *Queensland Building and Construction Commission Act 1991* (Qld) ('QBCC Act'), the enabling act, permits Mr Van Eyk to apply to the Tribunal for a review of the IR Decision.
- [13] The review is by way of a fresh hearing on the merits to produce the correct and preferable decision.⁷ In doing so, the Tribunal stands in the shoes of the IR decision maker and has all of the functions of the IR decision maker.⁸ The Tribunal can and should consider relevant material which was not before the IR decision maker.

The review decision

- [14] The function of the Tribunal in conducting a review is to reach the correct and preferable decision. It does not have to find legal or factual error in the decision under review nor is it obliged to follow the path or process adopted by the original decision maker.⁹
- [15] It is however the position of the Commission that the IR Decision is the correct and preferable one which ought to be affirmed and that the analysis of the decision and the process followed in reaching it, is warranted.
- [16] The original decision maker investigated each of the complainant's nine complaints and concluded that Mr Van Eyk had not engaged in unsatisfactory conduct in relation to any of the complaints.

⁶ BOD-16 – Information notice dated 6 November 2017, 95-96.

⁷ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act') s 20.

⁸ *Ibid* s 19.

⁹ *Ibid* s 20; See also *Kehl v Board of Professional Engineers of Queensland* [2010] QCATA 58, [9], [12].

- [17] The IR decision maker addressed each of the nine complaints, concluding that unsatisfactory conduct was proven in respect of complaints one, three, five, six, seven and eight but was not proven in respect of complaints two, four and nine.
- [18] The IR decision maker did not, however, confine his investigations to those nine complaints and made findings of six instances of unsatisfactory conduct.¹⁰
- [19] He concluded that:
- (a) In respect of each of the six instances, Mr Van Eyk contravened:
 - (i) The standards of conduct and professionalism contained in the code of conduct; and
 - (ii) His obligation to act in the public interest pursuant to s 136(1) of the Building Act;
 - (b) Additionally, in respect of instances one, two and four, a contravention of legislative requirements was found; and
 - (c) In each instance, his conduct fell within the definition of unsatisfactory conduct contained in Schedule 2 of the Building Act.
- [20] He further concluded that the six instances of unsatisfactory conduct constituted professional misconduct as defined in subparagraphs (a) and (f) of the definition of that term contained in Schedule 2 of the *Building Act* 1975 (Qld) ('Building Act').
- [21] Mr Van Eyk's application for review is effectively in two parts. The first of those relates to the breadth of the investigation being undertaken having regard to the original complaint. By doing so, the IR Decision maker, Mr Van Eyk says, failed to comply with the procedures for complaints provided in the Building Act and the QBCC Act and denied him procedural fairness and natural justice.
- [22] This has been considered by the Tribunal following an application for miscellaneous matters by Mr Van Eyk filed on 14 August 2018. That application was dismissed by the Tribunal on 20 September 2018. No reasons have been published or requested and the decision has not been appealed.
- [23] In any event, given the nature of the review,¹¹ I am satisfied in these proceedings that Mr Van Eyk has been made fully aware of the allegations against him and has been given adequate opportunity to provide evidence and make submissions in respect of them.
- [24] At the hearing on 7 June 2019 the Tribunal heard the evidence and submissions relating to the six instances of unsatisfactory conduct specified in the IR Decision.
- Unsatisfactory conduct / Professional misconduct**
- [25] Unsatisfactory conduct for a building certifier is defined to include 'conduct that is contrary to a function under this Act or another Act regulating building certifiers ... including, for example ... contravening the code of conduct'.¹²

¹⁰ The subject matter of complaints two, three, four and nine are dealt with in three, four and five.

¹¹ *Blundell v QBCC* [2018] QSC 58.

¹² *Building Act* 1975 (Qld) sch 2.

- [26] The code of conduct lists 10 ‘standards of conduct and professionalism’ with which building certifiers must comply.¹³ Standard 3 requires a building certifier to comply with ‘legislative requirements’. If the Tribunal is satisfied there has been a breach of standard 3, a finding of unsatisfactory conduct must almost inevitably follow. Any breach of the code of conduct may constitute either unsatisfactory conduct or professional misconduct:

There is a distinction between offences of a basic administrative nature defined as ‘unsatisfactory conduct’ and more serious offences such as significant technical breaches that may compromise the safety of people in buildings, defined as ‘professional misconduct’.¹⁴

First instance

- [27] It is alleged that Mr Van Eyk failed to inspect the swimming pool work within six months of the development application and before the approval lapsed in contravention of section 35B(1) of the *Building Regulation* 2006 (Qld) (‘Building Regulation’), and in doing so has committed an offence which attracts a penalty.
- [28] Mr Van Eyk admits that this is the case.¹⁵
- [29] I find that he has failed to comply with the legislative requirements and accordingly standard 3 of the code of conduct, and unsatisfactory conduct as defined in Schedule 2 of the Building Act has been made out.

Second instance

- [30] It is alleged that Mr Van Eyk did not comply with his obligation under section 29 of the Building Regulation, to give notice to the QBCC as soon as practicable after becoming aware of the failure of a licensed builder to give notice for a stage of work under section 27 of the Building Regulation.
- [31] There are two such failures identified:
- (a) The temporary fence stage before the pool is filled (a stage of accessible building work pursuant to s 24(6) of the Building Regulation; and
 - (b) The final stage.
- [32] Mr Van Eyk acknowledges that he was aware from attendances onsite and in respect of other works that the swimming pool work was being undertaken and that he was asked to look at ‘the pool barrier which was nearing completion’ and that he asked to be called when it was ‘ready for inspection’.¹⁶
- [33] Nobody did notify him and an extraordinary sequence of events including serious health issues, the destruction of records by fire and computer issues resulted in him losing track of the progress of the matter and as a result he was ‘under the mistaken impression that the project had been finalised’.¹⁷

¹³ Code of conduct for building certifiers, 14 November 2003, 3.

¹⁴ Ibid 6 (‘breaches of the code of conduct’).

¹⁵ Application to review a decision filed 6 April 2018, Support document, 3.

¹⁶ Ibid Support document, 3, 4.

¹⁷ Ibid Support document, 4.

- [34] He says he did notify the Commission as required, as soon as he became aware of the ‘obligation to notify’. He attended to it by delivering a notice.¹⁸ In oral evidence Wayne Blackman, the IR Decision maker, acknowledged that the notice ultimately delivered by Mr Van Eyk was a suitable notification but that it was provided after the IR Decision.
- [35] When asked in cross-examination of when he became aware that the swimming pool had in fact been completed, Mr Van Eyk said that he became aware of it on receipt of the IR Decision.
- [36] As I understand, Mr Van Eyk’s evidence is that he acknowledges attending the property sometime in October 2016 at the builder’s request, not for a formal inspection, and observed that the pool was under construction or close to it. However, as a result of his medical condition and the other factors referred to by him he was not aware that the inspection had been missed. He could not notify because he was not aware of it.
- [37] It was put to him that he was aware of the missed inspection but was unaware of his obligation under section 29 to notify it or chose not to do so.
- [38] I am satisfied in all the circumstances that Mr Van Eyk was not aware that the inspections had been missed and that upon becoming aware notified the Commission.
- [39] It is further alleged that he failed to take any form of appropriate regulatory action to address the omitted inspections or the filling of the swimming pool.¹⁹
- [40] The IR Decision does not specify what Mr Van Eyk could or should have done on becoming aware of the missed inspections. No evidence was called which spoke to the appropriate action and it was not put to Mr Van Eyk in cross-examination that he should have adopted a particular course of action.
- [41] I am not satisfied that the second instance of unsatisfactory conduct has been proven.

Third instance

- [42] The third instance of unsatisfactory conduct relates to a deck constructed around the perimeter of the swimming pool.
- [43] The application and approval for the pool did not include the deck and accordingly it was an unauthorised development. It is not in dispute that the deck does not comply with the minimum set back requirement under the Gold Coast Planning Scheme.²⁰
- [44] The IR Decision acknowledges that Mr Van Eyk is not responsible for the non-approved structure but asserts:

Notwithstanding, the private certifier holds responsibility for the regulatory oversight of the swimming pool work, ... undertaking inspections and the taking of appropriate regulatory action if/when required, including the taking

¹⁸ Application to review a decision filed 6 April 2018, Support document, 4, annexure 8.

¹⁹ Respondent’s bundle of documents filed 8 June 2018, BOD-49 – Internal review decision dated 9 March 2018, 411.

²⁰ Gold Coast Planning Scheme 03, Version 1.2, 14 November 2011.

of any necessary enforcement action to address non-compliances when reasonably known.²¹

[45] Mr Van Eyk says in respect of that:

- (a) There is no express or implied statutory obligation for him to oversee general building works outside the scope of the building development applications assessed and approved by him;²² and
- (b) After the pool building approval had lapsed, he had no authority to initiate enforcement action.

[46] Neither the IR Decision nor the evidence establishes the contention that there is a general requirement to oversee works outside the scope of building development approvals approved and certified by a certifier. No expert evidence was called to establish such an obligation in practice.

[47] While Mr Van Eyk acknowledged in cross-examination that he attended the site on or about October 2016 and was asked by the builder to ‘look at the deck’, it is not clear on the evidence whether the non-compliance could have been detected at that point. There is no evidence of what stage construction of the deck had reached at that time. No evidence was called in that regard and it was not put to Mr Van Eyk in cross-examination that the deck was complete or near to it. I am not satisfied that non-compliance was ‘reasonably known’ to him at the time of that inspection.

[48] Neither the IR Decision nor submissions made at the hearing indicate what enforcement action Mr Van Eyk should have taken at that point.

[49] The Council issued a show cause notice to the proprietaries on 22 June 2017 hence it is difficult to see the utility in further action being taken by Mr Van Eyk. Steps were being taken to remedy the compliance issues, including the preparation of a building application for the pool, deck and barrier.²³

[50] The Queensland Building Work Enforcement Guidelines²⁴ contemplates that appropriate action includes ‘negotiating with the applicant or owner to remedy a development fence’.

[51] I am not satisfied in those circumstances that unsatisfactory conduct has been proven.

Fourth instance

[52] Mr Van Eyk assessed and approved application 2461 for additions to the dwelling, specifically including two decks, two external stairs and a ramp.

[53] Mr Van Eyk does not contest in evidence and submissions that the approved plans show the external stairs and deck as being located 1.025 metres from the boundary of the property and accordingly not in compliance with the minimum set back requirements under the Gold Coast Planning Scheme.

²¹ Respondent’s bundle of documents filed 8 June 2018, BOD-49 – Internal review decision dated 9 March 2018, 412.

²² Application to review a decision filed 6 April 2018, Support document, 4.

²³ Ibid 5.

²⁴ Queensland building work enforcement guidelines, 1 September 2002, 4; Exhibit 5.

- [54] It is further alleged that the works as constructed vary the approved plan by further reducing, albeit slightly, the setback from the southern boundary and by adding another external staircase connecting the two decks.
- [55] Mr Van Eyk submits that he cannot be held responsible for those variations.²⁵ In the absence of any evidence demonstrating active participation by him in the construction process, I agree with that submission.
- [56] It does not appear to be contested that the application could not be approved by Mr Van Eyk without the assessment and approval of the Council for the reduced setbacks and that this did not occur. I find that his failure to comply with the legislative requirements contained in section 83(1) of the Building Act is an offence under that Act and a breach of the standard of conduct and professionalism. I find that this behaviour constitutes unsatisfactory conduct.

Fifth instance

- [57] Application 2696 for dwelling additions was approved by Mr Van Eyk on 22 March 2017. The approval was retrospective because the works, which included the construction of a roof over the upper level deck had been carried out before the application without any building development approval.
- [58] It is asserted that Mr Van Eyk's conduct in approving the application is unsatisfactory in that he failed to take all reasonable and appropriate steps to accurately determine natural ground levels, the height of the roof above the natural ground and to identify that the building work effectively resulted in a three story building.²⁶
- [59] Before granting the approval, Mr Van Eyk sought concurrence agency assessment approval from the Council because the building work encroached the minimum side boundary setbacks. His submission to Council:
- (a) Referred to drawings by Earthsolve and Stewart McIntyre & Associates Consulting Surveyors;
 - (b) Calculated the roof's ridge level to be about 8.39 metres above natural ground level by adopting Mr McIntyre's measurement of height for the roof fascia above natural ground level of 7.49 metres and calculated the rise of the roof from fascia to ridge line on the basis of a ten degree pitch specified in the plans; and
 - (c) Advised that the height of the roof had been checked by a surveyor presumably Mr McIntyre.²⁷
- [60] Mr Van Eyk's evidence is that in calculating the height of the roof ridge line he relied on the advice of the builder, Richard Johnson, who assured him that its height was less than 9 metres above natural ground level²⁸ and produced on Mr Van Eyk's request the Earthsolve drawings and Stewart McIntyre drawings.²⁹

²⁵ Application to review a decision filed 6 April 2018, Support document, 5.

²⁶ Respondent's bundle of documents filed 8 June 2018, BOD-49 – Internal review decision dated 9 March 2018, 417, [62].

²⁷ Ibid BOD-36 – Supplementary information from applicant re roof over decks dated 18 February 2018, 323–324.

²⁸ Application to review a decision filed 6 April 2018, Support document, 7-8.

- [61] Mr Johnson provided him with a sketch plan and calculation³⁰ which he subsequently checked.³¹
- [62] He concluded ‘although the height information was less than ideal. [sic] I was satisfied that the height of the building is less than 9 metres’.³²
- [63] Mr Van Eyk concedes that his calculation in that submission is incorrect because the pitch of the roof as constructed was 18.7 degrees rather than 10 degrees as specified in the drawings and used by Mr Van Eyk in his calculations. He now calculates the height as 9.27 metres.³³
- [64] The complainant retained Alan Sullivan Constructing Surveyors who provided a surveyor report to him dated 3 March 2017.³⁴ Mr Sullivan concluded ‘it would appear the highest point of the roof is approximately 12.15 metres above natural ground level’.³⁵
- [65] In a subsequent report to the complainant dated 14 February 2018,³⁶ he advised that the reference mark in the McIntyre plan ‘may or may not be at natural ground level but is definitely not directly below the highest point of the roof so it does not give the height above natural height level at that point’. He recalculated the height of the ridge line above natural ground level at approximately 11.21 metres.³⁷
- [66] Mr McIntyre in a response to an enquiry by the Commission dated 28 February 2018 concluded that the gutter level point is 10.8 metres above ground.³⁸
- [67] Neither Mr Sullivan nor Mr McIntyre gave evidence in these proceedings. Little or no weight can be placed on the various brief reports contained in the bundle. I am not confident that either has accurately identified natural ground level. The Tribunal has not been given the opportunity to seek clarification of their methodology or calculations. The words ‘natural ground level’ do not appear in the McIntyre letter of 28 February 2018. I am unable to determine the height of the ridge line above natural ground level.
- [68] Counsel for the Commission, Mr Schmitt submitted that it was not necessary for the Tribunal to determine the actual roof height to find misconduct. I accept that, however when a finding as to the height cannot be made, unsatisfactory conduct must be established by other means. No evidence has been called as to what Mr Van Eyk could or should have done in the circumstances. While I agree with Mr Van Eyk that the information was ‘less than ideal’, in the absence of evidence to the contrary I find that he has acted reasonably and met the required minimum standards.
- [69] In the course of an investigation which unfolded over months, Mr Sullivan and Mr McIntyre were unable to agree on a measurement. I am therefore unable to

²⁹ Statutory declaration of Gerard Van Eyk filed 17 December 2018, [10], [11]-[18].

³⁰ Exhibit 3.

³¹ Ibid [20], [21].

³² Ibid [22].

³³ Ibid [56].

³⁴ BOD-2 – Email from complainant and Ms Boucaut dated 6 March 2017, 25–26.

³⁵ Ibid.

³⁶ BOD-31 – Further submissions from complainant and Ms Boucaut dated 14 February 2018, 219–226.

³⁷ Ibid 219–220.

³⁸ BOD-46 – Email chain between QBCC and surveyor Stewart McIntyre, 393–394.

speculate on what Mr Van Eyk could have done to verify the information given to him by Mr Johnson in the context of a certification process in which time and expense considerations are more critical.

[70] I am also not satisfied that Mr Van Eyk intended to mislead the Council by indicating that his measurements had been checked by Mr McIntyre. Mr McIntyre's plan was produced at Mr Van Eyk's request for a measurement of roof height and in my view the notation of the plan suggested the calculation had been done. I am also not satisfied that the Council was misled. The approval process involved a discussion between Mr Van Eyk and Council officers in circumstances where the height was clearly identified as an issue by the concurrence complaint by the complainant to the Council.

[71] I am not prepared on the evidence before me to find that the levelling of the pad results in the structure having three stories. Mr Blackman said in evidence that it created 'a platform people can use'. It may well be that earth may constitute a floor but I am not satisfied that in this case it necessarily does.

Sixth instance

[72] The concurrence agency approval included a number of conditions including conditions that:

- (a) Any deviation from the endorsed plans could not be made unless amended plans were submitted and endorsed by the Council or otherwise agreed in writing; and
- (b) The balustrading oriented towards northern and southern boundaries had to have a maximum transparency of 50 percent to protect amenity.

[73] The IR decision maker says that these conditions were breached in that:

- (a) The development changed resulting in height above nine metres having three stories instead of two and having an 18 percent pitched roof instead of 10 percent pitched roof; and
- (b) The balustrading was clear glass and had a transparency approaching 100 percent.

[74] In view of my findings in respect of instance five I am not satisfied that any action was required by Mr Van Eyk to obtain endorsement in respect of the building height or the number of stories.

[75] Mr Van Eyk does not dispute the old pitch of the roof or the transparency of the balustrading or that he issued a form 21, a final inspection certificate despite non-compliance with those conditions.

[76] I am satisfied in those circumstances that the conduct falls below standards 3 and 10 of the standards of conduct and professionalism and constitutes unsatisfactory conduct as defined in Schedule 2 of the Building Act.

[77] Having found three instances of unsatisfactory conduct I am not satisfied that those instances could be considered repeated unsatisfactory conduct that would constitute professional misconduct as defined in Schedule 2 of the Building Act.

Orders

[78] I order:

1. The decision of QBCC made on 8 March 2018, that Mr Van Eyk engaged in six instances of unsatisfactory professional conduct and as a consequence professional misconduct is set aside.
2. The Tribunal substitutes a decision that Mr Van Eyk engaged in three instances of unsatisfactory professional conduct.