SUPREME COURT OF QUEENSLAND

CITATION:	*Coral Homes Qld Pty Ltd v Queensland Building Services Authority* [2013] QSC 171
PARTIES:	**CORAL HOMES QLD PTY LTD ACN 097 304 062** (applicant/respondent) v **QUEENSLAND BUILDING SERVICES AUTHORITY ABN 623 045 109 68** (respondent/applicant)
FILE NO/S:	BS 2730/13
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	11 July 2013
DELIVERED AT:	Brisbane
HEARING DATE:	8 April 2013
JUDGE:	Philip McMurdo J
ORDER:	**Application for review is dismissed.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – POWERS OF COURTS UNDER JUDICIAL REVIEW LEGISLATION – DECLARATIONS – DIRECTIONS TO ACT OR REFRAIN FROM ACTING – where respondent proposed to send letters to consumers of the applicant – where proposed letters outlined potential defects in the consumers' homes and remedies available – where applicant brought application seeking declaration that the respondent did not have the power to send out proposed letters – where applicant also sought declaration that respondent must provide applicant with reasonable opportunity to make submissions after being provided with the material upon which its proposed letter is based – where the applicant also sought an order preventing the respondent from sending the letters – where applicant brought its application on the grounds that the respondent had no power to send the letters, that by sending the letters the respondent would breach the requirements of natural justice and that the letters indicated the respondent could not bring an impartial mind to the exercise of its discretion – where the respondent brought an application for summary dismissal of the proceedings –

whether the applicant has any prospect of ultimately obtaining the declarations and orders it seeks – whether the applicant's grounds provide any basis for obtaining the relief it seeks

Judicial Review Act 1991 (Qld), s 43, s 48
Queensland Building Services Authority Act 1991 (Qld), s 3, s 5, s 72

Balog v Independent Commission Against Corruption (1990) 169 CLR 625; [1990] HCA 28, considered
Deputy Commissioner of Taxation v Salcedo [2005] 2 Qd R 232; [2005] QCA 227, cited
LCR Mining Group Pty Ltd v Ocean Tyres Pty Ltd [2011] QCA 105, cited

COUNSEL: P J Dunning SC with A D Scott for the applicant/respondent
D P O'Gorman SC for the respondent/applicant

SOLICITORS: Holding Redlich for the applicant/respondent
HWL Ebsworth for the respondent/applicant

[1] The applicant builds houses. The respondent is the Authority established under the *Queensland Building Services Authority Act* 1991 (Qld) ("the QBSA Act").

[2] Under Part 6 of the QBSA Act, the respondent is empowered to direct a person who carried out building work, which in the respondent's opinion is defective or incomplete, to rectify that work. The respondent has directed the applicant to rectify what it says is defective building work in the construction of some eight houses. It contends that the concrete slab in each house was defectively constructed, with the consequence that excessive movement has occurred in the structure of each house. The applicant challenges each direction in proceedings which it has brought in the Queensland Civil and Administrative Tribunal. In each case, the applicant's position is that the respondent should have exercised its discretion not to direct rectification because, the applicant contends, the fault was that of an independent consulting engineer who produced the structural design for each house. The applicant contends that according to a published policy of the respondent, a builder which adheres to such a design ought not to be required to rectify the problem.

[3] The respondent apprehends that there may be more houses than those eight, which have been constructed by the applicant with defective foundations. Therefore it proposes to write to the owners of some 628 houses which are in what the Authority has identified as "high risk" locations, meaning areas where the soils are especially reactive to changes in moisture content. It has identified those locations as including, but not limited to, the Darling Downs, the Lockyer Valley and Springfield Lakes. On 21 March 2013, lawyers for the respondent wrote to lawyers for the applicant, attaching a draft of the respondent's proposed letter to "potentially affected homeowners." The purpose of the present proceeding is to obtain relief which would prevent the respondent from sending such a letter.

[4] In the Originating Application as filed, the applicant sought a statutory order of review, pursuant to s 30(2)(b) of the *Judicial Review Act* 1991 (Qld) ("the JR Act").

This relief was to be sought for what was described as the conduct relating to a decision of the respondent to write the proposed letter. However, at the hearing of this matter, the applicant was given leave to amend its application, so as to delete the claim for relief under Part 3 of the JR Act and to confine its case for relief under Part 5. The applicant seeks orders pursuant to s 43 of the JR Act for declarations that the respondent has no power to send these letters. Alternatively, the applicant seeks a declaration that the respondent is not empowered to send these letters until it provides the applicant with what is described as a reasonable opportunity to make submissions to the applicant after the respondent provides the applicant with such detail of the evidence or other material upon which the respondent's decision to send the letters is based. It also seeks, pursuant to s 43, "an order in the nature of prohibition or injunction restraining the respondent from sending the letters."

[5] The respondent cross-applied for the summary dismissal of the proceeding pursuant to s 48 of the JR Act, arguing that there is no reasonable basis for the application. But for the withdrawal of the claim for relief under Part 3 of the JR Act, the respondent would have contended that its decision to send these letters was not a decision to which the JR Act applies because the decision did not itself confer, alter or otherwise affect legal rights or obligations, which is an essential criterion according to the joint judgment in *Griffith University v Tang*.[1] The applicant's abandonment of its claim for relief under Part 3 properly recognised this defect in its original claim. But still the respondent pressed its application under s 48, arguing that the applicant has no prospect of ultimately obtaining the relief which is now sought under Part 5.

[6] It is necessary to say something of the respondent's powers and responsibilities, defined as they are by the QBSA Act. According to s 3, the objects of the QBSA Act are as follows:

> "3 Objects of Act
>
> The objects of this Act are—
>
> (a) to regulate the building industry—
>
> (i) to ensure the maintenance of proper standards in the industry; and
>
> (ii) to achieve a reasonable balance between the interests of building contractors and consumers; and
>
> (b) to provide remedies for defective building work; and
>
> (c) to provide support, education and advice for those who undertake building work and consumers."

For present purposes, the most relevant of those objects are the provision of remedies for defective building work and the provision of "support, education and advice for … consumers."

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1 (2005) 221 CLR 99 at 130-131 [89] per Gummow, Callinan and Heydon JJ.

[7] Part 2 of the QBSA Act establishes the respondent Authority. By s 5, it is a body corporate which "has, for or in connection with the performance of its functions, all the powers of a natural person … ."

[8] The respondent is the body responsible for the licensing of builders, a function which is not however directly relevant to the present arguments. Its relevant functions are those under Part 5, which provides for the statutory insurance scheme, and Part 6, which provides for the rectification of defective or incomplete building work.

[9] Under Part 5, a licensed contractor must pay the appropriate insurance premium in respect of each contract for residential construction work and the respondent must issue a certificate of insurance in respect of that work which results in a policy of insurance coming into force for the benefit of the consumer.[2] A person claiming to be entitled to indemnity under this insurance scheme must give notice of that claim to the Authority.[3] If the respondent Authority makes any payment on a claim under the insurance scheme, it may recover the amount of the payment, as a debt, from the building contractor by whom the construction work was, or was to be, carried out or "any other person through whose fault the claim arose."[4]

[10] Within Part 6, s 71A requires a consumer, who wants the Authority to consider whether to direct rectification of building work, to apply in writing to the Authority setting out details of the consumer's complaint. The Authority may then require a consumer to comply with a process established by the Authority to attempt to resolve the matter with the person who carried out the building work.[5]

[11] Section 72 confers the power upon the Authority to require rectification of building work as follows:

> "72 Power to require rectification of building work
>
> (1) If the authority is of the opinion that building work is defective or incomplete, the authority may direct the person who carried out the building work to rectify the building work within the period stated in the direction.
>
> (2) In deciding whether to give a direction under subsection (1), the authority may take into consideration all the circumstances it considers are reasonably relevant, and in particular, is not limited to a consideration of the terms of, including the terms of any warranties included in, the contract for carrying out the building work.
>
> …
>
> (6) If in order to rectify building work it is necessary to do so, the direction may require that a building or

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2 s 69.
3 s 70.
4 s 71(1).
5 s 71A(4).

part of a building be demolished and building work be recommenced.

…

(8) A direction cannot be given under this section more than 6 years and 3 months after the building work to which the direction relates was completed or left in an incomplete state unless the tribunal is satisfied, on application by the authority, that there is in the circumstances of a particular case sufficient reason for extending the time for giving a direction and extends the time accordingly.

…

(10) A person who fails to rectify building work as required by a direction under this section is guilty of an offence.

…

(14) The authority is not required to give a direction under this section to a person who carried out building work for the rectification of the building work if the authority is satisfied that, in the circumstances, it would be unfair to the person to give the direction.

(15) A direction given under this section need not be complied with if—

(a) a proceeding for a review of the authority's decision is started in the tribunal; and

(b) the tribunal orders a stay of the decision."

[12] It is the discretion within s 72(14) which is at the heart of the applicant's argument, both in the cases before QCAT and here. The applicant says that it would be unfair for it to be directed to perform work which, although resulting in a defective structure, was performed according to a structural design by an independent consulting engineer. It refers to the respondent's own published policy, entitled "Rectification of Building Work Policy", which came into effect in 2010. That document relevantly provided that "it may be unfair or unreasonable … to issue a direction if the building contractor in carrying out the work has complied with schedule 1" of that policy.[6] Schedule 1 sets out what a building contractor must do, in the engagement of an engineer, to have the benefit of that discretion in the event of the construction resulting in subsidence. The applicant claims to have done everything required by Schedule 1 and argues that the respondent's stance, at least in the eight cases before QCAT, is inconsistent with its own published policy relating to its discretion under s 72(14).

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6 Exhibit DD-2 to the affidavit of David Harold Dawson sworn 5 April 2013.

[13] At a meeting between the parties in February 2013, it appears that the respondent disclosed that it was considering making payments under the statutory insurance scheme in relation to some hundreds of houses which had been built by the applicant. This resulted in correspondence between the parties' lawyers, beginning with a demand by the applicant's lawyers for copies of all claims or complaints received by the Authority and details of the houses under consideration for the purposes of the insurance scheme. On 12 March 2013, the respondent's lawyers sent a letter enclosing a copy of each complaint form which the respondent had received. But their letter also included this information:[7]

> "(a) Your client has built about 2300 which are currently covered by the Queensland Home Warranty Scheme (Scheme);
>
> (b) Of those premises, 628 are in what BSA [the respondent], has identified as 'high risk' locations (including, but not limited to, the Darling Downs, the Lockyer Valley and Springfield Lakes);
>
> (c) Given the issues with the slab design, BSA, as a proper regulator, has determined that it must take active steps to advise the owners of the premises in the 'high risk' areas of the issues so that:
>
> (i) They can make a complaint before the expiry of their coverage; and
>
> (ii) BSA can investigate and issue Directions/make payments as the case requires."

[14] On 15 March, the applicant's lawyers demanded an undertaking that the respondent provide 14 days notice prior to taking "active steps" as referred to in that letter, contending that the applicant may well suffer "enormous and unwarranted damage to its business reputation and goodwill" should those steps be taken.[8]

[15] On 19 March, the applicant's lawyers wrote again, this time demanding that the respondent provide particulars of those matters which had been set out in the letter of 12 March. The particulars which were demanded were as follows:[9]

> "… particulars of the definition of a 'high risk' location, including:
>
> (i) a detailed description of the method employed by the Authority to 'identify' purportedly high risk locations; and
>
> (ii) any research or data that has been obtained to support the 'determination' that a location is 'high risk'; …
>
> particulars of the 'issues' that the Authority:
>
> (i) has identified with the slab design; and
>
> (ii) proposes to advise the homeowners about; …

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7 Exhibit DD-7 to the affidavit of David Harold Dawson sworn 5 April 2013.
8 Exhibit DD-8 to the affidavit of David Harold Dawson sworn 5 April 2013.
9 Exhibit DD-9 to the affidavit of David Harold Dawson sworn 5 April 2013.

particulars of the manner and method of how the Authority will 'advise' homeowners [and] if that advice is to be in writing, then provide a draft of the advice."

[16] On 21 March, the respondent's lawyers replied, in terms which included the following:[10]

> "In relation to your correspondence dated 15 March 2013 (and subsequently demanded in your correspondence dated 19 March 2013), an undertaking in the terms requested will not be offered by our client.
>
> It is not our client's intention to damage your client's reputation or good will, or deny it procedural fairness.
>
> However, given our client's obligations under its legislation (most importantly to provide remedies for defective work) our client does not believe that it can simply sit on its hands in the present circumstances where a number of consumers may be adversely affected.
>
> We attach a draft of the correspondence BSA proposes to send to potentially affected homeowners. Our client will provide to your client a copy of each letter which it sends at the same time it sends it to a homeowner. The draft is provided solely for your client's information, but you will note that the correspondence does not identify your client and addresses the particulars you have sought in paragraphs (b) to (d) of your letter of 19 March.
>
> We confirm that only in the event of a complaint being made will our client carry out an investigation. Your client will be invited to attend any site meetings and to make representations regarding its work at that time (in accordance with usual practice)."

[17] The draft letter is as follows:[11]

> "Dear [Insert]
>
> SLAB FAILURES IN LOCAL AREA
>
> We understand that you are the owner of [insert address].
>
> As you may be aware, BSA is the state agency which has responsibility for:
>
> 1. Regulating the building industry; and
>
> 2. Maintaining the Queensland Home Warranty Scheme (Insurance Scheme).

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10 Exhibit DD-10 to the affidavit of David Harold Dawson sworn 5 April 2013.

11 Ibid.

BSA is aware that the soils in your local area (being [insert]) are highly reactive (in the sense that they swell during periods of high rainfall and they shrink excessively during periods of low rainfall).

BSA has become aware of a number of instances in [local area] where the installation of a particular type of slab has allowed the foundations of various houses to move excessively. This has resulted in (among other things):

1. Doors/windows jamming entirely and/or becoming difficult to open; and

2. Excessive slopes developing in the floor of various premises.

Other signs which may suggest that a house is suffering from excessive movement in its foundations are:

- Excessive cracking to internal wall linings such as plasterboard, particularly above or below windows or above door openings.

- Diagonal cracking to wall linings.

- Excessive cracking or stepped cracking to external brickwork or rendered wall surfaces.

- Excessive gaps occurring between window or door frames and external brickwork or rendered wall surfaces.

In the event that your house is suffering from excessive foundation movement, BSA may be able to assist you:

1. BSA may be able to assist you by directing the builder who built the premises to rectify the situation (known as a 'Direction to Rectify'); and/or

2. You may have a claim against the Insurance Scheme (and you may be eligible for up to $200,000,00 in payments/assistance to help with the rectification of the movement in the foundations).

We enclose a copy of the terms and conditions of the Insurance Scheme and we direct your attention to Part [insert] commencing on page [insert].

If you suspect that such movement is occurring and consequently to allow BSA to inspect your premises so that it can consider:

1. Whether to issue a Direction to Rectify and/or

2. Your eligibility to claim under the Insurance Scheme,

> we ask that you complete the enclosed complaint form. Strict time frames apply to claims under the Insurance Scheme and so if any issue exists please complete and return the complaint form to BSA urgently.
>
> We ask that all complaint forms by returned to the following address (by email and by post):
>
> We look forward to hearing from you.
>
> If you have any questions, please contact …
>
> Regards"

[18] The Amended Originating Application sets out three grounds which are as follows:

(1) The respondent does not have power to send the letters.

(2) By sending the letters, the respondent would breach the requirements of natural justice because it has failed to afford the applicant a reasonable opportunity to be heard.

(3) The proposed letters to homeowners together with the letters from the respondent's lawyers of 12 and 21 March 2013 give rise to a reasonable apprehension that the respondent will not bring an impartial mind to a decision whether to issue a direction for the rectification of building work in relation to any addressee of the proposed letter.

[19] The respondent argued that none of these grounds discloses a reasonable basis for any part of the applicant's claim for relief. For the applicant it was argued that one or more of the grounds has at least a sufficient prospect of success to warrant the case going further, rather than being summarily dismissed, and cited cases in relation to the discretion under r 292 of the *Uniform Civil Procedure Rules* 1999 (Qld), particularly *LCR Mining Group Pty Ltd v Ocean Tyres Pty Ltd*[12] and *Deputy Commissioner of Taxation v Salcedo*.[13] Clearly, those cases provide guidance for the exercise of the power under s 48 of the JR Act. However, the facts which are relevant to the claim for relief in these proceedings are very limited and apparently uncontroversial. Of course, there is obviously a substantial controversy in the QCAT proceedings, as it is to be expected there would be for any other house which the applicant may be required to rectify where the complaint relates to an inadequate structure which was designed by an independent engineer. But that factual controversy is not to be resolved in the present proceeding. The merits or otherwise of the applicant's case can be assessed now.

[20] For the first ground, it was argued that the Act contains no provision which empowers the respondent to write such letters. It was said that the respondent's function was to react to complaints, if and when made, rather than to encourage them.

[21] It was also submitted that the powers conferred by s 5 of the QBSA Act must be construed strictly, so as not to interfere with common law rights absent sufficiently clear language, for which was cited, amongst other cases, *Balog v Independent*

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12 [2011] QCA 105.

13 [2005] 2 Qd R 232.

Commission Against Corruption.[14] This argument was developed to a proposition that "any assertion by the Authority that it has power to take action which will prejudice the [applicant's] business goodwill and reputation must be scrutinised strictly."[15] But the particular common law rights, which might be compromised by an interpretation of the QBSA Act which authorised the proposed correspondence, were not identified. Ultimately, the argument seemed to be that the respondent's powers must be subject to a limitation that the private business interests of a person or company should not be even potentially affected, except where that power is more specifically conferred than by the terms of s 5. If I am correct in so interpreting the applicant's argument, it is one which cannot be accepted. It is an argument which goes well beyond the proposition for which *Balog* is an authority, and it involves a limitation which is not indicated by the terms of s 5 or otherwise by the QBSA Act.

[22] Upon this first ground, the applicant's argument at times seemed to suggest that the proposed correspondence would be beyond power because it would be for an improper purpose, in that the respondent should only be reactive to complaints as and when they are made. However, that confines too narrowly the functions of the respondent, having regard to the objects of the QBSA Act. As already noted, one of those objects is to provide support, education and advice for consumers.[16] Therefore, it is within the respondent's power to provide information to the public about the operation of the QBSA Act. That object would be promoted by the proposed correspondence to homeowners, although it would be the provision of information to a certain section of the public. The proposed letter would alert addressees to the possibilities of defects in their houses which are more serious than they might appreciate and to the existence of potential remedies under the QBSA Act. The letter would request the owner to make a complaint, but only if the owner, upon his or her own inspection, suspects that there is excessive movement in the foundations. To alert homeowners to such a problem and to encourage them to make a complaint in that circumstance is not improper; rather, it is to provide support, education and advice of a kind within s 3(c).

[23] In my view, the claim based upon this first ground could not succeed.

[24] In relation to the second ground, the argument for the respondent appeared to accept that there was some requirement to provide natural justice ahead of its sending the proposed letters, but that any such requirement had been met. The applicant said that the requirements of natural justice were more extensive, in that the respondent must provide the particulars which it had demanded and then provide the applicant with an opportunity to address those particulars in submissions or perhaps meetings.

[25] In the course of their oral submissions, counsel for the applicant were asked to identify or describe just what their client might put to the respondent which it had not put already, or at least had the opportunity to do so. They submitted that what had not occurred was a "meaningful dialogue", under which they might persuade the respondent that its concerns for these other houses were misplaced. The suggestion was that ahead of any communication to the homeowner, the present parties must have an extensive discussion about whether any defects in a certain house should be made the responsibility of the applicant. But that would appear to

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14 (1990) 169 CLR 625 at 635-636.

15 Submissions on behalf of the applicant, para. 16.

16 QBSA Act, s 3(c).

be unrealistic, in the circumstance where the respondent does not know which houses do have apparent structural defects, and if so their nature and extent. The proposed letters would be written with a view to identifying them.

[26] The applicant seems unable to identify any matter which it has been prevented from putting to the respondent, which would be of present relevance. By that I mean of relevance to the respondent's decision to send these letters, rather than any subsequent consideration of whether to exercise any of its powers under Parts 5 and 6 of the QBSA Act.

[27] Accordingly, the second ground could not provide a basis for the relief which is claimed.

[28] The third ground is a complaint of a breach of the rules of natural justice, not in deciding to send these letters, but if and when the respondent decides to give directions in relation to any of these houses under s 72. It was argued that a fair minded observer might reasonably apprehend that the respondent would not bring an impartial mind to the exercise of the discretion under s 72, having regard to the content of the letters of 12 and 21 March and of the proposed letters to homeowners.

[29] The letters from the respondent's solicitors and the proposed letters to homeowners would not provide a compelling case against any subsequent decision of the respondent under s 72. These documents, taken individually or together, do not suggest such a pre-judgment. In the letter of 21 March, the respondent's lawyers wrote that in the event of complaint being made, the respondent would carry out an investigation for which the applicant would be invited to attend any site meetings and to make representations in accordance with the respondent's usual practice. But in any case, this complaint is premature because it is one which must be made about any direction under s 72, if and when that is issued.

[30] Accordingly, this third ground could provide no basis for the relief which is sought. It follows that the respondent's cross-application under s 48 should succeed and the applicant's proceeding should be dismissed.