

CITATION: *Omae v Queensland Building Services Authority*
[2012] QCAT 80

PARTIES: Ms Makiko Omae
v
Queensland Building Services Authority

APPLICATION NUMBER: GAR356-11

MATTER TYPE: General administrative review matters

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: **Kate Buxton, Member**

DELIVERED ON: 24 February 2012

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. The application is dismissed.**
- 2. Submissions on costs be filed in QCAT and served on the other party by 1 March 2012.**
- 3. The issue of costs will be determined on the papers after 1 March 2012.**

CATCHWORDS: Building dispute – whether Tribunal has jurisdiction to review decision – proper characterisation of claim not within review jurisdiction – consideration of application to extend time

APPEARANCES and REPRESENTATION (if any):

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (QCAT Act).

REASONS FOR DECISION

- [1] Ms Makiko Omae is a homeowner who has, by application filed 4 November 2011, sought review of a decision of the Queensland Building Services Authority (the “BSA”) made 29 June 2011 (the “decision”).
- [2] The decision was the approval of the sum of \$19,561 as an insurance payment to enable rectification works to be carried out. That approval allowed Ms Omae to engage the contractor of her choice for the works, and was calculated on the basis of the most economical of three quotes

for the scheduled rectification works, the most economical quote being Mr Foote.

- [3] The application and attached correspondence discloses that Ms Omae seeks the review because, in her view:
- (a) The most economical quotation did not provide separate estimates for each item;
 - (b) The most economical quote was from a builder of “questionable reputation”.
- [4] The relief sought in the application includes:
- (a) A formal apology from the BSA; and
 - (b) A new accurate BSA estimate for the works; or
 - (c) Approval to use an alternative builder from the panel.
- [5] Ms Omae has sought an extension of time to review the decision as more than 28 days has elapsed prior to the filing of the application for review. The BSA opposed the extension of time and argued, in addition, that the review application is not within QCAT’s jurisdiction and should therefore be dismissed.
- [6] This Tribunal is now required to consider the parties’ written submissions and determine:
- (a) The issue of whether the application to review is within QCAT’s jurisdiction; and
 - (b) If so, whether an extension of time should be granted to permit the determination of the application.

Jurisdiction

- [7] The BSA have submitted¹ that QCAT does not have power to review the decision because the relief sought doesn’t relate to any decision reviewable by QCAT. Section 86 of the *Queensland Building Services Authority Act 1991* (Qld) (the “QBSA Act”) sets out the scope of QCAT’s review jurisdiction in respect of the QBSA’s decisions. Relevantly, that section provides:

86 Reviewable decisions

(1) The tribunal may review the following decisions of the authority—

...

- (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;*

...

(2) The tribunal must not review the following decisions of the authority—

...

¹ Written submissions filed 9 January 2012, paragraphs 13-17.

(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.

- [8] There is no evidence to suggest that part of the insurance claim has been disallowed as contemplated by s 86(1)(h). The application annexes not only the decision set out in the BSA's letter dated 26 June 2011 but also some of the BSA's internal documentation relevant to the quotation process. This documentation was obtained by Ms Omae through freedom of information. There is no suggestion, in correspondence, email or elsewhere, that the scope of works specified in the tender process was insufficient or that part of the necessary rectification works were omitted. Ms Omae does make such an assertion in her submissions in support of the application for the extension.² It is noteworthy that no particulars whatsoever have been supplied by Ms Omae as to the ways in which the scope of works or the approved claim may have been inadequate and the first time this unsubstantiated allegation makes an appearance in the documentation is in the written submissions filed in January 2012.
- [9] Therefore, based on the information available to this Tribunal, the BSA's decision is not one made under section 86(h) to disallow all or part of an insurance claim. Although there is discussion in the email exchanges between Ms Omae and Mr Foote, the most economical builder identified during the tender process, about the scope, where further information is sought of Mr Foote and provided by him, this does not appear to be a decision by the BSA about the scope of the works. Again, no particular deification in the scope of works are identified. It is not therefore a reviewable decision pursuant to section 86(1)(g).
- [10] The proper characterisation of the BSA's decision is one to allow an insurance claim in full and to value the claim both based on the most economical quote provided during the tender process. There is no suggestion that the tender process has miscarried in any way.
- [11] Ms Omae has expressed concerns that the builder who provided the most economical quote, Mr Foote, was not "reputable". However, what she seeks from this Tribunal includes an order that she can use another builder on the panel. She was entitled to engage the builder of her choice and does not need review of the decision to achieve this. The BSA decision makes this fact plain. However, because a builder properly included in the tender process has provided a more economical quote, the BSA are entitled to limit the value of the claim to the amount of that quote.
- [12] The highest and best analysis of the complaint articulated by Ms Omae is that she would have preferred a higher amount to be approved so that she could use not the most economical builder but a different builder who delivered a higher quote without having to make up any short fall herself.

² Written submissions filed 9 January 2012 paragraph 1.

In addition, she would have liked an apology (as she described the process as having been lengthy).³

- [13] This relief is not available in QCAT. This statutory Tribunal has only the review jurisdiction prescribed by enabling Acts such as the QBSA Act. If no reviewable decision can be identified which falls within QCAT's jurisdiction then the review application must be dismissed.

Dismissing under section 47 QCAT Act

- [14] QCAT may, on its own initiative, strike out or dismiss a proceeding (pursuant to section 47 QCAT Act) if the Tribunal believes the application is misconceived or lacking in substance.

- [15] For the reasons set out above, this Tribunal does not accept that the relief sought by the applicant is properly the subject of an application for review. It is therefore misconceived.

- [16] In any event, it appears that in relation to the release Ms Omae seeks:

- (a) The apology sought is not an order available on review and ought not properly form part of the application;
- (b) The "new accurate" estimate sought could only be obtained by the BSA undertaking the same tender process again. There is no serious suggestion that the process miscarried or that the applicant is entitled to orders requiring the BSA to undertake the process again. Indeed, there is not one item that has been identified by the applicant as not having been included in the scope of works provided to the tendering builders;
- (c) Ms Omae is entitled to use the builder of her choice (albeit that the insurance funds to pay for that builder are limited to the amount determined by the BSA). There is no ground to ask for a commensurate increase in the insurance fund simply because she preferred another builder.

- [17] The proceedings therefore lack substance and, further, for the reasons set out above, ought be dismissed pursuant to section 47.

Extension of time

- [18] It is not necessary for me to consider the issue of extension of time. However, I will do so for completeness, as this issue would arise if the proper characterisation of the application for review was in respect of a decision about the scope of works under section 86(1)(g) of the QBSA Act. Such a decision must not be reviewed if 28 days has elapsed prior to the application being made (section 86(2)(c)).

- [19] The decision as to the amount of insurance money to be paid was made by the BSA and received by Ms Omae on 29 June 2011. This application was filed on 4 November 2011, over four months later (and over three

³ See application filed 4 November 2011, especially part c page 5.

months outside the prescribed time limit). An application has been filed pursuant to section 61(1)(a) of the QCAT Act to extend time.

[20] The threshold question for determination by this Tribunal is whether there is jurisdiction to entertain the review application having regard to section 86(2)(c) of the QBSA Act. That section provides that the Tribunal can not review a decision in relation to the scope of works if 28 days have elapsed and no application for review has been filed within that time, as is the case here.

[21] In *Smith v QBSA* [2010] QCAT 448 at [30] Senior Member Oliver stated:

“Section 86(2) is a provision relevant to the substantive issue of whether jurisdiction exists to review a decision of the QBSA. Failure by a prospective applicant to file an application within the statutorily prescribed period of 28 days cannot be “cured” or “waived” by the operation of s.61(1) of the QCAT Act.”

[22] This decision was applied by Member Stilgoe (as she then was) in *Compig Pty Ltd v Queensland Building Service Authority* [2011] QCAT 255 at [2] and by Member Howe in *Cardillo v Queensland Building Services Authority* [2011] QCAT 574 at [15] where he stated:

“Section 86(2) of the QBSA Act is a statutory imperative that directs the tribunal not to exercise its powers of review in the circumstances prescribed by that provision. The power given the Tribunal to grant relief from procedural requirements such as the making of an application for review within 28 days of decision, contained in s 61 QCAT Act, can only be exercised within the bounds of jurisdiction. Section 86(2) declares that matters falling within that subsection are beyond the tribunal’s jurisdiction.”

[23] The statutory intention is plain. Section 86(1) prescribes matters that the Tribunal may review and section 86(2) of the QBSA Act prescribes matters which may not be reviewed. This application, if it were in relation to decision about the scope of works by the BSA falls within the second category and in circumstances where the application has not been filed in time there is no power under section 61 of the QCAT Act to provide relief for procedural requirements. The application is not within QCAT’s review jurisdiction.

Orders

[1] The application is dismissed.

[2] Submissions on costs be filed in QCAT and served on the other party by 1 March 2012.

[3] The issue of costs will be determined on the papers after 1 March 2012.