

**CITATION:** *Glen Williams Pty Ltd v Queensland Building Services Authority* [2012] QCAT 127

**PARTIES:** Glen Williams Pty Ltd t/a Glen Williams  
Constructions Pty Ltd  
v  
Queensland Building Services Authority

**APPLICATION NUMBER:** GAR322-10

**MATTER TYPE:** General administrative review matters

**HEARING DATE:** 22 March 2011

**HEARD AT:** Brisbane

**DECISION OF:** **Dr Bridget Cullen, Member**

**DELIVERED ON:** 22 March 2012

**DELIVERED AT:** Brisbane

**ORDERS MADE:**

- 1. The Queensland Building Service Authority's decision on 31 August 2010 to issue the Applicant with a Direction to Rectify and/or complete is confirmed.**
- 2. The parties are to bear their own costs of and incidental to the Application for Review.**

**CATCHWORDS:** Review of decision of Queensland Building Services Authority – direction to rectify – builder's obligations under the Building Code of Australia – followed certified Plans – decision confirmed

*Queensland Building Services Authority Act 1991, s 72(5)(b), Schedule 2*

*R v His Honour Judge Miller and the Builder's Registration Board of Queensland, ex parte Graham Evans & Co. (Qld) Pty Ltd* [1987] 2 Qd R 446

*Fontain v QBSA* [2004] QCCTB 163

*JM Kelly (Project Builders) Pty Ltd v Queensland Building Services Authority* [2010] QCAT 568

*Harold v QBSA* [1995] QBT 55

*Skinner v QBSA* [2005] QCCTB 172

*Lazinski v QBSA* [2010] QCAT 516

*Gary Norwood Homes Pty Ltd v QBSA* [1997] QBT 193

**APPEARANCES and REPRESENTATION (if any):**

<b>APPLICANT:</b>	Self-represented
<b>RESPONDENT:</b>	Queensland Building Services Authority represented by in-house solicitor, Scott Seefeld

**REASONS FOR DECISION****Overview**

[1] On 5 January 2004, Mr Glen Alan Williams of Glen Williams Constructions Pty Ltd signed a 'Master Builders Residential Building Contract' to complete the construction of a house situated on Dean Street in Red Hill ("the house"). On 23 March 2007, and after completion of the building works, the property was purchased by Mr Jamie Beresford, together with another person. Thereafter, on 16 March 2010, Mr Beresford made a complaint to the Respondent, the Queensland Building Services Authority ("QBSA"), relating to various construction defects in the house.

[2] Following lodgement of the complaint by Mr Beresford, an inspection was conducted by Mr Bruce Haines, who is a QBSA building inspector. Following upon his inspection, Mr Haines considered that there were defects in the house at Dean Street that were of sufficient magnitude to justify the issuing of a Direction to Rectify, which was done on 31 August 2010. The Direction to Rectify required that Mr Williams rectify the following items within twenty-eight (28) days:

*"1. Assessment of AS 1684.2 notes the 150x50 F4 hardwood internal floor joists located throughout the internal floor area of the dwelling are undersized for the span. As a result the internal floor presents excessive flex when walked upon and consequential damage due to the excessive flex in the floor has occurred to the ceiling cornice on the wall portion where centered (sic) over the joist span.*

*The Building Code of Australia section 3.4.3 requires timber framing to be designed in accordance with AS1684.2".<sup>1</sup>*

[3] Mr Williams submits to the Tribunal that he should not be required to rectify the floor joists in the house at Dean Street, for the following reasons:

- An independent inspection of the property in 2007, at the time of purchase by Mr Beresford, found that the building was structurally sound;
- Mr Williams was contracted by AAD Design ("AAD") to complete building of the house on Dean Street that had been designed by AAD in conjunction with the engineering firm of Warren Brown & Associates Pty Ltd ("Warren Brown");

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<sup>1</sup> Statement of Reasons, Exhibit 11.

- The home was subsequently certified by Building Approvals & Inspection Consultants Pty Ltd (“BA&IC”);
- AAD, Warren Brown and BA&IC were all engaged by the original owner of the Dean Street property, Mr Paul Swerdlow; and
- In light of the foregoing it would be grossly unfair to expect Mr Williams, as the builder, to have identified the issue of undersized floor joists, in circumstances where none of the designer, the engineer, or the private certifier had identified the problem.

[4] Notwithstanding the argument advanced by the Applicant, the QBSA considers that Mr Williams, as a licensed builder, should be expected to know that there was an error in the building plans, despite the error having previously escaped the attention of each of the independent inspector, AAD, Warren Brown and BA&IC.

### **Issues for determination**

[5] In making this decision, I have considered each of the following issues:

- (a) Is the building work defective?
- (b) Should Mr Williams now be responsible for the undersized floor joists?
- (c) Was it reasonable, in all the circumstances, for the QBSA to exercise its discretion to issue a Direction to Rectify to Mr Williams?

#### *Is the building work defective?*

[6] The QBSA submits that the appropriate size for the floor joists, in accordance with AS (Australian Standard) 1684.2, is 225 x 50 mm. The floor joists actually utilised in construction of the house on Dean Street were however 150 mm x 50 mm. These joists were installed as a single span, spanning up to 4200mm to the northern side of the centre bearer and 3800mm to the southern side of the centre bearer. Therefore, the spans are, respectively, 1200mm and 800mm longer than what is mandated as being permissible in these circumstances by AS1684.2-2006, Table 6, Supplement 14<sup>2</sup>.

[7] In order to comply with Table 6, the floor joists should be 225 x 50 mm and 200mm x 50mm, respectively. The QBSA submits that this amounts to substantial non-compliance with the relevant standard. Following upon his inspection, Mr Haines concluded that, due to the floor joists being undersized, the floor of the house was flexing excessively, thus causing consequential damage to the wall linings and cornices.<sup>3</sup>

[8] Mr Williams concedes that the floor joists are not in accordance with AS 1684.2 or section 3.4.3 of the Building Code of Australia (“BCA”), though

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<sup>2</sup> A copy of Australian Standard 1684.2-2006, Table 6 of Supplement 14 is attached to Exhibit 12, Statement of Reasons.

<sup>3</sup> QBSA’s Initial Inspection Report, dated 31 May 2010, SOR-7.

he contends they were “only 70mm outside the acceptable parameters at the time of construction”.<sup>4</sup>

- [9] Schedule 2 to the *Queensland Building Services Authority Act 1991* “QBSA Act” defines “defective”, in relation to building work, as including faulty or unsatisfactory building work. The QBSA submits that the term “faulty or unsatisfactory” includes building work that does not comply with the BCA and the relevant Australian Standard. Particularly in circumstances where this failure has led to consequential damage to the house, and in conformity with previous Tribunal authorities wherein similar findings had been made, I am satisfied that the building work performed by Mr Williams is now properly categorised as “defective”.<sup>5</sup>

*Should Mr Williams now be responsible for the defective building work?*

- [10] It follows from the foregoing analysis that I am satisfied that the undersized floor joists constitute defective building work. Consideration must now turn to a determination as to who bears responsibility for that, in circumstances in which the evidence reveals that the builder, Mr Williams, was merely following plans provided to him by an architect, in circumstances wherein a structural engineer had also had input to the design, and the works, as constructed, were then “signed off” by a private certifier.
- [11] Section 72(5)(b) of the QBSA Act states that the person who carried out the building work is taken to include a licensed contractor whose name, licence number and address is stated on the contract.<sup>6</sup> Here, Mr Williams’ name, licence number and address appear on the Master Builders Residential Building Contract. Moreover, Mr Williams, in his evidence, acknowledged that he was responsible for construction of the Dean Street house. For these reasons, I conclude that Mr Williams falls within the legislative definition of having “carried out” the building work.
- [12] The QBSA cites several previous Tribunal authorities in support of the contention that Mr Williams should now be held responsible for the defective building work, notwithstanding the circumstances of compounding error that I have described in paragraph [10], above. In *R v His Honour Judge Miller and the Builder’s Registration Board of Queensland, ex parte Graham Evans & Co. (Qld) Pty Ltd*<sup>7</sup>, the Full Court of the Queensland Court of Appeal (Connolly, McPherson and Derrington JJ) held that where a builder’s work is faulty or unsatisfactory, the discretion to direct the builder to rectify the defect is enlivened, but that, compliance with the contract or defective design are factors to be considered in exercising that discretion. In *His Honour Judge Miller*, however, the building owner, in an effort to cut costs, required the builder to use an inexpensive product that the court said was, “very likely against the advice of its own architect.” Similar circumstances do not exist here.

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<sup>4</sup> Affidavit of Glen Williams, sworn to 8 December 2010, paragraph 8.

<sup>5</sup> *Harold v QBSA* [1995] QBT 55; *Fontain v QBSA* [2004] QCCTB 163; *Leeds v QBSA* [2005] QCCTB 203; *Skinner v QBSA* [2005] QCCTB 172; *Lazinski v QBSA* [2010] QCAT 516.

<sup>6</sup> Residential Building Contract, Annexure No. SOE-1 to Affidavit of Glen Williams.

<sup>7</sup> [1987] 2 Qd R 446.

- [13] In *Fontain v QBSA*<sup>8</sup>, the Member upheld a direction to rectify in circumstances wherein the builder also adhered to building plans designed and certified by an engineer, finding that:

*It is the builder's responsibility to ensure the building work complies with relevant regulations of the building code of Australia; and further that*

*The law is well established that a builder cannot be excused from the responsibility to comply with manufacturers or regulatory body specifications simply because the architect's drawings were wrong*<sup>9</sup>.

- [14] The very same principles were applied in *JM Kelly (Project Builders) Pty Ltd v Queensland Building Services Authority*<sup>10</sup>, where QCAT considered a challenge to a direction on the basis that the builder followed the architect's plans. The Member held that:

*... section 72 of the Queensland Building Services Authority Act 1991 does place responsibility on a builder if the result of a builder following its client's design is that the building work is defective or incomplete.*<sup>11</sup>

- [15] The Tribunal later stated at [15]: '*as pointed out previously, defective design does not excuse defective building.*'

- [16] Whilst I understand Mr Williams' concerns that he was merely following the plans prepared by other professionals, the law in this area is now well settled. The QBSA Act is quite specific in making the builder responsible for any defective work, despite the involvement of other professionals. Here, for reasons of consumer protection, the intent of the parliament is to clearly lay responsibility for defective building works squarely at the feet of the builder. As unsettling as this is may be for builders, particularly, in circumstances where the professionals Mr Williams relied upon arguably have more specialist training and expertise than does he, it remains the clear intent of the QBSA Act. Moreover, it has previously been held that fault by the builder need not be established in order for rectification to be directed:

*Each case, however, will need to be determined according to its own facts, and fault or no fault will not necessarily be the determining factor as to whether or not the direction to rectify will be made.*<sup>12</sup>

- [17] Mr Williams submits that the building designer, engineer and private certifier involved should each be directed to share in the cost of rectification of works. QCAT does not have jurisdiction to make such an order in these proceedings, as this is a review of an administrative decision by the QBSA against Mr Williams, and the designer, engineer and private certifier are not parties to these the proceedings. In any event, Mr Williams may not be without consequential legal remedy. However, this is a matter for Mr Williams to agitate in separate proceedings, after having obtained appropriate legal advice.

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<sup>8</sup> [2004] QCCTB 163.

<sup>9</sup> *Ibid* at paragraph 19.

<sup>10</sup> [2010] QCAT 568.

<sup>11</sup> *Ibid* at paragraph 8.

<sup>12</sup> *Gary Norwood Homes Pty Ltd v QBSA* [1997] QBT 193.

### **Was it reasonable, in all the circumstances, to issue Mr Williams with the Direction to Rectify?**

- [18] Mr Williams has provided QCAT with statements which, in his view, demonstrate that he is not at fault for the defective, undersized floor joists. He argues that he was contractually bound to adhere to the design specifications contained in the certified plans, and is therefore not liable for the undersized floor joists.<sup>13</sup>
- [19] The QBSA submits that a licensed contractor is responsible for ensuring works are carried out in accordance with the relevant Australian Standards and the BCA, and that simply following approved building plans does not, of itself, relieve a contractor of that responsibility. Rather, in these circumstances, the QBSA submits that Mr Williams, as the licensed builder, should be expected to have the knowledge to be capable of determining whether the joints were undersized. Upon proper analysis the applicant's contention amounts to what might be described as the construction industry equivalent of the so-called "Nuremburg defence". As was the case at the War Crimes Tribunals in the aftermath of World War II, the defence of "only following orders" has been discredited.

### **Is "a little bit defective" still defective?**

- [20] As a further aspect of Mr Williams' position that it was not reasonable to expect him to detect that the floor joists were not in accordance with the BCA and AS AS1684.2, Mr Williams argues that the floor joists are "only slightly undersized". In my view, whether the building work is "just a little bit defective" is not a persuasive argument in terms of challenging the reasonableness of issuing a Direction to Rectify in these circumstances. The reality here is that the work, as completed, has caused considerable flex in the floor such that damage to the structure has occurred, albeit more than six years after the work was completed.
- [21] Justice Derrington, at [458] in *His Honour Judge Miller* (cited above) noted:
- In some circumstances, there is obvious need for protection of the owner even though the builder may be able to point to a term of the contract justifying the defective result, while in others the builder may be perfectly justified in conforming with the specifications and should not be required to remedy the defect.*
- [22] Here, the QBSA states that there is an obvious need for protection of the owner. Neither the previous nor current owners of the Dean Street house caused the defect, or were in a position to prevent the defect from occurring in the first place. In contrast, Mr Williams, with his building knowledge, was in a position to consider whether the floor joists were undersized in view of the spans. In these circumstances, I think it was reasonable for the QBSA to exercise its discretion to direct Mr Williams to rectify the defective building work.

### **Orders**

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<sup>13</sup> Affidavit of Glen Williams, sworn to 8 December 2010, paragraph 7.

- [1] Accordingly, the QBSA's decision on 31 August 2010 to issue Mr Williams with a Direction to Rectify and/or complete is confirmed.
- [2] The parties are to bear their own costs of and incidental to the Application for Review.