

**CITATION:** *Brown v Queensland Building and Construction Commission (No 2)* [2016] QCAT 7

**PARTIES:** Deborah Brown  
(Applicant)  
v  
Queensland Building and Construction  
Commission  
(Respondent)

**APPLICATION NUMBER:** GAR010-15

**MATTER TYPE:** Building matters

**HEARING DATE:** On the papers

**HEARD AT:** Brisbane

**DECISION OF:** **Member Gardiner**

**DELIVERED ON:** 7 January 2016

**DELIVERED AT:** Brisbane

**ORDERS MADE:**

- 1. The decision of the Queensland Building and Construction Commission dated 9 January 2014 is confirmed.**
- 2. The application for costs is dismissed.**

**CATCHWORDS:** BUILDING – REVIEW – Where application made to review decision made in 2014 that a certifier engaged in unsatisfactory conduct or professional misconduct – Where an extension of time granted – Where no inspection made of requirements of Bushfire Attack Level 29 by certifier – Whether unsatisfactory conduct or professional misconduct

*Building Act 1975 (Qld), s 204*

*Troy Richardson’s Building Approvals & Inspections v QBSA* [2013] QCAT 113;  
*Schwede v QBSA* [2009] QCCTB 157 referred

**APPEARANCES:**

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

## REASONS FOR DECISION

- [1] Siblings Deborah and Christopher Brown constructed a kit home on Fraser Island, completed in December 2010, using the services of a local builder.
- [2] On 8 February 2012 Ms Brown lodged a complaint with the Queensland Building and Construction Commission (as it is now) concerning the conduct of the certifier Luke Nicholas Owen-Jones with respect to the site.
- [3] The Commission says the effect of the complaint was that Ms Brown alleged Mr Owen-Jones issued a Form 21 Final Inspection Certificate when the dwelling did not comply with the requirements of Bush Fire Attack Level (BAL) 29 of Australian Standard 3959-2009 for the construction of buildings in bushfire prone areas.
- [4] Initially the Commission says the complaint did not identify Ms Brown's specific concerns and at the Commission's request, Ms Brown provided a list of her specific issues.
- [5] While Ms Brown did not consider BAL29 was generally complied with, her specific concerns related to the deck made of pine not kwila; no nylon brushes of external door seals on the garage door; sealing of roof gaps; lack of signoff for an inspection of the slab; inadequate stormwater pit and lack of insulation in the roof.
- [6] This complaint was investigated by the Commission and on 9 January 2014, the Commission advised Ms Brown of its decision. The decision was that Mr Owen-Jones engaged in unsatisfactory conduct under section 204(1) of the *Building Act 1975* (Qld) ('Building Act').
- [7] Mr Michael Pehrson, Senior Audit and Investigations Officer (Certification) with the Commission identified<sup>1</sup> that he believed Mr Owen-Jones had not inspected the work as required by the inspection guidelines in the final stage of 1a buildings for the construction requirements for bushfire prone areas. In particular, he should have confirmed the correct timber was used in the upper level deck framing and that the ends of the roof sheet over the ensuite were in-filled to stop hot ember penetration.
- [8] The Commission was satisfied Mr Owen-Jones breached the code of conduct for building certifiers by not complying with legislative requirements and not ensuring inspections are carried out.
- [9] The Commission reprimanded Mr Owen-Jones under section 204(4) of the Building Act and directed Mr Owen-Jones to provide specified documents to the Fraser Coast Council and to the Commission.
- [10] On 18 August 2014, Ms Brown made an application to extend time to review 2014 decision concerning the certifier.

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<sup>1</sup> In the Information Notice dated 9 January 2014.

- [11] On 30 September 2014, the Tribunal allowed an extension of time in relation to the decision concerning the certifier to 24 October 2014.
- [12] On 23 October 2014, Ms Brown filed a further review application with QCAT about this decision.
- [13] A joint conclave of experts with the Commission was convened by the Tribunal on 19 March 2015. This conclave was attended by Mr Laurence Eves from the Fraser Coast Regional Council and the expert from the Commission, Mr Michael Pehrson.
- [14] A joint experts report was filed in the Tribunal on 2 April 2015. In relation to the certifier, the background to the report shows that Ms Brown was concerned that the development approval lodged with the Council showed the site as assessed and approved as a BAL29 site and that the dwelling didn't comply with the requirements of the Australian Standard.
- [15] During its investigations into the complaint lodged by Ms Brown, the Commission engaged Mr Adrian Hansen, an expert in the assessment of bushfire prone areas to assess the site in relation to the correct Bushfire Attack level. Mr Hansen recommended the removal of some saplings and overhanging trees. After the builder undertook this, Mr Hansen confirmed and certified the site as BAL19 instead of 29.
- [16] The experts agreed that the original certifier Mr Owen-Jones should issue a new development approval that confirmed the Bushfire Attack Level of BAL19. Mr Owen-Jones had been directed by the Commission in the original decision of 9 January 2014 to lodge the new assessment and Form 16 certificate with the Fraser Coast Regional Council so that the information would be archived on the property file.
- [17] The submission of the Commission in this matter dated 20 October 2015 record that the certifier complied with these directions<sup>2</sup>.
- [18] A review is a fresh hearing to produce the correct and preferable decision<sup>3</sup>. The Tribunal can confirm, amend or set aside the decision and substitute its own or return it to the original decision maker<sup>4</sup>. The Tribunal is also required to fulfil its functions to achieve the objects of the QCAT Act by encouraging early resolution, minimising costs and conducting quick proceedings in an informal way in circumstances consistent with achieving justice<sup>5</sup>. The parties in this matter elected to have the hearing dealt with on the papers – without an oral hearing.

*The Review of the Decision of 9 January 2014*

- [19] In submissions filed by Ms Brown on 15 September 2015, she addresses her other concerns about the conduct of the certifier. These issues reflect

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<sup>2</sup> See paragraph 18.

<sup>3</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 20.

<sup>4</sup> *Ibid* s24(1).

<sup>5</sup> *Ibid* s4.

those raised by Ms Brown in her original complaint to the Commission in February 2012 and they are responded to by the Commission in its submissions filed 21 October 2015.

*Item 1 Non-compliance with All BAL29 provisions*

- [20] Ms Brown identifies this as a general complaint for the Commission to investigate. She provides no specifics under this complaint. Her major concern has been addressed as discussed above.

*Item 2 Non-compliant deck and eaves*

- [21] With the reclassification of the site to BAL19, and on the basis of Mr Hansen's report that the builder had sealed the ends of the ensuite eaves, the site now complies with the requirements of BAL19 and the use of pine is allowed under that standard<sup>6</sup>.

*Item 3 Roller door brush and seals*

- [22] Inspection by the Commission of the roller door on 25 October 2012 showed that the roller door had a complying rubber seal installed that sealed the door under the relevant standard and that the external garage door had a solid core, a storm seal installed and a timber member sill making it compliant with the relevant standard<sup>7</sup>.

*Item 4 Sealing roof gaps.*

- [23] As indicated above the builder had sealed the ends of the ensuite so this item had been rectified and was no longer of concern.

*Item 5 Form 21 does not have sign off for slab stage*

- [24] In its submissions, the Commission stated it did not have a full copy of the Form 21 so could not comment on this item<sup>8</sup>. However, the Commission had a copy of the Form 16 inspection certificate for the slab confirming the inspection had been done. The Commission further submitted that this item was irrelevant to the decision the Commission had made concerning the certifier.
- [25] Having examined the Commission's grounds for the decision it made concerning the certifier (the BAL classification), I am satisfied that this item is irrelevant to this matter.

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<sup>6</sup> Submission of the Commission dated 20 October 2015, paragraph 14.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

*Item 6 Inadequate Storm Water Pit*

- [26] This was determined by the Commission to not be defective building work<sup>9</sup>. Ms Brown has not provided any further evidence concerning this item to suggest this matter is relevant to the conduct of the certifier.

*Item 7 Ceiling Insulation*

- [27] Ms Brown alleges in her submissions that ceiling insulation has not been installed by the builder on the 1<sup>st</sup> and 2<sup>nd</sup> floor ceilings and that the certifier has provided a certificate confirming the correct insulation has been installed. She accepts that roof insulation was installed<sup>10</sup>.
- [28] The Commission submits<sup>11</sup> the builder did not install bulk ceiling insulation and reflective foil under the roof sheet as required by the contract. Instead, the builder installed foil backed, blanket type insulation under the roof sheeting and no bulk ceiling insulation. The certifier accepted a Form 16 from the builder stating the energy efficiency requirements were met.
- [29] The Commission engaged an independent report from Andrew Barrett, an independent energy efficiency expert, who concluded that the building was compliant with energy efficiency requirements.
- [30] The changes by the builder are suggested by the Commission to be a contractual matter for Ms Brown. The Commission says there is no evidence that the certifier engaged in unsatisfactory conduct or professional misconduct as defined by the Building Act in relation to this item.
- [31] On other matters addressed by the Commission in its submissions (the position of the house on the lot, original work rejected as contractual), the Commission says there is no evidence the certifier engaged in unsatisfactory conduct or professional misconduct as defined by the Building Act.

*Discussion*

- [32] Under sub-sections 204(1) and (2) of the Building Act, after a complaint has been lodged concerning a certifier, the Commission must decide whether or not the certifier has engaged in unsatisfactory conduct or professional misconduct and give notice to the complainant and the certifier of its decision.
- [33] “Unsatisfactory conduct” and “professional misconduct” are terms defined in the dictionary to the Building Act. “Unsatisfactory conduct” includes conduct that is contrary to a function under the Building Act including, for example, disregarding relevant and appropriate matters. It also includes a

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<sup>9</sup> Ibid paragraph 31.

<sup>10</sup> submission of Ms Brown dated 15 September 2015, page 12.

<sup>11</sup> submission of the Commission dated 20 October 2015, paragraph 32.

breach of the Code of Conduct for Building Certifiers<sup>12</sup>. Standard 10 of the Code requires a building certifier to ensure inspections are carried out to ensure building work complies with the development permit.

- [34] “Professional misconduct” is relevantly conduct that shows incompetence, or a lack of adequate knowledge, skill, judgment, integrity, diligence or care in performing building certifying functions, such that it compromises the health or safety of a person or the amenity of a person’s property or significantly conflicts with a local planning scheme and is contrary to a function under the Building Act or another Act.
- [35] The Commission refers to the decision of *Troy Richardson’s Building Approvals & Inspections v QBSA*<sup>13</sup> where the learned member relied on the following passage from *Schwede v QBSA*<sup>14</sup>. In the *Schwede* decision, the member commented that:-

Plainly, professional misconduct is a very serious matter: it is conduct that shows serious incompetence, lack of knowledge, judgement, integrity, diligence or care; it is conduct that compromises the safety of persons using buildings, the amenity of a property or significantly conflicts with local planning laws; it is unlawful conduct – in the sense of conduct contrary to the Acts regulating the functions of private certifiers; it is corruption in the sense of seeking or taking benefits in return for breaching the regulating Act or seeking to corrupt other private certifiers in the same way; it is defiance of the orders of the tribunal or the BSA; it is fraud, dishonesty, unethical and improper conduct.

- [36] The Commission has devoted considerable time and resources to investigating Ms Brown’s concerns both in this matter and in the related matter concerning the construction of the building itself. There are few remaining concerns and they are either limited or irrelevant to the review applications.
- [37] The Commission submits that the conduct of Mr Owen-Jones as certifier satisfies the test of unprofessional conduct in his not undertaking a personal inspection of the site but does not satisfy the higher test of professional misconduct as discussed in the *Richardson decision* above.
- [38] I accept and agree with this submission. I am satisfied Mr Owen-Jones’ conduct was either incompetent or a lack of adequate judgment, integrity, diligence or care in performing building his certifying functions, such that it compromised the health or safety of Ms Brown or the amenity of her property. It certainly significantly conflicted with the requirements of BAL29.
- [39] I am not satisfied the correct and preferable decision is to overturn the decision of the Commission made 9 January 2014 and that decision is confirmed.

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<sup>12</sup> Code of Conduct for Building Certifiers effective 14 November 2003 under s 32 of the *Building Act 1975* (Qld).

<sup>13</sup> [2013] QCAT 113 at para19.

<sup>14</sup> [2009] QCCTB 157 at para 65.

[40] As Ms Brown has failed in her application to change the decision of the Commission under review, her application for costs is also dismissed.