SUPREME COURT OF QUEENSLAND

CITATION:	*Queensland Building Services Authority v Orenshaw & Anor* [2012] QSC 241
PARTIES:	**QUEENSLAND BUILDING SERVICES AUTHORITY** (plaintiff/applicant) v **WAYNE FRANCIS ORENSHAW** (first defendant/plaintiff by counterclaim/first respondent) **SHEPHERD & DUDLEY PTY LTD ACN 068 491 494** (second defendant by counterclaim/second respondent)
FILE NO/S:	30 of 2012
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Cairns
DELIVERED ON:	31 August 2012
DELIVERED AT:	Cairns
HEARING DATE:	22 June 2012
JUDGE:	Henry J
ORDER:	**1. Paragraph 25(b) of the defence is struck out and the first defendant has leave to re-plead it or the whole of the paragraph giving proper explanation for the denial of debt.** **2. Judgment for the plaintiff on the first defendant's counterclaim (as it relates to the plaintiff).** **3. The third party claim by the first defendant against the second defendant is set aside and leave given for the first defendant to commence a separate proceeding against the second defendant in respect of the matters raised in the third party claim.** **4. Leave is granted for the proceeding identified in ex PAR2 to the affidavit of Paul Andrew Rojas, sworn 19 June 2012, to be commenced in the Supreme Court.** **5. Leave is granted pursuant to *Uniform Civil Procedure Rules* 1999 (Qld) r 78 for the plaintiff to consolidate the proceeding instituted pursuant to order 4 to this proceeding.** **6. I will hear the parties as to costs.**
CATCHWORDS:	PRACTICE – SUMMARY JUDGMENT – where the first defendant performed allegedly defective building work on two properties – where the plaintiff decided to indemnify the owners – where the plaintiff seeks recovery of that alleged debt from the first defendant – where the plaintiff seeks

summary judgment – whether the first defendant has no real prospect of successfully defending the plaintiff's claim

PRACTICE – SUMMARY JUDGMENT – where the first defendant makes a counterclaim against the plaintiff for breaches of duties of care allegedly owed by the plaintiff – where the plaintiff seeks summary judgment in respect of the counterclaim against it – whether the first defendant has no real prospect of succeeding on its counterclaim against the plaintiff

INSURANCE – BUILDING – LOSS OR DAMAGE – where the plaintiff contends the defence must fail because the validity of the process by which the owners were indemnified and thus the right of recovery from the first defendant cannot be challenged – whether the plaintiff's decision to indemnify is unassailable in this proceeding

NEGLIGENCE – where the first defendant's counterclaim against the plaintiff alleges the plaintiff breached a duty of care to reject the company's licence application and caused damage – whether there was a duty of care – whether its breach caused damage – whether the damage was too remote – whether the first defendant has no real prospect of succeeding

PRACTICE – STRIKING OUT – where the plaintiff seeks in the alternative orders striking out much of the defence and the whole of the counterclaim

PRACTICE – where the plaintiff seeks orders setting aside the first defendant's claim against the second defendant and giving the first defendant leave to commence that claim as a separate proceeding – whether the divergence in the nature of the two cases is such that they should be separated

PRACTICE – where the plaintiff seeks to consolidate a further claim by it against the first defendant – whether the same or substantially the same questions are involved in both proceedings

Queensland Building Services Authority Act 1991 (Qld) ss 30–31, 34–36, 42, 71, 86, 111C, sch 2
Uniform Civil Procedure Rules 1999 (Qld) rr 78, 292–293

Beer v J.M. Kelly (Project Builders) Pty Ltd [2008] 2 Qd R 199.
Deepcliffe P/L v *The Council of the City of Gold Coast* [2001] QCA 342
Johnson v Gore Wood & Co [2002] 2 AC 1
Lange v Queensland Building Services Authority [2011] QCA 58

LCR Mining Group Pty Ltd v Ocean Tyres Pty Ltd [2011] QCA 105
Racecourse Co-operative Sugar Association Limited v Attorney-General (Qld) (1979) 142 CLR 460
Stuart v Kirkland-Veenstra (2009) 237 CLR 215
Thomas v D'Arcy [2005] 1 Qd R 666

COUNSEL: BE Codd for the plaintiff/applicant
MA Jonsson for the first defendant/plaintiff by counterclaim/first respondent

SOLICITORS: Rostron Carlyle Solicitors for the plaintiff/applicant
Williams Graham Carman for the first defendant/plaintiff by counterclaim/first respondent

[1] The applicant plaintiff makes application for:

(a) summary judgment in respect of those parts of the defence and reply and answer which go to liability by reason that no proper defence has been entered; and

(b) summary judgment in respect of the counterclaim against the plaintiff.

In the alternative it seeks orders striking out much of the defence and the whole of the counterclaim.

[2] Depending on the extent of its success it also seeks consequential orders setting aside the first defendant's claim against the second defendant[1] and giving the first defendant leave to commence that claim as a separate proceeding.

[3] In a separate application the plaintiff seeks to consolidate a further claim by it against the first defendant.

Background

The claim

[4] The plaintiff claims $187,455.18 as a debt due and owing pursuant to ss 111C(3) and 111C(6) of the *Queensland Building Services Authority Act* 1991 (Qld) ("*QBSA Act*"). The effect of those sub-sections is to deem a company director liable to pay an amount owed by the director's company to the Queensland Building Services Authority ("QBSA") because of a payment made by the QBSA on a claim under the *QBSA Act*'s insurance scheme.

[5] Section 68 of the *QBSA Act* requires that before commencing residential construction work a building contractor must pay the QBSA the appropriate insurance premium for the work. On accepting the premium the QBSA must, pursuant to s 69, issue a certificate of insurance. Section 68(3) provides the certificate is conclusive evidence the work is covered by a policy of insurance under the statutory scheme. Where the QBSA subsequently indemnifies claimants under the scheme, as occurred here, s 71 provides the authority may recover the amount as

[1] While referred to herein as the "second defendant", *Shepherd & Dudley Pty Ltd* is only a defendant in respect of the first defendant's counterclaim.

a debt from the building contractor. If, as here, the contractor is a company, that liability also attaches to its directors, pursuant to s 111C of the *QBSA Act*.

[6] The plaintiff's claim stems from allegedly defective building work performed at two residential properties in Marina Terrace, Hamilton Island by Whitsunday Pole Homes Pty Ltd ("the company").[2]

[7] After inspecting the allegedly defective works, preparing scopes of works and calling for tenders, the QBSA decided to indemnify the owners of both properties, in respect of their insurance claims, for the amounts of the alleged cost of rectification works. In each instance, the QBSA served the company with a notice of debt for those amounts.[3] The QBSA paid those amounts to the owners, who were allegedly entitled to indemnity under the statutory insurance scheme.[4] Having made those payments the QBSA pleads the debt in turn owed to it by the company, pursuant to s 71, has not been paid.[5]

[8] The company entered external administration on or about 30 July 2009 and, because the first defendant was a director of the company,[6] the plaintiff's action seeks recovery of the debt from him.

[9] The first defendant denies the statutory insurance scheme applies in respect of either of the company's contracts ("the first and second contracts") with the owners because they were cost plus contracts and the scheme's insurance policy conditions provide that in relation to non-completion claims the plaintiff is only liable to pay for loss when the contract is a fixed price contract and has been properly terminated.[7] In reply, the plaintiff denies the contracts were cost plus contracts and pleads that in any event the policy conferred a discretion whether or not to indemnify a complainant under other than a fixed price contract and further that the plaintiff has a right of recovery regardless of whether its payment was within the scope of the insurance policy conditions.[8] The plaintiff pleads the only entitlements to contest the propriety of the indemnities given by the plaintiff to the owners arose under the *QBSA Act* or the *Judicial Review Act* 1991 (Qld) and have lapsed.[9]

[10] The first defendant denies the building work was defective. He pleads the company's work was incomplete rather than defective. He pleads that the work was incomplete because the company was not the holder of a licence in the class "builder – low rise" because of the negligence of the plaintiff and the second defendant.[10] He also pleads in respect of the first property that the work was incomplete because the company was locked out and not paid for work performed and that any defect as at that time was due to design error on the part of the owners' architects.[11] The plaintiff's reply in this context repeats its contention that the propriety of the insurance scheme payments cannot be disputed in this proceeding

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2 Statement of Claim ("SOC") [5], [6], [9], [12], [20], [25], [28].
3 Ibid [16], [23], [31]; Defence of the First Defendant ("1st DEF"), [1].
4 SOC, [33].
5 Ibid [35].
6 Ibid [36] – [37]; 1st DEF, [1].
7 1st DEF, [3].
8 Amended Reply to the Defence of the First Defendant ("Reply"), [4].
9 Ibid [5].
10 1st DEF, [5], [17].
11 Ibid [5].

and also pleads that the first defendant's allegation of negligence does not comply with the rules of pleading.[12]

[11] The first defendant pleads the costs of rectification did not represent the fair and reasonable cost of rectification,[13] which the plaintiff replies does not comply with the rules of pleading.[14]

[12] By reason of the matters pleaded the first defendant denies there is a debt owing.[15]

[13] The first defendant further claims a right of set off against his counterclaim.[16]

The counterclaim

[14] He counterclaims $4,034,383.31 as damages for negligence against the plaintiff and the second defendant, added by counterclaim.

[15] The second defendant, a firm of chartered accountants, recommended the first defendant switch from being a sole trader to a company structure and assisted the defendant to implement that arrangement.[17] The new company needed to be licensed to build. The first defendant alleges the second defendant arranged for him to sign a blank licence application for the company in the understanding the second defendant would complete and lodge it with the plaintiff.[18] It is alleged the second defendant ought to have known the company required a "builder – low rise" licence in order to carry out work, the first defendant allegedly being the holder of "builder – low rise" and "builder – open restricted to renovations, repairs, alterations and additions" licences and that in breach of an alleged duty of care it lodged an application for the company for a "builder – open" licence.[19]

[16] As to the plaintiff's alleged liability, the counterclaim alleges the plaintiff owed the first defendant a duty of care to reject the licence application on grounds it was for a class of licence the company was not entitled to hold because the class of licence applied for exceeded the classes of licence held by the first defendant (as nominee).[20] Alternatively, it is alleged the plaintiff had a duty of care to make further enquiry of the first and or second defendant.[21]

[17] The plaintiff is alleged to have breached this alleged duty of care by not rejecting the company's licence application and issuing the company with a licence for the class "builder – open restricted to renovations, repairs, alterations and additions" without enquiring whether the company also required the other class of licence then held by the first defendant, namely, "builder – low rise".[22]

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12 Reply, [6], [16].
13 1st DEF, [11], [16], [22].
14 Reply, [12], [15], [20].
15 1st DEF, [25].
16 Ibid [27].
17 Counterclaim ("CC"), [4], [5]; Defence of the Second Defendant to the Counterclaim of the First Defendant ("2nd DEF"), [4].
18 CC, [5].
19 Ibid [6]–[8].
20 Ibid [10].
21 Ibid.
22 Ibid [11].

[18] A further breach of duty of care is alleged against the plaintiff in that when the company applied to the plaintiff for insurance in respect of the two building contracts and for an increase in its allowable turnover the plaintiff accepted the applications when it allegedly owed a duty to the first defendant to reject the applications in that they contemplated work beyond the work permitted by the company's building licence.[23]

[19] The alleged basis upon which these breaches are said to have been causative of loss is that the company was not paid by parties to building contracts with the company due to it being prohibited by s 42(3) of the *QBSA Act* from recovering money under the contracts because it had performed work it was not licensed to carry out.[24] In consequence, it is alleged the first defendant was deprived of dividends.[25]

[20] The plaintiff disputes many of the factual allegations in the counterclaim. It denies there was such a thing as a licence in the class of "builder – open restricted to renovations, repairs, alterations and additions", contending the latter components of that description do not describe the class of licence but, rather, its conditions.[26] It denies the existence of the duties of care pleaded against it[27] and pleads even if there was negligence by the plaintiff it was not causative of any loss allegedly suffered.[28] Further, it denies the first defendant's allegation, which is seemingly critical to the plaintiff's alleged causation of loss, that the company breached s 42 of the Act, which prohibits working without a contractor's licence of the appropriate class, or that a breach was foreseeable.[29]

Relevant principles

[21] The plaintiff's applications for summary judgment are made pursuant to *Uniform Civil Procedure Rules* 1999 (Qld) ("*UCPR*") rr 292 and 293. Rule 292(2) provides:

> "If the court is satisfied that –
>
> (a) the defendant has no real prospect of successfully defending all or a part of the plaintiff's claim;
>
> (b) there is no need for a trial of the claim or the part of the claim;
>
> the court may give judgment for the plaintiff against the defendant for all or the part of the plaintiff's claim and may make any other order the court considers appropriate."

[22] Rule 293 imposes effectively the same test, viz, "no real prospect of succeeding", in circumstances where summary judgment is sought against the plaintiff.

[23] The test for summary judgment in the *UCPR* has been the subject of considerable judicial analysis. The recent analysis of the relevant authorities by White JA in *LCR Mining Group Pty Ltd v Ocean Tyres Pty Ltd* [30] emphasised the following. The words "no real prospect of succeeding" mean what they say. They are to be applied in conjunction with the requirement of satisfaction that there is no need for a trial,

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23 Ibid [18] – [19].
24 Ibid [23].
25 Ibid.
26 Reply, [3], [25].
27 Ibid [26], [30].
28 Ibid [33].
29 Ibid [25].
30 [2011] QCA 105, [26] – [30].

so as to ensure before any summary intervention that there is a high degree of certainty about what the ultimate outcome of the proceeding would be if it were allowed to go to trial in the ordinary way.

The claim

[24] The plaintiff's claim presents as straightforward. Having made payments on claims under its insurance scheme it says it is entitled to recover those amounts as a debt pursuant to ss 71 and 111C of the *QBSA Act*, which relevantly provide:

> "**71 Recovery from building contractor etc.**
>
> (1) If the authority makes any payment on a claim under the insurance scheme, the authority may recover the amount of the payment, as a debt, from the building contractor by whom the relevant residential construction work was, or was to be, carried out or any other person through whose fault the claim arose.
>
> …
>
> **111C Liability of directors for amounts**
>
> …
>
> (3) This section also applies if a company owes the authority an amount because of a payment made by the authority on a claim under the insurance scheme. …
>
> (6) If this section applies because of subsection (3), the liability to pay the amount attaches to—
>
> (a) each individual who was a director of the company when building work the subject of the claim was, or was to have been, carried out; and
>
> (b) each individual who was a director of the company when the payment was made by the authority.
>
> (7) A liability under subsection (4), (5) or (6) to pay a penalty or an amount applies regardless of the status of the company, including, for example, that the company is being or has been wound up."

[25] The first defendant's denial there is a debt owing,[31] insofar as it is founded on matters pleaded in paras 1 to 22 of the Defence, rather than the counterclaim, seemingly relies upon allegations that:

(a) the owners' contracts were not covered by the insurance scheme; or
(b) there were no defects; or
(c) the defects were not caused by the company; or
(d) the rectification costs were unreasonable; or
(e) the first defendant did not receive notice of the plaintiff's decisions which would have been reviewable.

These allegations all relate to various aspects of the process overseen by the QBSA, culminating in the QBSA's decision to make the payments to the owners that ss 71 and 111C in turn authorises it to recover as a debt from the first defendant.

[26] The applicant effectively contends the defence to its claim for the debt must fail because the validity of the process by which the plaintiff indemnified the owners

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[31] 1st DEF, [25].

and thus its right of recovery from the first defendant cannot be challenged in this proceeding.

[27] At first blush, it appears to be a bold assertion that a building company or its directors, who may dispute the existence of and liability for defects, must nonetheless pay the QBSA whatever amount for the cost of rectification of defects the QBSA decides to pay out to an owner under the statutory insurance scheme.

[28] However, the applicant emphasises s 86 of the *QBSA Act* provides rights of review of its decisions by a tribunal, defined in the Act as being QCAT, the Queensland Civil and Administrative Tribunal. Section 86 relevantly provided:

> "**86 Reviewable decisions (s 104 QBTA)**
>
> (1) The tribunal may review the following decisions of the authority—
>
> …
>
> (e) a decision to direct or not to direct rectification or completion of tribunal work;
>
> (f) a decision that tribunal work undertaken at the direction of the authority is or is not of a satisfactory standard;
>
> (g) a decision about the scope of works to be undertaken under the statutory insurance scheme to rectify or complete tribunal work;
>
> (h) a decision to disallow a claim under the statutory insurance scheme wholly or in part;
>
> (i) a decision that a domestic building contract has been validly terminated having the consequence of allowing a claim for non-completion under the statutory insurance scheme;
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> …
>
> (2) However, the tribunal may not review the following decisions of the authority—
>
> (a) a decision to recover an amount under section 71;
>
> (b) a decision to direct rectification or completion of tribunal work by a building contractor and any finding by the authority in arriving at the decision if—
>
> (i) 28 days have elapsed from the date the direction to rectify or complete was served on the building contractor and the contractor has not, within that time, applied to the tribunal for a review of the decision; and
>
> (ii) the authority has—
>
> …
>
> (B) served a notice on the building contractor advising a claim under the statutory insurance scheme has been approved in

> relation to tribunal work stated in the direction; or
>
> (c) a decision about the scope of works to be undertaken under the statutory insurance scheme to rectify or complete tribunal work if 28 days have elapsed since the decision was served on the building contractor and the contractor has not, within that time, applied to the tribunal for a review of the decision. …"

[29] Does s 86 preclude the first defendant, in defending the plaintiff's suit to recover the alleged debt, from denying there is a debt owing?

[30] Its content does not bespeak such a prohibition. Section 86 allows for review of some of the processes preliminary to payment of a claim, for example, a decision work is unsatisfactory or a decision as to the scope of rectification works required. However, s 86 does not specifically provide for a review of a decision to allow a claim, notwithstanding that it provides for review of a decision to disallow. Nor does it allow the tribunal to review a decision to recover the amount paid out from the building contractor as a debt pursuant to s 71. Why should the absence of provision for challenge of such matters by review before QCAT preclude dispute about such matters in a defence before this court?

[31] The plaintiff submits that absent an express power authorising a review there is no power for the first defendant to contest the validity of the QBSA's decision to indemnify.[32] The submission's premise is that there is otherwise no way to avoid the consequence that the QBSA's payment to a claimant becomes a debt recoverable under ss 71 and 111C.

[32] Whether the decision to pay the claims was reviewable under the *QBSA Act* or by way of judicial review cannot be determinative of the legal legitimacy of the first defendant's defence. The determinative question is whether the statutory right of recovery under which the claim is brought can be defended by reliance upon denials effectively alleging that the QBSA ought not have paid the amounts it now seeks to recover. The answer necessarily flows from the elements of the sections conferring that right and whether the substance of the pleaded denials disputes those elements.

[33] In the present context the critical element in s 71(1) is that the QBSA must have made a "payment on a claim under the insurance scheme" and similarly in s 111C(3) that there was a "payment made by the authority on a claim under the insurance claim" (emphasis added). In *Lange v Queensland Building Services Authority*[33] Margaret Wilson AJA observed:

> "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".[34]

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32 Plaintiff's Outline of Submissions, [121].

33 [2011] QCA 58.

34 Ibid [72].

[34] Those observations were made in the context of her Honour dealing with an issue that was not central to the appeal. The appellant contended the payment made by the QBSA was not paid under the insurance scheme because circumstances excluding its liability to pay under the scheme were present. It was submitted that the QBSA's entitlement to recover under ss 71 and 111C was not triggered if the payment was not made under the insurance scheme. However, her Honour rejected that argument because the trigger for recovery was the making of payment on a claim under the scheme, not of payment under the scheme.

[35] In *Lange's Case* the other members of the court declined to express a concluded view on the above obiter dictum of Wilson AJA. However, its persuasiveness was diluted by a qualification added by the President:

> "… it is in my view undesirable to express a concluded view on the point. I observe, however, that it seems unlikely that parliament would have intended for QBSA to recover from building contractors (or where building contractors are companies, their directors) payments wrongly made to those insured by the QBSA on policies entered into under Pt 5 of the Act."[35]

[36] It is undoubtedly correct that the relevant element, or trigger as Wilson AJA called it, is that there has been a payment on a claim under the insurance scheme. However, it is conceivable there may be incorrect facts or incorrect inferences of fact relied upon, in respect of a claim purportedly made under the insurance scheme and the nature of the error may be such that on the correct facts it cannot be said to have been a claim under the insurance scheme at all.

[37] Carried to its logical extreme in such a case, the applicant's argument, which in fairness it did not advance, would have to be that ss 71 and 111C ought be read as referring to payment on a claim "purportedly" made under the insurance scheme, regardless of any degree of factual error bearing upon whether it actually is a claim under the scheme. That would involve erroneous reliance on a qualification not present in the relevant sections.

[38] 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.

[39] The first defendant submits in effect that its defence identifies a number of allegations[36] raising triable issues as to whether the payment sought to be recovered by the plaintiff was a payment on a claim under the insurance scheme. The first of those allegations, that the contracts were cost plus contracts and thus not covered by the statutory scheme, may arguably ground an argument that the claims were therefore not claims under the insurance scheme. However, the link between the

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35 Ibid [3].

36 First Defendant's Outline of Submissions, [84].

allegation and that argument is not clear on the pleadings. It is of such importance that it should be - in order to prevent surprise at trial.[37]

[40] It is even less clear how the other allegations relied upon in this context may ground an argument the payments were not on claims under the insurance scheme. It is not enough to plead a denial and refer generally to other paragraphs in the pleadings as the reasons for the denial where the basis upon which those paragraphs constitute reasons is not obvious and is not explained.

[41] The lack of clarity stems in particular from the first respondent's denial of the debt near the conclusion of his defence:

> "25. In respect of paragraph 35 of the statement of claim, the first defendant:
>
> …
>
> (b) Denies that there is any debt owing to the plaintiff for the reasons given in paragraphs 1-22 and in the first defendants counterclaim."

[42] None of the content of paras 1–22 of the defence or of the counterclaim are expressed per se as "reasons" why there is no debt owing. The applicant ought not be left to infer in a speculative way how those paragraphs explain the denial. There should be a direct explanation for the first defendant's belief that the allegation a debt is owed is untrue.[38]

[43] Much of the content in the earlier paragraphs of the defence appears to dispute matters of fact relevant to the QBSA's decision as to whether and how much it ought pay on the claims. That is of doubtful relevance to the material issue, which is whether the payments were on claims under the insurance scheme.

[44] Despite that doubt the nature of the present application calls for caution before interfering at this early stage. It is inappropriate to strike out tracts of allegations in the defence which the first defendant's counsel submits raises triable issues as to whether the payment sought to be recovered by the plaintiff was a payment on a claim under the insurance scheme, unless there is no substance to that submission. As mentioned above there appears to potentially be some arguable substance to it as regards the first identified allegation but otherwise there is uncertainty because of the above-mentioned lack of clarity in the pleadings. That uncertainty stems from the lack of specificity as to the reasons relied on in para 25(b) of the defence. In the first instance it is that defect which much be addressed.

[45] The appropriate course at this stage is to strike out para 25(b) and give the first defendant leave to re-plead it or the whole of the paragraph, so that the explanations for the denial are properly articulated. In that way the first defendant can ensure its pleading articulates the reasons why the allegations it relies upon, or at least those it decides to persist in relying on, mean the payments sought to be recovered were not payments on claims under the insurance scheme.

The counterclaim

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37 See, *UCPR* rr 149(1)(c), 150(4)(c).

38 See *UCPR* r 166(4).

[46] The plaintiff's submissions advanced many arguments of divergent importance as to why the counterclaim must fail. That diversity is unsurprising. The counterclaim relies upon some creative reasoning in trying to blame the QBSA for damage to the company that appears to have been self-inflicted.

[47] In order to bring focus to the necessary analysis it is helpful to use the framework of the elements of negligence.

[48] The plaintiff submits, in effect, that the first defendant cannot prove:
(a) the plaintiff owed the first defendant a duty of care; or
(b) the plaintiff breached a duty of care; or
(c) the breach caused the damage suffered; or
(d) the damage suffered was not too remote a consequence of the breach.

[49] As will become apparent, the counterclaim is doomed to fail on the latter two of those four elements.

[50] It is necessary in the first instance to identify the first defendant's purported case in negligence as against the plaintiff.

The first defendant's case in negligence against the plaintiff

[51] In summary, para 10 of the counterclaim alleges the plaintiff owed the following relevant duties of care to the first defendant:
(a) to reject the company's licence application, because it was for a class of licence the company was not entitled to hold ("duty to reject the licence application"), and to notify the first defendant of the reasons for rejection;
(b) to not issue the class of licence applied for without enquiring of the first defendant and or company as to the classes of licence, then held by the first defendant, the company required ("duty to make enquiry in respect of the licence application").

[52] The breaches of these duties alleged in para 11 of the counterclaim are in summary:
(a) not rejecting the licence application;
(b) issuing a licence to the company:
    (i) without enquiring of the first defendant and or company whether the company also required the other class of licence then held by the first defendant, namely "builder – low rise";
    (ii) which was not for the other class of licence then held by the first defendant, namely "builder – low rise".

[53] In summary, para 18 of the counterclaim alleges the plaintiff owed the following duties of care to the first defendant:
(a) to reject the company's applications for insurance in respect of the first and second contracts on the grounds they were for insurance for works beyond that permitted by the company's licence, and to notify the first defendant of the reasons for rejection ("duty to reject the insurance applications");
(b) to reject the company's application for an increase in its allowable turnover on the grounds it contemplated the performance of works beyond that permitted by the company's licence, and to notify the first defendant of the reasons for rejection ("duty to reject the applications for increased allowable turnover").

[54] The breaches of those duties are alleged in para 19 of the counterclaim to be:

(a) accepting the company's payment for insurance for the first and second contracts and issuing the company with certificates of insurance;

(b) accepting the company's application for an increase in its allowable turnover.

[55] Some indication as to how those alleged breaches are said to have caused damage to the plaintiff is given by the allegation in the counterclaim that between August 2006 and March 2008 the company unknowingly carried out works beyond the work permitted by the company's licence.[39] It is pleaded that on becoming aware that was so, the company successfully applied for a "builder – low rise" licence and, according to the pleading, "the company's licence was then properly aligned with the first defendant's (as nominee) licence".[40] The inference implicit in the counterclaim is that the works which had been carried out beyond the company's "builder-open" licence, limited by condition as it was to renovations, repairs, alterations and additions, were works which would have been permitted under a "builder – low rise" licence unlimited by such conditions.

[56] The counterclaim pleads an "overview" as to how the first defendant's alleged negligence caused the first defendant loss and damage:

> "On or about 30 July 2009 the Company entered external administration as a consequence of parties with whom the company had entered into building contracts not paying the Company for building work performed pursuant to the building contracts due to the Company being prohibited by section 42(3) of the Queensland Building Service Act 1991 from recovering money under the building contracts because the Company had carried out work it was not licensed to carry out (but which the Company would have been licensed to carry out but for the plaintiff's and the second defendant's negligence)."[41] (emphasis added)

[57] Section 42 of the *QBSA Act* relevantly provided:

> "**42 Unlawful carrying out of building work**
>
> (1) A person must not carry out, or undertake to carry out, building work unless that person holds a contractor's licence of the appropriate class under this Act.
>
> …
>
> (3) Subject to subsection (4), a person who carries out building work in contravention of this section is not entitled to any monetary or other consideration for doing so."

[58] The counterclaim goes on to plead in effect that the company was thereby deprived of the opportunity to derive profit from various of its contracts and the defendant deprived of dividends that would have been paid to him from the company's profits.[42] It also pleads, as a consequence of the company entering external administration, the first defendant had to sell his Cannonvale property at a loss and

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39 CC, [20].

40 Ibid [22].

41 Ibid [23](a).

42 Ibid [23](b)-(g).

the company had to sell its boat at a loss, depriving the first defendant of dividends that would have been paid from the sale of the boat in due course.[43]

Duty of care

Issue of licence

[59] Of the duties of care enumerated in para 10 of the counterclaim, it is the alleged duty of care to reject or not issue (hereafter referred to simply as a duty to reject) the licence application, which was the prime focus of the first defendant's submissions resisting the application for summary judgment.

[60] The other main duty of care alleged in para 10 was the duty not to issue the class of licence applied for without inquiring of the first defendant and or company as to which classes of licence then held by the first defendant the company required. The articulation of that duty in the pleading implied a positive obligation upon the QBSA to double check with the applicant and nominee what class of licence the applicant required, notwithstanding that the application itself clearly indicated what class of licence was being sought. The alleged breach in para 11 of the counterclaim implies this duty to inquire extended to double-checking with the applicant and nominee whether the applicant required an additional class of licence held by the nominee other than that for which the applicant had applied.

[61] There is no provision within the *QBSA Act* and no feature of the factual circumstances of the case sufficient to warrant the imposition of a duty upon the statutory regulator to enquire of an applicant or its nominee whether they require a class of licence that has not been applied for. Indeed, the contention runs contrary to the QBSA's statutory obligation. That obligation relates to whether or not the licence class or classes applied for should be granted, not to whether the applicant ought to have applied for or might have overlooked applying for some different class of licence.

[62] The first defendant contends in effect that the QBSA has an obligation to investigate the suitability of the licence applied for in the context of the commercial intent of the plaintiff. Public policy considerations would inevitably preclude a trial judge from imposing upon a statutory regulator a duty to enquire into matters that are internal to the decision-making of a potential applicant. Such matters are no business of the regulator.

[63] For all of these reasons, the first defendant has no real prospect of a court finding the plaintiff owed it the duty to enquire pleaded in para 10 of the counterclaim.

[64] What though of the other duty included in para 10 of the counterclaim, the duty to reject the company's licence application?

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43 Ibid [23](h)(i).

[65] The plaintiff's statutory obligation under s 34(1) was to issue a licence if satisfied the applicant was entitled to it. This is a positive obligation and there is not a converse provision specifically dealing with the authority's obligation if it is not so satisfied. However, it is reasonably arguable that absent the satisfaction required by s 34(1) the QBSA is not empowered to grant a licence, from which it follows it arguably has a duty to reject the application in the absence of that satisfaction.

[66] Assuming there is a duty to reject a licence application if the QBSA is not satisfied the applicant is entitled to it, could that implied statutory obligation translate to a common law duty of care owed to the applicant and nominee?

[67] The first defendant emphasised the observations of McMurdo P in *Deepcliffe P/L* v *The Council of the City of Gold Coast*,[44] that a public authority might well be subject to a common law duty of care and consequential damages for negligence in circumstances where it is called upon to exercise a statutory power or to perform a statutory duty. More recently the President observed in *Meshlawn P/L v State of Qld*[45] that "this area of the law has developed and evolved since 1988 and continues to do so, although incrementally and cautiously". Her Honour there noted the importance, in this field, of public policy considerations and observed the High Court decision of *Stuart v Kirkland-Veenstra*[46] suggested that:[47]

> "… in determining whether, in light of public policy considerations, the exercise of a public authority's power involves a duty of care, the most salient feature is the operation and purpose of the statutory scheme which gives rise to that power."

[68] Given the obvious purpose of the licensing regime here is to protect potential customers it appears likely that any "duty" to reject would be owed to the potential customers of builders rather than builders. However, it is at least arguable that the regime in part also serves the purpose of protecting builders from themselves.[48] Thus there lingers an arguable prospect that there is a duty to reject owed to licence applicants.

[69] It is an argument of dubious merit. However, this is an area of the law that is not so well settled or simple that the determination of the present issue presents as entirely clear-cut. It is a determination of some complexity. Indeed, on the plaintiff's very thorough analysis there are at least six principles, one of which requires consideration of a further five salient matters, to apply.[49] Given the complexity of the issue its resolution is more safely suited to the setting of a trial.[50]

[70] In the circumstances, while the argument appears to be a weak one, I am not prepared to find there is no real prospect of it succeeding and to find that there is no need for a trial to determine the issue.

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44 [2001] QCA 342, [42].

45 [2010] QCA 181, [5].

46 (2009) 237 CLR 215, 239, 262-263.

47 *Meshlawn P/L v State of Qld* [2010] QCA 181, [9].

48 For instance, s 3 of the *QBSA Act* refers to achieving a reasonable balance between the interests of building contractors and consumers and providing support for those who undertake building work.

49 Plaintiff's Outline of Submissions, [80].

50 See, eg, *Theseus Exploration NL v Foyster* (1972) 126 CLR 507. See also *Moder v Commonwealth of Australia; Sochorova v Commonwealth of Australia* [2012] QCA 92 as an illustration of the need for caution where the hearing of the summary judgment application is an inadequate forum for the determination of complex legal issues.

Application for insurance

[71] The first defendant effectively alleges the plaintiff had a duty to reject the insurance applications if they were for insurance for works beyond that permitted by the company's licence.

[72] As earlier mentioned, s 68 provides a "building contractor" must pay the authority the appropriate insurance premium. The provision does not allude to a "licensed" building contractor. Section 69 requires that when the premium payment is accepted the authority must issue a certificate of insurance. There is no specific reference to any criteria by which the decision to accept the premium is determined. That is unsurprising given that the payment of the premium is not necessarily essential to the provision of insurance coverage. Section 69(2) contemplates a policy of insurance will come into force regardless of whether a premium is paid or a certificate issued if, in summary, a consumer enters a contract for residential construction work with a contractor licensed to carry out residential construction work covered by the scheme or with someone fraudulently claiming to be so licensed. Further, the generic insurance policy conditions which are in evidence[51] provided:

> "These policy conditions apply to residential construction work covered by the Statutory Insurance Scheme for which a premium has been paid, a contract entered, or work commenced (whichever is the earliest) on or after 29 September 2006." (emphasis added)

[73] This is a statutory scheme which insures the consumer even before the premium is paid. That tells strongly against the inference of any duty to reject insurance applications at all, let alone on the basis they relate to work beyond that permitted by the applicant's licence. So too does the fact the obligation to pay the premium is that of a building contractor as distinct from a licensed building contractor. The payment obligation is seemingly independent of the contractor's licence status. Moreover, even if such a duty exists, it is very unlikely that it would constitute a duty of care owed to a builder given the purpose of the statutory insurance scheme is to protect the consumer.

[74] However, despite the apparent force of the plaintiff's arguments based on the legislative provisions, those provisions do not provide much detail about the insurance scheme and none about the documents described in the pleadings as "applications for insurance". There is no evidence before the Court of whether the scheme has been documented in a form or forum by which builders are informed of its processes. Nor is there evidence of whether those processes stipulate any conditions upon which premiums will be accepted. There is no evidence before the court of what, if any, documents were exchanged in association with the premium payments. For example was there a form the insurer required to be submitted with the premium payment? The pleading contemplates there was an insurance application. What was in it? Did it require detail of the building work such as to raise an expectation the premium would not be accepted if the builder were not licensed to perform that work?

[75] In the absence of such evidence the setting of a trial looms as the safer forum to consider this argument determinatively. Again, while the argument in support of the first defendant's allegation appears to be a weak one, I am not prepared to find

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[51] Affidavit of Nerida Ruth Whelan (doc 19), ex NRW8.

there is no real prospect of it succeeding and that there is no need for a trial to determine the issue.

Application for increase in allowable turnover

[76] The question whether the plaintiff had a duty of care to reject the company's application for an increase in its allowable turnover on the grounds it contemplated the performance of works beyond that permitted by the company's licence was not the subject of material submissions.

[77] For present purposes it will be assumed that such a duty might exist.

Breach of duty

Issue of licence

[78] Analysis of the relevant legislative provisions[52] reveals an important distinction between classes of licence and conditions imposed upon licences. It demonstrates there is no substance to the first defendant's allegation that the plaintiff should have rejected or not issued the licence. To the contrary, the plaintiff was positively obliged to issue the licence.

[79] Part 3 of the *QBSA Act* deals with licensing. Section 30 provides that a licence is to be divided into classes by regulation:

> "**30 Classes of Licences**
>
> (1) A licence may be issued authorising the licensee –
>
> (a) to carry out, and to supervise, all classes of building work; or
>
> (b) to supervise (but not to carry out) all classes of building work; or
>
> (c) to carry out, and to supervise, building work of 1 or more classes specified in the licence; or
>
> (d) to supervise (but not to carry out) building work of 1 or more classes specified in the licence.
>
> (2) Licences are to be divided into classes by regulation–
>
> (a) according to whether the licence relates to all classes of building work or is limited to a specified class or specified classes of building work; and
>
> (b) if the licence is limited to a specified class, or specified classes, of building work–according to the class or classes of building work to which it relates.

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52 Provisions that are herein referred to are those that existed at the relevant time.

(3) A contractor's licence or supervisor's licence may be issued for any class of licence.

(4) However, a regulation may specify a class of licence to be a class that may be held and renewed by a person who held that class immediately before the commencement of the regulation specifying the class but may not, after the commencement of that regulation, be applied for by, or issued to, another person."

[80] Section 116(1) provides the Governor in Council may make regulations under the *QBSA Act*. Section 30 does not provide for the delegation of the Governor in Council's power to divide licences into classes to the QBSA. The QBSA cannot create a class of licence. Only the Governor in Council can do that, by way of regulation. In *Racecourse Co-operative Sugar Association Limited v Attorney-General (Qld)*[53] Gibbs J observed:

> "When a discretionary power is conferred by statute upon the Executive Government, or indeed upon any public authority, the power can only be validly exercised by the authority upon whom it was conferred. Its exercise cannot be delegated to someone else, unless the statute, upon its proper construction, permits such delegation."

[81] Section 34 provides for the circumstances under which the QBSA must grant a licence, namely:

"**34 Grant of Licence**

(1) If the authority is satisfied, on an application under this division, that the applicant is entitled to a licence, the authority must issue a licence of the appropriate class.

(2) A contractor's licence is to be in the form of a card stating –

(a) the licensee's name and licence number; and

(b) the class of building work the licensee is licensed to carry out;

(3) The authority may also issue a licence certificate in a form determined by the authority.

..." (emphasis added)

[82] Notwithstanding that s 34 requires that the QBSA must issue a licence of the appropriate class if satisfied the applicant is entitled to a licence, s 35 nonetheless authorises the QBSA to impose conditions:

"**35 Imposition of conditions etc. on grant of licence**

(1) A licence may be granted subject to such conditions as the authority considers appropriate.

…"

[83] In a similar vein s 36 allows the QBSA to impose conditions on licences already granted. The *QBSA Act* defines "condition" as including a limitation or restriction.[54]

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53 (1979) 142 CLR 460, 481.

54 *QBSA Act* sch 2 (definition of "condition").

[84] There is therefore an important distinction between classes of licences and conditions of licences. The classes of licence, which the QBSA may issue, are not classes created by the QBSA. They are a selection of licences fixed by regulation by the Governor in Council. However, the QBSA does have the power under s 35 to impose conditions on the classes of licences it issues.

[85] Another important feature of the licensing provisions is that where, as here occurred, a company is applying for a licence, it is necessary the company's nominee – the officer or employee it nominates to have supervision of building work carried out under a licence[55] – is licensed to supervise the same class of building work for which the company seeks a licence.

[86] Section 31(2) provides that a company is entitled to a contractor's licence if the QBSA is satisfied on application by the company for a licence that:

> "(b) the company's nominee holds a licence specifically identifying, as a class of building work that the nominee may supervise, the same class of building work for which the licence is sought by the company..."

[87] In the present matter, the first defendant, who was the nominee in the company's application for a licence, pleads he was licensed by the plaintiff as the holder of licence number 21581 in the classes of "builder – low rise", "builder – open restricted to renovations, repairs, alterations and additions".[56] "Builder – low rise" is a licence class pursuant to sch 2 pt 4 of the *Queensland Building Services Authority Regulation 2003* (Qld). "Builder – open" is a licence class pursuant to sch 20 pt 6. The regulation does not however describe any class of licence as "builder – open restricted to renovations, repairs, alterations and additions".

[88] It is apparent from the evidence filed, particularly the QBSA's licence searches, that the words "restricted to renovations, repairs, alterations and additions" relied upon by the first defendant as describing a class of licence held by him, actually described conditions imposed by the plaintiff upon the "builder – open" class licence which he held.[57] The first defendant's counterclaim is plainly wrong in quoting conditions to describe an alleged class of licence.

[89] This error infects the first defendant's counterclaim against the plaintiff. An essential factual premise of the plaintiff's duty of care as alleged in para 10 of the counterclaim is that the company's licence application "was for a class of licence the company was not entitled to hold because the class of licence applied for exceeded the classes of licence held by the first defendant as nominee". In fact, the licence application was for a class of licence described in the application form as "builder – open licence".[58] This did not exceed a class of licence held by the first defendant as nominee. The first defendant did hold such a class of licence.

[90] A problem which manifested itself in the future for the company was that it did not apply for a "builder – low rise" class of licence, which was another class of licence held by the first defendant. However, that merely meant it did not apply for as many

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55 Ibid (definition of "nominee").
56 CC, [3](a).
57 Affidavit of Paul Andrew Rojas (doc 9), ex 4 – 5.
58 Ibid, ex 8.

classes of licence as the first defendant held, not that it applied for a class of licence exceeding that held by the first defendant.

[91] The QBSA issued the company with the only class of licence that it applied for and, contrary to the first defendant's pleading, that class of licence did not exceed the classes of licence held by the first defendant. There was no breach of duty as pleaded regarding the licence.

A change of tack

[92] The first defendant's submissions sought to avoid the incorrect factual premise of the duty of care pleaded at para 10 of its counterclaim by identifying a different premise. Its submissions recast the QBSA's relevant conduct away from wrongly issuing a licence class exceeding that held by the first defendant (the unsustainable allegation discussed above) to wrongly issuing a licence for a class of building work exceeding that for which the first defendant was licensed.

[93] In explaining the consequence of the QBSA's alleged error as recast by its submissions, the first defendant points out that s 34(1) of the *QBSA Act* provides that the QBSA must issue a licence of the appropriate class if satisfied on an application under the division that the applicant is entitled to a licence. The first defendant submits the formation of that critical state of satisfaction is dependant on it being satisfied of the requirement stipulated in s 31(2)(b). The first defendant submits that because, on its interpretation, that requirement was not met, the QBSA should not have been satisfied that the company was entitled to the licence for which it applied and it should have rejected the application. The first defendant submits that the plaintiff's conduct in issuing the contractor's licence to the company was for these reasons ultra vires the *QBSA Act*.

[94] Unfortunately, this whole line of argument is grounded on a factual premise recast in submissions by the first defendant but not pleaded in para 10 of his counterclaim. At the very least some amendment of the counterclaim would be necessary if the counterclaim is to live on. But would that cure the problem?

[95] The first defendant's submission highlighted that s 31(2)(b) requires not that there be consistency between the "class of licence" held by the nominee and the "class of licence" applied for by the company. Rather, it requires consistency between the "class of building work" the nominee may supervise and the "class of building work" for which the company's licence is sought. The first defendant submits this is a subtle but important distinction. He asserts the latter requirement was not met because the first defendant's licences limited him to supervising[59] "works involving 'low rise' and 'renovations, repairs, alterations and additions'" whereas the company's applications sought "an open building licence, unlimited by any particular category or type of building work".[60]

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[59] The first defendant's licence entitled him to supervise building work. The *QBSA Act* sch 2 provides a contractor's licence means a licence authorising the licensee to carry out, and to supervise, building work. The *Queensland Building Services Authority Regulation* sch 3 provides a builder contractor's licence means, inter alia, a licence of a class in sch 2 pts 4 – 10.

[60] First Defendant's Outline of Submissions [26] – [27].

[96] Part of the statutory context in which the first defendant's submission falls to be considered is that a company's entitlement to a contractor's licence pursuant to s 31 does not remove the QBSA's power to impose conditions on that licence pursuant to s 35. Thus, where an applicant company applies for a class of licence that is the same class as one held by the company's nominee (and assuming the nominee's licence is in the class of licences which authorises the supervision of building work), but where the nominee's licence contains conditions, the QBSA can preserve consistency by imposing the same conditions upon the licence issued to the company. Indeed, that is precisely what occurred here.

[97] The first defendant's submission is, in effect, that even though the first defendant held a licence in the licence class "builder – open", which had the consequence he could perform building work on all classes of buildings,[61] the conditions on his licence meant he was restricted in the type of building work which he could carry out in respect of such buildings.

[98] The first defendant's interpretation implicitly draws upon the definition of "building work" in sch 2 of the *QBSA Act*, which refers to various types of activity, including:

> "(a) the erection or construction of a building; or
> (b) the renovation, alteration, extension, improvement or repair of a building …"

[99] The thinking underlying the first defendant's submissions is that the imposition of conditions restricted the types of building activity which the first defendant could supervise and this equated with a restriction of the "class of building work" specifically identified in his licence which he could supervise.

[100] The term "class of building work", as used in s 31 is not defined by the *QBSA Act* but its use in the preceding section, in the singular and plural, provides a powerful indication of the particular meaning it carries when used in pt 3 of the Act. In particular, s 30(2) provides:

> "Licences are to be divided into classes by regulation –
> (a) according to whether the licence relates to all classes of building work or is limited to a specified class or specified classes of building work; and
> (b) if the licence is limited to a specified class, or specified classes, of building work – according to the class or classes of building work to which it relates."

[101] That use of language in s 30 indicates the words "class of building work", as used in s 31, mean the building work that may be performed within a particular class of licence identified in the regulation, not the building activity that is referred to by a condition imposed on a licence.

[102] Such an interpretation is contextually consistent with the approach in pt 3 whereby the QBSA can impose conditions on particular licences but cannot itself create a class of building work to which a licence relates, that being a matter for regulation by the Governor in Council.

[103] In contrast, the interpretation of s 31(2)(b) urged by the first defendant is contextually inconsistent with the surrounding provisions. It would give rise to the

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61 *Queensland Building Services Authority Regulation* reg 2(1).

curious result that where a nominee's licence of a particular class contains conditions, the relevant company could not successfully apply for a licence of that class because it would necessarily be an application for a class of licence without the limiting effect of conditions attaching to it and thus a licence allowing work which is not the same as that which the nominee is licensed to supervise. Such a disentitling construction is at odds with the entitling purpose of the section.[62]

[104] For these reasons the interpretation of s 31(2)(b) contended for by the first defendant is incorrect. An amendment of the pleadings to accommodate the first defendant's contention would therefore be pointless. No trial is needed to determine this point. The first defendant is doomed to fail in its argument that the plaintiff should have rejected the licence application or not issued the licence. There was no breach of any duty by the plaintiff in respect of the issue of the licence.

Applications for insurance and increase in allowable turnover

[105] For present purposes this analysis is proceeding on the premise the alleged duties of care to reject the insurance applications and increased allowable turnover applications may have existed. It therefore also proceeds on the premise those alleged duties may have been breached by the acceptance of the insurance premium and issue of insurance certificates and the acceptance of the increased allowable turnover application.

[106] The analysis will also continue on the premise, notwithstanding my finding to the contrary, that there may have been a breach of the alleged duty to reject the licence application.

Causation

How could the breaches cause the company to work beyond its licence?

[107] Even assuming all of the alleged categories of breaches of duty of care may have occurred, what is the nub of the first defendant's case as to causation?

[108] In short it is that, had the plaintiff dealt with the applications for the licence, insurance and increased allowable turnover as it supposedly should have, the first defendant and or company would have been prompted into realising the company needed to apply for a "builder – low rise" class licence. This complaint is at the core of the first defendant's case in respect of all three categories of alleged breaches of duty, as was confirmed by the following submissions of counsel for the first defendant in this application.

[109] The first defendant submitted in respect of the licence application that the QBSA should not have been satisfied of the requirement stipulated in s 31(2)(b) of the *QBSA Act* and therefore should have rejected the application or alternatively made enquiry of the applicant. He submitted either of those events would have caused the first defendant to be "alerted to the anomaly in the licence application and taken action to ensure that an appropriate licence was issued in the company's favour".[63]

[110] The first defendant's submissions made a similar complaint with respect to:

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62 See s 14A *Acts Interpretation Act* 1954 (Qld).

63 First Defendant's Outline of Submissions [32].

> "(a) The Plaintiff having successfully applied for insurance upon certain contracts while the licensing deficiency remained in place;
>
> (b) The Plaintiff having sought and obtained from the Plaintiff approval for an increase in its allowable turnover."[64]

It was submitted that on each of those occasions the plaintiff considered and acceded to the company's applications in circumstances "that ought to have put the plaintiff on notice as to the existence of the company's licensing anomaly".[65]

[111] The first defendant contends that but for these acts by the plaintiff, the company and the first defendant "would not have been exposed to the risks associated with the licensing anomaly".[66]

[112] If that anomaly is that the licence should not have been issued then it is difficult to see how it occasioned risk to the company or the first defendant when it was the same class of licence as had been applied for and, when issued, carried the same conditions as the nominee's licence in that class.

[113] If the anomaly is that the company overlooked applying for and thus did not hold another class of licence, namely "builder – low rise", then it is difficult to see how the QBSA could be the cause of any risk flowing from that omission. Such a class of licence was not applied for and was not issued. The risk of harm or damage, which at least arguably warrants the existence of a duty of care to reject applications for licences, insurance or increase in allowable turnover, is the risk a company may perform work beyond the capacity or ability of it or its nominee, not that it will fail to read its licence or perform work for which it is not licensed.

[114] In purporting to explain its case the first defendant drew by way of analogy on the failure to warn cases.[67] But what was the QBSA supposed to warn the company and first defendant of? The company was given the class of licence it applied for. The conditions imposed on that licence were the same as the conditions on the company's nominee's licence. It is not to the point that the application had not requested the imposition of such conditions and that the QBSA decided to impose them. Conditions could be imposed by the QBSA regardless of whether they were sought by the company. It was the responsibility of the company and its nominee to ascertain from the content of the issued licence what it was in fact licensed to do. There was never any basis upon which they could blindly assume merely from the fact an application was made that the company would therefore be licensed, let alone be licensed without conditions. It was the licence once issued, not the application for it, which determined what work the company could perform. The licence when issued was, to use the language of the first defendant's analogy, the warning as to what the company was licensed to do. It was a matter for the company and its nominee as to whether they abided by the licence that had been issued.

[115] The first defendant submits the fact it was the company's responsibility to comply with the licence it was given is only relevant to contributory negligence and does

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64 Ibid [33] (citations omitted)
65 Ibid [34].
66 Ibid [35].
67 Ibid.

not detract from the QBSA's liability in negligence. However, damage is not actionable if it has not been caused by the fault of another. The damage complained of here is said to flow from the company having worked beyond the limits of the licence it was issued with. The company's responsibility to work within the limits of its licence and thus be aware of the content of the licence it was issued with presents an insurmountable obstacle to the inference of the necessary relationship of cause and effect between the alleged breach of duty and the alleged damage.

[116] The novel construct relied upon to meet the element of causation here is that because the plaintiff did not take action which, as an incidental consequence, would have prompted the company to realise it was going to undertake work it was not licensed to carry out, the plaintiff therefore caused the company to carry out work it was not licensed to carry out.

[117] How can such a construct overcome the reality that the company already knew it was working within a licensing regime and that in issuing the licence the plaintiff had in effect already told the company what it was licensed to do? It would require the imposition of a duty on the QBSA to double-check licensees have read the licences they are issued with. This is not quite the duty to make enquiry in respect of the licence application that has been pleaded, and which I have already explained is unsustainable. But it is akin to it. It is verging on a duty that is parental in nature. As a matter of policy and common sense no court would impose such a duty upon a statutory regulator. Moreover, there is no basis to infer such a duty from the legislative scheme or the circumstances of the case. In short, the construct relied upon to meet the element of causation is, in reality, untenable.

[118] There is no need for a trial on this point. The first defendant has no real prospect of success in proving the company's alleged negligence caused the company to work beyond the limits of its licence. This alone is fatal to the counterclaim.

[119] It is not the only fatal problem.

How could the damage have been caused by the company working beyond its licence?

[120] The next insurmountable difficulty with the first defendant's case is that the damage complained of was not caused by the company working beyond its licence.

[121] The only event said to be causative of the plaintiff's loss is that the company, having carried out work beyond the work permitted by its licence, was "prohibited" by s 42(3) of the *QBSA Act* from recovering money under building contracts. This reliance upon the operation of s 42 of the *QBSA Act* is misconceived.

[122] In *Beer v J.M. Kelly (Project Builders) Pty Ltd*,[68] Muir JA, with whom Holmes JA and Mackenzie AJA agreed, found the words "contractors licence of the appropriate class" in s 42(1) means a licence has the class described in the licence, namely one of the classes of licences provided for by the regulations, which his Honour observed may make provision for restricted classes, limited classes or subclasses. His Honour did not accept that s 42(1) should be taken as prohibiting building work beyond the limits of any conditions imposed upon a contractor's licence. His Honour observed:

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[68] [2008] 2 Qd R 199.

> "If it can be said that there is a deficiency in the scope of s. 42(1), it does not arise from an obvious omission or erroneous or inadequate drafting. Rather, it results from the failure of the Regulations to provide for a restricted licence class or classes. Also, there may have been sound policy reasons, other than those discussed already, for confining the prohibition in s 42(1) to persons not holding "a contractor's licence of the appropriate class". If the prohibition were to be extended to work done in breach of conditions or exceeding limitations imposed by licences, penal sanctions could be visited on contractors for trivial transgressions unlikely to have any detrimental impact on consumers. It is of particular significance that the Act makes specific provision, in ss 48 and 89, for action which may be taken in the event of a breach of a condition of a licence. Under s. 48 the Authority may suspend or cancel the licence. The penalties for breach of conditions are flexible and permit the imposition of penalties which reflect the gravity of the breach. That, one would think, is likely to accord with the legislative intention."[69]

[123] It is common ground that the company held a licence in the class of "builder – open". This has the consequence that the company could not have been in breach of s 42(1) and was thus not "prohibited" by s 42(3) from recovering money under the building contracts. If it carried out work in contravention of the conditions of that licence that may have had potential disciplinary consequences, but it did not preclude the company from recovering payment.

[124] The damage complained of was not, as a matter of fact, caused by the company having worked beyond the limits of its licence.

[125] Again there is no need for a trial in respect of this point. The first defendant has no real prospect of succeeding on it. Its counterclaim against the plaintiff is therefore doomed to fail for this reason also. Summary judgment should be given.

Remoteness of damage

[126] Further to the need to prove cause and effect, to attribute liability for damage to the plaintiff the damage allegedly suffered ought not be too remote a consequence of the alleged breach of duty.

[127] For the plaintiff to be liable to the first defendant for loss caused by a breach of the duty of care the general nature of the loss alleged by the first defendant must be reasonably foreseeable.[70]

[128] As is apparent from the causation discussion above, the prohibition, which allegedly resulted in the alleged loss, was non-existent. How then could the nature of the loss be foreseeable?

[129] The first defendant's response to this apparently further fatal flaw in its case was to highlight that the decision in *Beer's Case* had not been handed down until nearly the end of the era when the works the subject of the first defendant's complaint had

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69 Ibid 213.

70 *Perre v Apand Pty Ltd* (1999) 198 CLR 180; *Bryan v Maloney* (1995) 182 CLR 609.

been completed. Thus, it was submitted, *Beer's Case* is irrelevant in a temporal sense.

[130] The premise of such a submission is that the law was somehow different until *Beer's Case*, as if that case was akin to legislative change, as distinct from merely a case explaining existing legislation. The argument appears to be that, as a matter of fact, the plaintiff's conduct caused the loss because, rightly or wrongly, the first defendant thought it was prohibited from seeking payment because it had performed work beyond the limits of its licence because of the supposed breach of duty by the plaintiff. This is at best an argument that goes only to whether there is potentially evidence the breach caused damage. It cannot, even potentially, redeem the first defendant's position in respect of the remoteness of that damage.

[131] Again there is no need for a trial on this point. There is no real prospect of a court concluding the damage was not too remote in circumstances where it was not and could not have been foreseeable to the plaintiff that the first defendant would suffer damage because the company wrongly believed it was prohibited from recovering money. This is a further reason why the counterclaim against the plaintiff is doomed to fail.

[132] The first defendant's submissions sought to deal with this problem by another change of tack.

[133] It was submitted:

> "61. It was or ought to have been eminently foreseeable that the creation of an unwitting deficiency in Whitsunday Pole's licence status might create the opportunity for combative clients to withhold remuneration to which the company would otherwise be incontrovertibly entitled.
>
> ...
>
> 63. ...The complaint here is that were it not for the Plaintiff's failures in the first instance, the clients concerned would not have had <u>the opportunity</u> to justify non-payment of remuneration in purported reliance upon the Act."[71]

[134] This so-called "opportunity" to justify non-payment is not pleaded at all,[72] let alone as caused by the plaintiff or in turn as causative of loss. Nor has evidence been filed as to what, if any, justification for non-payment was used. But even disregarding these shortcomings the case advanced by the submission is unsustainable.

[135] The submission's reference to purported reliance upon the Act implies the justification for non-payment was an incorrect understanding that s42 precluded recovery. It strains reality to characterise the "opportunity" to use such an incorrect justification as having a causal role. The reality is that the opportunity for builders' customers to use incorrect excuses to justify non-payment is ever present in respect of any building contract. It is a risk of inherently unlimited scope.

[136] In essence the first defendant's submission seeks to redress want of foreseeability of the company wrongly thinking it was prohibited from recovering from a customer,

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71 First Defendant's Outline of Submissions, [61], [63] (emphasis in original)

72 The pleading in its present form asserts the loss derived from the above-discussed non-existent prohibition on recovery.

by moving the focus to something even more difficult to foresee, namely what incorrect justification a customer may choose as an opportunity to try and justify non-payment. Even if such an opportunity could be correctly characterised as providing a causal connection between the alleged breach and the damage allegedly suffered, reliance upon it would not solve, indeed it would highlight, the fatal problem that the damage alleged is too remote a consequence of the alleged breach.

[137] There is no real prospect of a court finding the alleged negligence was a sufficiently proximate cause of the alleged damage to establish liability. Again there is no need for a trial to determine the point. Summary judgment should be given.

Deficiencies – damages

[138] The plaintiff complained that the counterclaim fails to address the effect of s 42(4), which provides in effect that a person is not stopped under sub-s (3) from claiming reasonable remuneration for carrying out building work if the amount claimed does not include a profit margin. Given the damages as pleaded in the counterclaim make no reference to any diminution on account of the application of s 42(4), the plaintiff submits the extent of the damages claimed could not in any event have been foreseeable. This is either a major pleading deficiency or, more probably, a reflection of an unavoidable evidentiary deficiency in the first defendant's capacity to prove the full extent of the damages claimed. It is not a deficiency that would warrant the summary dismissal of the counterclaim.

[139] The plaintiff also submits that the counterclaim against it turns upon a loss allegedly suffered by the company and is therefore a loss that only the company is able to pursue. The first defendant's loss is pleaded, in effect, as flowing from his status as an employee[73] or shareholder,[74] in particular as a shareholder deprived of dividends that would have been paid to him but for the company's loss.[75] The plaintiff emphasises the damages pleaded did not arise out of any direct relationship between the plaintiff and the first defendant, but rather arise pursuant to the losses said to have been suffered by the company. Relying inter alia upon *Gould v Vaggelas*[76] the plaintiff submits the relevant general principle is that a loss incurred by a company can only be recovered by the company itself and is exclusive of any concurrent duty of care owed to a shareholder or employee.

[140] In *Thomas v D'Arcy*[77] McPherson JA, with whom Williams JA and White J agreed, referred to the three principles advanced by Lord Bingham in *Johnson v Gore Wood & Co*[78] in respect of claims by shareholders for losses which appear to be those of their company, namely:

> "(1) Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss…

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73 CC, [6], [9], [10]. However, the references to livelihood therein are not expressly relied upon in the subsequent pleading of loss and damage.

74 CC, [23].

75 Paragraph 23(h) contains the only pleading of loss which does not expressly plead loss of dividends but it does not suggest a reliance on loss other than by reliance on the first plaintiff's status as a shareholder or employee.

76 (1985) 157 CLR 215.

77 [2005] 1 Qd R 666, 671 et seq.

78 [2002] 2 AC 1, 35–36.

> (2) Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a cause of action to do so), even though the loss is a diminution in the value of the shareholding…
>
> (3) Where a company suffers loss caused by a breach of duty to it, and a shareholder suffers a loss separate and distinct from that suffered by the company caused by breach of a duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other…"

[141] The third of those principles, relevant here because of the pleading of duties owed to both the company and first defendant, was regarded by McPherson JA as consistent with the High Court's decision in *Gould.* McPherson JA observed that in *Gould* the High Court endorsed the rule in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)*[79] that:

> "a shareholder cannot recover damages comprising a diminution in the value of his shareholding which are a mere reflection of a loss suffered by a company of which he is a member. On the other hand, he is entitled to recover damages for a loss suffered by him personally that is separate and distinct from the loss suffered by the company."[80]

[142] The observations of Gibbs CJ in *Gould*[81] suggested the real difficulty in this area of law is that the distinction between damages which are merely a reflection of a loss suffered by a company and damages for a shareholder's personal loss, separate and distinct from the loss suffered by the company, may be difficult to draw in respect of the particular facts of a case. It is critical in this context to assess the true substance of the damages sought. As White J put it in *Thomas v D'Arcy*:

> "Where separate duties are owed to a company and an individual who happens to be a shareholder in the company it is the nature of the damages sought to be recovered which is important. If, no matter how pleaded, the damages are merely reflective of losses sustained by the company they may not be recovered by the individual. It is that characteristic which will be determinative."[82]

[143] In the present matter the counterclaim's pleading of deprivation of dividends[83] implies the loss is that of the first defendant, not the company. Unfortunately, there is no direct explanation pleaded for those deprivations and insufficient detail pleaded to reliably infer the causal explanation. However, with the exception of para

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79 [1982] Ch 204.

80 *Thomas v D'Arcy* [2005] 1 Qd R 666, 676. Subsequent to the hearing of oral submissions in this matter the parties directed the Court's attention to *Greene v McIver*[2012] QSC 181,[55] – [56] where it was observed a shareholder may be able to recover the loss of the value of the shareholding or the value of dividends the shareholder would have received. However, those observations were plainly not intended to be read in disregard of the principles (derived from the cases which were footnoted to the observations) that determine whether the loss is recoverable on the suit of the shareholder in a given case.

81 (1985) 157 CLR 215, 219.

82 [2005] 1 Qd R 666, 679.

83 Except for [23](h), which is even less clear.

23(h), which is even more inadequate in pleading the cause of the loss, the context in which they are pleaded invariably follows reference to the company's loss and is followed by a quantification of loss equivalent to that apparently suffered by the company. This suggests the very strong likelihood, adverse to the first defendant, that, with the exception of para 23(h), which presently denies sensible analysis, the damages sought are in substance reflective of losses sustained by the company.

[144] Unfortunately, there is little evidence relevant to the point before the court on the present application, making it difficult to look with confidence beyond the pleadings to the true substance of the damage.

[145] The plaintiff could not locate documents supporting the damages claim through disclosure and the first defendant declined its request for further and better particulars on the subject, ostensibly to avoid incurring potentially unnecessary cost pending the disposition of the summary judgment application.[84] As it has transpired, the first defendant has avoided that cost because, for the reasons already given, summary judgment will be given for the plaintiff on the counterclaim.

[146] But for that outcome I would strike out para 23, because its particulars do not adequately plead the exact circumstances in which the loss or damage was suffered,[85] give leave for it to be re-pleaded with adequate particularity and give liberty to apply so that the plaintiff would have a further opportunity, should it wish to persist, in advancing its summary judgment application on this issue.

Severance

[147] The plaintiff applies for severance of the third party claim by the first respondent against the second respondent, accompanied by the giving of leave to the first respondent to commence a separate proceeding against the second respondent. The application was apparently premised on the success of its application for summary judgment as against the first defendant.

[148] Its argument is that if the counterclaim against it is summarily dismissed, the utility in the matters being heard together is significantly reduced and the disadvantage to it commensurately increased. While it is unnecessary for every defendant to be interested in all the relief sought or in every cause of action,[86] delay and inconvenience occasioned by a lack of common interest in the claims and facts relevant to them may warrant an order for severance.[87]

[149] Having regard to those considerations, the divergence in the nature of the two cases, which will follow in the wake of the summary dismissal of the counterclaim, is so significant that they should be separated.

Application to consolidate

[150] The plaintiff also makes application for leave to commence a further proceeding, the intended claim and statement of claim for which are ex PAR2 to the affidavit of Paul Rojas, and to consolidate the claim and statement of claim to the current proceedings pursuant to *UCPR* r 78.

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84 Affidavit of Paul Andrew Rojas (doc 22).

85 See *UCPR* r 155.

86 Ibid r 66.

87 Ibid r 68.

[151] In essence, the plaintiff seeks to join with the existing proceeding a similar action to recover another debt because of an insurance payment made by it to another former customer of the company and first defendant. The same or substantially the same questions are involved in both proceedings and accordingly they meet a criterion for consolidation pursuant to r 78.

[152] Rule 78 contemplates consolidation of "proceedings" so it will be necessary for the proceeding contemplated by ex PAR2 to be commenced. Leave is sought for that to occur in the Supreme Court.

[153] The application is not opposed. In all the circumstances the orders sought should be made.

Orders

[154] I order:

1. Paragraph 25(b) of the defence is struck out and the first defendant has leave to re-plead it or the whole of the paragraph giving proper explanation for the denial of debt.
2. Judgment for the plaintiff on the first defendant's counterclaim (as it relates to the plaintiff).
3. The third party claim by the first defendant against the second defendant is set aside and leave given for the first defendant to commence a separate proceeding against the second defendant in respect of the matters raised in the third party claim.
4. Leave is granted for the proceeding identified in ex PAR2 to the affidavit of Paul Andrew Rojas, sworn 19 June 2012, to be commenced in the Supreme Court.
5. Leave is granted pursuant to *Uniform Civil Procedure Rules* 1999 (Qld) r 78 for the plaintiff to consolidate the proceeding instituted pursuant to order 4 to this proceeding.
6. I will hear the parties as to costs.