QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Nicholls v Queensland Building and Construction Commission & Anor* [2018] QCAT 432
PARTIES:	**STEVEN GEOFFREY NICHOLLS** (applicant) **v** **QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION** (first respondent) **TIMOTHY RAE & LYNETTE RAE** (second respondents)
APPLICATION NO/S:	GAR082-17
MATTER TYPE:	General administrative review matters
DELIVERED ON:	12 December 2018
HEARING DATE:	13 September 2018; 14 September 2018
HEARD AT:	Brisbane
DECISION OF:	Member Kent
ORDERS:	**1. It is ordered that the Queensland Building and Construction Commission's decision of 21 March 2017 that the Settlement Agreement was a building contract and that the Second Respondents had properly terminated it is affirmed.** **2. Parties have one month from the delivery of this decision to file with the Tribunal and exchange with each other any submissions on costs.** **3. The issue of costs will be considered on the papers by the Tribunal.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – OTHER MATTERS – Reviewable decision – s 86(1)(i) of the QBCC Act – reviewable decision - Settlement agreement- interpretation of settlement agreement – proper termination of contract – compulsory conference *Queensland Building and Construction Commission Act* 1991 (Qld), s 71A, s 72, s 86, s 87 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 6, s 3, s 9, s 17, s 20, s 21, s 24, s 35(3)(c), s 84, s 87, s 89, s 129, s 131, s 132, s 157, s 158, s 159, s 160

Uniform Civil Procedure Rules 1999 (Qld), r 668

Attwells & Anor v Jackson Lalic Lawyers Pty Ltd [2016] HCA 16
Auret v QBCC [2013] QCAT 623
Beverley Yule v Darcy Smith [2013] NSWSC 209
Chavez v Moreton Bay Regional Council [2009] QCA 348
Codelfa Construction Pty Ltd v State Rail Authority of New South Wales [1982] HCA 24
Electricity Generation Corporation t/as Verve Energy v Woodside Energy Pty Ltd (2014) 251 CLR 640
Fylas Pty Ltd v Vynal Pty Ltd [1992] 2 Qd R 593
General Credits Ltd v Ebsworth [1986] 2 Qd R 162
Goldfield Projects Pty Ltd v Queensland Building and Construction Commission [2015] QCATA 101
Harvey v Phillips (1956) 95 CLR 235
Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd [1989] HCA 23
Lightfoot & Anor v Temple [2010] QCAT 124
Maples Winterview Pty Ltd v Liu [2015] ACTSC 58
McEwen v Barker Builders Pty Ltd [2010] QCATA 49
Newcrest Mining Limited v Thornton [2012] HCA 60
Perkins v Queensland Building and Construction Commission [2017] QCAT 283
Perri v Cooloongatta Investments Pty Ltd 149 CLR 537
Sun Cool Pools & Spas v Freedom Pools & Spas [2005] QCCTB 4
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52
Wilson Four Pty Ltd v Sihota & Anor [2014] QSC 257

APPEARANCES & REPRESENTATION:

Applicant:	Mr J Hitchcock, A J and Co Lawyers
First Respondent:	Mr R Ensby, Gadens Lawyers
Second Respondent:	Ms C Ray, Construct Law Group Pty Ltd

REASONS FOR DECISION

Background

The current application: previous QBCC decision

[1] The current application arises from review proceedings which were commenced in the Tribunal by the Applicant, Mr Nicholls, who was the builder who engaged in a domestic building contract with the second respondents, Mr and Mrs Rae.

[2] The first respondent is the Queensland Building and Construction Commission (QBCC). What is sought to be reviewed in this application is a decision by the QBCC that the domestic building contract entered into between Mr Nicholls and Mr and Mrs Rae on the property located at 15 Carlingford Place, Robina QLD 4226 was validly terminated by the owners having the consequence of allowing a claim for non-completion under the Statutory Insurance Scheme.

Previous proceeding re: domestic building dispute

[3] There has been a previous proceeding in this matter which was BDL115-15 – *Steven Geoffrey Nicholls t/as Waterwood Homes v Timothy Rae and Lynette Rae*. On 23 June 2015 the Applicant commenced the domestic building dispute proceedings in the Tribunal claiming he had properly terminated the contract and seeking restitution for loss suffered by the Applicant, being the value of work performed by him up to the termination.

[4] On or about 22 July 2015, the owners filed a response and/or counter-application in QCAT, seeking a determination that their own termination of the contract was valid and claiming damages for breach.

[5] Statements of evidence were filed and there was a hearing listed to commence before the Tribunal on 8 August 2016. The Applicant and the respondent owners agreed to adjourn the hearing part-heard and convene a Compulsory Conference at QCAT on 8 August 2016 to try to settle the matter.

[6] At the Compulsory Conference , the Second Respondents and the Applicant entered into a written settlement agreement in respect of BDL115-15. The agreement document was drafted by the Tribunal Member and signed by the parties at the Compulsory Conference, and dated on the front page 4 August 2016 (it is accepted by all parties that the date was an error).

[7] The settlement agreement was later sent out by post and the date on that document is 9 August 2016.

[8] One of the terms of the settlement agreement was that the parties agreed to the terms of the settlement being incorporated, subject to such variations to wording as may be required, as the terms of a decision by consent of the Tribunal.[1]

[9] In addition to this signed document, on August 2016 the Tribunal made a decision by consent with respect to BDL115-15. The Tribunal decision noted that it was conditional on the QBCC accepting the appointment role set out in the Tribunal. The settlement agreement provided for the Applicant to perform building work as defined by the *Queensland Building and Construction Commission Act* 1991 (Qld) (QBCC Act). Some relevant terms were as follows:

(a) Paragraph 20(b) of the settlement provided that the QBCC were to report within 30 days of inspection and that after that the builder will undertake the following building works as identified in the QBCC report;

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1 Settlement agreement, paragraph 21.

(b) Paragraph 20(c) provided that the Applicant was to comply with the requirements in paragraph 10;

(c) Paragraph 10 provided that Mr Nicholls was to undertake the building work in the QBCC report within a specified period of time;

(d) If the QBCC was not prepared to comply with the terms of the agreement and the consent decision, the matter would be listed by the Tribunal for a further directions hearing.

[10] On 29 August 2016, the QBCC wrote to QCAT accepting the appointment in writing and agreeing to comply with the inspection requirements. On 30 August 2016, the Tribunal provided its final decision dismissing the application and counter-application in BDL115-15. This matter was heard on the papers.

The original dispute and settlement agreement

[11] Prior to the settlement agreement, the dispute centred around a contract for works entered into by Mr Nicholls and Mr and Mrs Rae on 17 March 2015 ('the original contract') for the construction of an extension to, and the renovation of a dwelling at 15 Carlingford Place, Robina.

[12] It was alleged that cover under the Statutory Insurance Scheme came into force in relation to the residential construction work pursuant to that contract.

[13] The works were not completed. Following a series of events, both Mr Nicholls and the homeowners contended breach of contract entitling each of them to a right to terminate the contract. Ultimately, after correspondence was exchanged by both parties, Mr Nicholls commenced the building dispute proceedings that were the subject of the settlement agreement.

[14] Post the Tribunal decision of 30 August 2016, the next relevant date was 3 November 2016, when the QBCC produced its inspection report. Thereafter events unfolded in the following timeline leading up to a purported termination of the contract (for the remedial work post settlement):

(a) On or about 4 November 2016, Mr Nicholls emailed the building inspector, Mr Luckan – an employee of QBCC, seeking clarification of a number of items referred to in the inspection report;

(b) On 6 November 2016, Mr and Mrs Rae wrote to Mr Nicholls advising of their requirements in relation to the settlement;

(c) On 7 November 2016, Mr Nicholls emailed an employee of the QBCC, Ms Zivkovic, seeking a response from the QBCC in relation to the email he sent to the QBCC on 4 November 2016;

(d) On 8 November 2016, Mr Luckan forwarded an email to Mr Nicholls in response to his email;

(e) On 10 November 2016, Mr Nicholls forwarded a further email to Mr Luckan seeking further clarification in relation to item 5 of the inspection report which dealt with the height of garage/carport;

(f) On 15 November 2016, Mr Zivkovic forwarded an email to Mr Nicholls responding to Mr Nicholls email;

(g) On 16 November 2016, the homeowners wrote to Mr Nicholls in relation to, among other things, Mr Nicholls' insurance coverage. On 28 November 2016, Mr Nicholls sent an email to Mr and Mrs Rae advising them that, first he would be applying for an extension of time to complete the work as he required clarification from the QBCC on the inspection report and as a result of the Christmas break, and providing a response to matters raised in the homeowners previous correspondence. The homeowners responded via email;

(h) On 30 November 2016, Mr Nicholls forwarded an email to the homeowners stating his position in relation to the garage door issue and suggesting an alternative option of a 'fillet' under the garage door;

(i) On 4 December 2016, the homeowners wrote to Mr Nicholls in response to his email advising of their requirements and arrangements in relation to construction and asking him to commence work as required by the settlement agreement;

(j) On 5 December 2016, Mr Nicholls forwarded an email from an expert engineer, Geoffrey Hills;

(k) On 8 December 2016, Mr and Mrs Rae received two emails from Mr Hills;

(l) On 13 December 2016, Mr Nicholls received an email from the development compliance officer at the Gold Coast City Council concerning the proposed vehicular crossing in relation to the property;

(m) On 13 December 2016, Mr Nicholls sent a Form 40 application to QCAT and requested clarification on the garage door threshold issue and an extension of time to perform work;

(n) On 19 December 2016, Mr and Mrs Rae posted a letter to Mr Nicholls seeking rectification of the defects not part of the inspection report to be rectified within 10 business days. Mr Nicholls ceased work due to the Christmas break on 21 December 2016, and alleges he did not read the letter until 29 December 2016;

(o) On 22 December 2016, in response to a phone conversation had with Mr Nicholls earlier in the day, Mr Luckan forwarded an email to Mr Nicholls. Mr Nicholls then forwarded an email in response to this and said that he had applied to QCAT for a ruling on the garage door threshold;

(p) On 29 December 2016, Mr Nicholls forwarded an email to Mr Luckan and Ms Zivkovic, forwarding the letter from the homeowners dated 19 December 2016;

(q) On 2 January 2017, the homeowners wrote to Mr Nicholls providing notice of their intention to terminate the settlement agreement unless the alleged breaches of Mr Nicholls were remedied within 10 business days;

(r) On 3 January 2017, Mr Nicholls wrote to Mr and Mrs Rae in response to their email of 2 January 2017 notifying them of his QCAT application;

(s) On 7 January 2017, Mr Nicholls filed a second Form 40 application in QCAT seeking to terminate the settlement and asking for the matter to return to the Tribunal for a determination;

(t) On 29 January 2017, the homeowners issued a notice to Mr Nicholls correcting minor errors to the notice of intention to terminate of 2 January 2017;

(u) On or about 1 February 2017, the homeowners received an expert report from Mr Hills dated 1 February 2017 which was filed in the Tribunal and attached to the first Form 40; and

(v) On 6 February 2017, the homeowners purported to terminate the settlement agreement in reliance on the matters set out within their notice dated 2 January 2017. Mr Nicholls sent them an email in response advising that he had applied to QCAT for a ruling. He also sent an email to the QBCC stating that the homeowners were well aware that the matter was back before QCAT for a ruling on the garage door threshold.

[15] Prior to this purported termination by Mr and Mrs Rae on 6 February 2017, Mr Nicholls had not carried out any of the works identified in the QBCC inspection report. He had had a site meeting with the Gold Coast City Council concerning their requirements concerning the proposed vehicular crossing and the levels required to be achieved in that regard. He had consulted with his building expert in relation to the garage door and he had applied to QCAT for determinations (on 16 December and 7 January).

Proceedings in QCAT

[16] On 8 February 2017, QCAT advised Mr Nicholls that his 16 December 2016 and 7 January 2017 applications were rejected pursuant to s 35(3)(c) of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) (QCAT Act) on the basis that an order had been made on 30 August 2016 dismissing the application and counter-application by consent, and accordingly there was no proceeding on which the applications filed by Mr Nicholls could be filed.

[17] On 13 February 2017, the QBCC emailed Mr Nicholls, stating that insurance cover in respect of the Statutory Insurance Scheme had recently been taken out for residential work at 15 Carlingford Street for a value of $50,000.00 and deducting the amount of $564.35 from the homeowners account in respect of the relevant insurance premium.

[18] On 16 February 2017, the QBCC forwarded an email to Mr Nicholls notifying him that the homeowners had filed a non-completion claim with the QBCC.

[19] On 18 February 2017, Mr Nicholls filed a Form 43 application with QCAT to apply to reopen BDL115-15.

[20] On 19 February 2017, Mr Nicholls emailed Ms Jessica Martin, the then Acting Area Manager for the QBCC, referring to his conversation he had with her on 17 February 2017 and advising that he was awaiting legal advice and that he would respond as soon as he had received it.

[21] On 22 February 2017, Mr Nicholls sent an email to the QBCC notifying it of the Form 43 application at QCAT. On 23 February 2017, the QBCC wrote to Mr Nicholls advising him of their opinion in relation to the status of the contract and the settlement agreement and requesting that Mr Nicholls provide any further information for consideration by the QBCC prior to making its decision.

[22] Mr Nicholls' solicitors, A&J Co Lawyers, wrote to the QBCC in response to the QBCC's correspondence and enclosed a copy of application for reopening, correction, review or amendment in respect of BDL115-15 proceedings.

[23] On 21 March 2017, the QBCC provided a response to Mr Nicholls' solicitor's correspondence and notified Mr Nicholls of the QBCC's decision that the settlement agreement was a contract for the carrying out of residential construction work for the purposes of s 68H(1)(a)(ii) of the QBCC Act and that the Second Respondents had properly terminated the Settlement Agreement as required by clause 1.2 of the Insurance Policy conditions (Edition 8).

[24] On 12 May 2017, QCAT dismissed the application to reopen or renew BDL115-15.

[25] On 15 May 2017, Ms Martin of the QBCC received an email from Mr Nicholls advising that he would like to process through the formal issuing of a direction to rectify and return to the site to rectify the defects. On 19 May 2017, Ms Martin forwarded an email to Mr Nicholls' solicitor concerning Mr Nicholls' confirmation that he would participate in QBCC dispute resolution through the formal issuing of a direction to rectify and details had been provided to him of contact details for the building inspector.

[26] On 21 May 2017, Mr Nicholls sent an email to Mr D Burling, a building inspector employed by the QBCC, for technical advice on achieving a level carport threshold. On 22 May 2017, Mr Burling forwarded an email to Mr Nicholls responding to his request for technical advice on how to rectify the defect in relation to the carport.

[27] On 22 May 2017, Mr Nicholls sent an email to Ms Martin attaching information requested by Ms Martin in a telephone conversation they had had earlier in the day. This included the report of Mr Hills.

[28] On or about 24 May 2017, the QBCC issued to Mr Nicholls a direction to rectify stating that the carport had not been constructed in accordance with the contract documentation in that the measurement for the garage door was 2.125m, instead of 2.4m in height.

[29] On 12 June 2017, Mr Nicholls forwarded an email to Ms Martin and Mr Burling advising that he had sent the information on 22 May 2017, and advised that he could only rectify the garage door as per the certified plans which show 2.4m to the centre

of the opening and disputed the contents of the QBCC report stating that the opening is 2.125 at the left hand side.

[30] On 13 June 2017, Ms Martin forwarded an email to Mr Nicholls advising the QBCC that she had not received an email from him dated 22 May 2017. The same day, Mr Nicholls forwarded to Ms Martin the email of 22 May 2017.

[31] On 14 June 2017, Mr Burling forwarded an email to Mr Nicholls in response to his email of 12 June about the garage door, stating that the QBCC believed that Mr Nicholls must achieve 2.4m across the entire opening.

[32] Between 24 May 2017 and 26 June 2017, Mr Nicholls undertook rectification work pursuant to the direction to rectify, including building work in relation to item 4 – the garage door.

[33] On 12 July 2017, Mr Luckan attended the site to inspect the works undertaken by Mr Nicholls pursuant to the direction to rectify. Others in attendance were Ms Martin, Mr Burling, and Mr Hills.

[34] On 13 July 2017, the QBCC wrote to Mr Nicholls confirming that the items in the direction to rectify had been satisfactorily rectified. It would appear that there were directions to rectify relating to claims other than the settlement agreement in this proceeding however the details of the other claims were not before the Tribunal.

[35] It appears that upon inspection the garage or carport opening's minimum height on the left hand side of the door opening was increased from 2.125m to 2.325m. The overall width of the opening of the garage or carport was 5.400m. Approximately 400mm from the left hand side of the opening towards the centre of the garage a height clearance of 2400mm was achieved. The height of the opening then increased from 2400mm moving from that point to the right hand side of the opening.

[36] On 22 August 2017, Mr Luckan prepared a reinspection report in relation to his site inspection of 12 July 2017.

[37] The Applicant applied to QCAT for a review of the QBCC decision of 21 March 2017 and at a later date the Second Respondents were joined as parties in the proceedings. Ultimately the application was heard on 13 and 14 September 2018 when there was evidence adduced by affidavit and *viva voce* and submissions were made orally and in writing.

The Tribunal's jurisdiction and statutory framework

[38] The Tribunal has jurisdiction to deal with matters under the QCAT Act or an enabling Act pursuant to s 9(1) of the QCAT Act. Section 9(2) of the QCAT Act confers on the Tribunal original jurisdiction, review jurisdiction and appeal jurisdiction.

[39] The QBCC Act is an enabling Act within the meaning of s 6(2) of the QCAT Act that confers review jurisdiction on the Tribunal. In the current case, it is the Tribunal's jurisdiction on review being exercised and the conferring legislation is s 86 and s 87 of the QBCC Act.

[40] Section 17 of the QCAT Act states that the Tribunal's review jurisdiction is the jurisdiction conferred on the Tribunal by an enabling Act to review a decision made or taken to have been made by another entity under that enabling Act. The decision made or taken to have been made under the enabling Act is a reviewable decision and the entity that made or is taken to have made the decision is the decision-maker.

[41] Section 86(1) of the QBCC Act sets out decisions which the Tribunal may review, thus those decisions are reviewable decisions within the Tribunal's review jurisdiction conferred by the QBCC Act and s 17 of the QCAT Act. Section 86(2) of the QBCC Act specifies specific decisions of the QBCC which are not reviewable by the Tribunal.

[42] Relevantly to these proceedings, s 86(1)(i) concerns decisions that a domestic building contract has been validly terminated having the consequence of allowing an insurance claim for non-completion of work.

[43] Section 20 of the QCAT Act identifies what is involved in a review proceeding:

> **20 Review involves fresh hearing**
>
> (1) The purpose of the review of a reviewable decision is to produce the correct and preferable decision.
>
> (2) The tribunal must hear and decide a review of a reviewable decision by way of a fresh hearing on the merits.

[44] The Tribunal's functions in a proceeding for a review of a reviewable decision are set out in s 24:

> **24 Functions for review jurisdiction**
>
> (1) In a proceeding for a review of a reviewable decision, the tribunal may—
>
> (a) confirm or amend the decision; or
>
> (b) set aside the decision and substitute its own decision; or
>
> (c) set aside the decision and return the matter for reconsideration to the decision-maker for the decision, with the directions the tribunal considers appropriate.
>
> …

[45] Once an application for review of a reviewable decision has been made, it is incumbent upon the decision-maker of the reviewable decision maker of the reviewable decision to assist the Tribunal so it can make the correct or preferable decision on review. Section 21 and s 157 to s 160 of Chapter 3 of the QCAT Act set out the relevant steps for the provision of a statement of reasons by the decision-maker. The purpose of the provision of a statement of reasons is to help the Tribunal and to inform the Applicant of for the reasons for the decision. A statement of reasons has been provided in these proceedings.

Written Submissions

Applicant's Submissions (Mr Nicholls)

[46] Mr Nicholls says the original insurance under the original building contract remains in force, because the settlement agreement:

(a) Was not a contract;

(b) Was not a building contract; and

(c) Did not affect the status of the original contract.

[47] He points to some of the formalities required by legislation but not provided for including cooling off periods and the nature of a tribunal order:[2]

> 45. The terms of settlement do not contain requisite features of a Domestic building contract as stipulated by the QBCC Act, specifically in:
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> a. s 14(3)(b), (c), (d),(e),(h) and (i);
>
> b. s 14(4);
>
> c. s 14(9);
>
> d. s 32;
>
> e. s 33 calculable delays;
>
> f. s 34 Incalculable delays;
>
> g. s 35 inclusions; and
>
> h. s 40 'No Contract' information statement.

[48] Further, it is submitted that the QBCC report was not performable regarding the garage door so the Applicant had no choice but to make the application to QCAT.

[49] Mr Nicholls submitted that the original building contract remained in force and that the settlement agreement was merely a variation of this original contract. This was despite Mr Nicholls accepting under cross-examination that he had sought an order from the Tribunal initially that the contract had been terminated and that it was no longer in force at the time of the hearing. Mr Nicholls, at times, was confused in his answers and therefore not always clear in what he was suggesting. He did suggest that he thought throughout the proceeding that the contract was the original contract, despite having made a number of statements in his applications to QCAT, and in his statements and cross-examination, that he had believed that there was a termination and he was seeking what he referred to as a ruling from QCAT that there was a termination.

[50] Mr Nicholls' written submissions indicated that it was his view that hat the original insurance under the original building contract remained in force, because the

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2 Applicant's written submissions filed 18 December 2017, para [45].

settlement agreement was not a contract, it was not a building contract and it did not affect the status of the original contract.

[51] Central to Mr Nicholls submissions was that as the settlement agreement terms were incorporated into an order by the Tribunal, the agreement could not be terminated by the parties. It was his submission that it could only be brought to an end or changed by the Tribunal itself.

The QBCC's (First Respondent) submissions

[52] The QBCC submitted that the settlement agreement has legal status as a contract, separate to the orders. Further it was submitted it must be construed objectively and not read with any reference to subjective intent and they referred to objective contract theory.[3]

[53] They submitted that the settlement agreement, as a separate agreement, was a new building contract with its scope dictated by the QBCC inspection report and therefore quite different from the original contract. It was their contention that the QBCC Act was then engaged regarding insurance for this new contract.

[54] The QBCC further submitted that the original agreement clearly came to an end prior to and/or by the time of the settlement agreement, pointing to:

(a) Both parties had consented that they had properly terminated; and/or

(b) Both parties had abandoned the contract.

[55] They also submit that alternatively, the contract was ended as a result of the settlement agreement. They give a number of alternative reasons for this. Firstly, novation (footnotes omitted):[4]

> The principles relating to novation were discussed in the High Court decision of *ALH Group Property Holdings Pty Ltd v Chief CMR of State Revenue*.
>
> Relevant to this matter, the principles are as follows:
>
> (a) a novation, in its simplest sense, refers to a circumstance where a new contract takes place of the old;
>
> (b) the enquiry in determining whether there has been a novation is whether it has been agreed that the new contract is to be substituted for the old and the obligations of the parties under the old agreement are to be discharged;
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> (c) the new contract can be between the same parties to the original contract or between different parties;
>
> (d) rescission and novation ultimately depend on intention and intention may be inferred from conduct. The common law allows a tacit agreement to

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3 *Toll (FGCT) Pty Ltd v Alphafarm Pty Ltd* (2004) HCA 52, [40]. See also *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Pty Ltd* (2014) 251 CLR 640.

4 Submissions of the first respondent filed 23 January 2018, paras [35] – [38].

extinguish the obligations under the existing contract and this is inferred when an inconsistent obligation is by agreement substituted.

If the original building contract was still on foot immediately prior to the parties entering into the Settlement Agreement, it is submitted that the Tribunal should find, applying the above principles, that the Settlement Agreement effected an implied novation of the original building contract, upon consideration of the objective intention of the parties, derived by reference to the terms of the Settlement Agreement. In particular:

(a) the fact that the parties could have, but did not, expressly provide in the Settlement Agreement that the original building contract continued is relevant; and

(b) the fact that the terms of the Settlement Agreement, as regards the further building work to be undertaken by the Applicant, are quite inconsistent with the terms of the original building contract, in, inter alia, the following respects:

(i) the scope of works to be carried out to the original building contract were agreed and identified by reference to the stated contract plans and specifications. In contrast, in the Settlement Agreement the scope of works under that Agreement was left to the sole assessment and determination in the QBCC in an inspection report. This is a fundamental difference in the two agreements, and there was no guarantee that the required scope of works under the original building contract and the Settlement Agreement would be the same;

(ii) the mechanism by which the Applicant was to be paid for the work undertaken pursuant to the Settlement Agreement (involving an assessment and determination by the QBCC on a re-inspection) was fundamentally different to the method provided in the original building contract for the Applicant to be able to claim payment for work undertaken;

(c) the fact that the parties expressly referred to the contract documents (in paragraph 8 of the Settlement Agreement) in the context **only** [original emphasis] of being reference documents for the QBCC to decide what it considered was the required works to be undertaken pursuant to the Settlement Agreement supports the conclusion that the objective intention of the parties was that the Settlement Agreement would replace the original building contract as regards the obligations of the parties in respect of the further construction to be undertaken by the Applicant reference document for the QBCC to ascertain, for the purposes of the Settlement Agreement, what it considered the further works the Applicant had to carry out as provided for in the Settlement Agreement.

For the above reasons it is submitted that the Tribunal should find the entering into by the Applicant and Second Respondent of the Settlement Agreement was inconsistent with the continuation of the parties' obligations under the original building contract, at least as regards the further construction work the Applicant was to carry out on the resident, and the payment entitlements the Applicant had in respect of such works. If it is accepted the Settlement Agreement effected a novation of the original building contract, the original building contract was no longer of any effect. The result is that the novation

> released the Applicant from, at least, any future obligations under the building contract, in particular the obligation to complete the agreed building works in the manner provided in the original building contract.

[56] Alternatively, accord and satisfaction effected the release of the obligations under the original contract (footnotes omitted):[5]

> Alternatively, it is open to the Tribunal to find that the obligations under the original building contract were released, as the Settlement Agreement amounted to an accord and satisfaction of the rights and obligations of the Applicant and the Second Respondent arising from the original building contract.
>
> In the Application and Counter Application filed by the Applicant and Second Respondent in BDL 115-15, both parties made claims arising from each parties' purported termination of the original building contract.
>
> At common law, an obligation created other than by deed could be released by an agreement for valuable consideration if it amounted to an accord and satisfaction. The question as to whether there has been an accord and satisfaction is one of fact. It turns upon determining the parties' intentions, which may be discerned from the terms of any document said to constitute all or part of the agreement or in the surrounding circumstances.
>
> As regards the objective intention of the parties, reference is made to the submissions as paragraph 37 [of the QBCC's submissions filed 23 January 2018] as being relevant and being in support of a finding that the Settlement Agreement amounted to an accord and satisfaction of the parties' rights and obligations under the original building contract.

[57] In the final alternative, the QBCC submitted that there was implied rescission of the original contract (footnotes omitted):[6]

> If it was the case that the original building contract was on foot immediately prior to the parties entering into the Settlement Agreement, it is also open for the Tribunal to find that there was an implied rescission of the original building contract as a result of the parties entering into the Settlement Agreement. In that event, there was an accord and satisfaction of the original agreement.
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> In the High Court decision of *Commissioner of Taxation (Cth) v Sara Lee Household & Body Care (Aust) Pty Ltd*, the plurality referred with approval to the decision of Taylor J in *TALLERMAN & Co Pty Ltd v Nathan's Merchandise Victoria Pty Ltd* where his Honour said:
>
> > It is firmly established by a long line of cases … that the parties to an agreement may vary some of its terms by a subsequent agreement. They may, of course, rescind the earlier agreement altogether, and this may be done either expressly or by implication, but the determining factor must always be the intention of the parties as disclosed by the later agreement.

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5 Submissions of the First Respondent filed 23 January 2018, paras [39] – [42].

6 Submissions of the First Respondent filed 23 January 2018, paras [43] – [46].

> It is submitted that the objective intention of the parties (as revealed by the matters referred to in paragraph 37 [of the QBCC's submissions filed 23 January 2018]), support a finding that the effect of the parties entering into the Settlement Agreement was to rescind the original building contract.
>
> For the reasons indicated in paragraphs 37-45 [of the QBCC's submissions filed 23 January 2018], whether by way of application of the principles of novation, accord and satisfaction, or rescission, it is submitted that if it is considered that the original building contract was still on foot immediately prior to the parties entering into the Settlement Agreement, the effect of the Settlement Agreement was to end the rights and obligations that arose from the original building contract in in its place, the parties' rights and obligations were as contained in the Settlement Agreement.

[58] Further, the settlement agreement was a domestic building contract and a contract for carrying out residential construction work (if there is any tension between those terms). At paragraph [54] of their submissions, the QBCC deals with Mr Nicholls' submissions on this (emphasis original):

> With reference to paragraph 44 [of Mr Nicholl's submissions], using the same headings and lettering as that paragraph, the Commission submits as follows:
>
> **a. There was no new contract work anticipated, only completion of existing scope of works on specific terms**
>
> For the reasons indicated in paragraphs 37 – 46 [of the QBCC submissions filed 23 January 2018], it is submitted that the Settlement Agreement was intended to be a new agreement as to the building work the Applicant was to carry out for the Respondents, in place of the original building contract. It is not the case that the Settlement Agreement required the Applicant to complete the scope of works as expressed in the original building contract. The scope of works in the original building contract was determined by reference to the plans and specifications and other relevant contract documents. The Settlement Agreement provided a quite different basis upon which the scope of work to be undertaken by the builder pursuant to the Settlement Agreement was to be identified, i.e., by the QBCC in an inspection report and the scope of works required a determination by the Commission as to matters referred to in clause 9 of the Settlement Agreement;
>
> **b. The document is not expressed to be a contract**
>
> Whilst the Settlement Agreement was not expressed to be a contract, it was, in fact, a contract.
>
> **c. There are no terms in it suggesting that any party intended the terms of settlement to be an independent domestic building contract upon new terms**
>
> The fact that the Settlement Agreement did not expressly provide in the Settlement Agreement that was an independent domestic building contract upon new terms is not at all determinative – as submitted in paragraph 37 [of the QBCC's submissions filed 23 January 2018], it is submitted that the clear objective intention of the parties in entering into the Settlement Agreement was to provide for a new contractual arrangement whereby the Applicant agreed to carry out building work on an agreed basis.

d. The member had no authority under s84 of the QCAT Act to draw a new building contract

Section 84 of the QCAT Act merely allows the Member presiding at the compulsory conference to record the terms of the settlement in writing. There is no restriction expressed in section 84 as to the nature of the settlement that may be recorded by the Member and there was no reason why a settlement recorded may not, in fact, also constitute a new building contract.

e. It was open to the member to have provided for termination of the former contract as a term of the settlement, but he didn't

Pursuant to section 84, a Member may record the terms of settlement – there is no provision in the QCAT Act for a Member to advise the parties as to what terms should be included in the settlement. The Settlement Agreement was an agreement between the Applicant and the Second Respondent, and it was a matter for those parties as to what would be the agreed terms of the document.

f. It was open for the terms of settlement to provide for execution of a new contract, as an order, but it didn't

Whilst it is correct that the Settlement Agreement did not provide, **either way**, what the status of the original building contract was in light of the parties entering into the Settlement Agreement, that is not at all determinative of the issue. As submitted in paragraph 37 [of the QBCC's submissions filed 23 January 2018], it is clear that the objective intention of the parties in entering into the Settlement Agreement was that its terms were to reflect rights and obligations of the parties in respect of the further building work to be undertaken by the Applicant in respect of the construction.

g. The terms of settlement don't contain the features of a Domestic Building Contract

This is addressed in paragraphs 55 – 60 [of the QBCC's submissions filed 23 January 2018] (relating to paragraph 45 of the Applicant's submissions).

h. The terms of settlement do not create fresh contractual rights

The Settlement Agreement created new contractual rights and obligations for both the Applicant and the Second Respondent, which cannot be said to be the same as the rights and obligations arising from the original building contract. In a number of important respects, those rights and obligations are fundamentally different from that provided in the original building contract.

[59] If these submission were to be accepted then the settlement agreement did represent a new domestic building contract. Consequently, the insurance scheme was engaged and this was separate from the original contract.

[60] Further, it was submitted that *res judicata* does not apply. The QBCC submitted that there is a new agreement with new rights:[7]

> The submissions made by the Applicant at paragraphs 60 – 73 inclusive of the Applicant's submissions are, it is submitted, not at all relevant to the

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7 Submissions of the First Respondent filed 23 January 2018, para [76].

> circumstances of this matter. The parties, in entering into the Settlement Agreement, created new rights and obligations, quite separate from those that had existed in relation to the original building contract. In those circumstances, there is no question of an issue estoppel or res judicata.

[61] As to performance of the settlement agreement, it was submitted that Mr Nicholls repudiated by not turning up and doing any work for three months, and the second respondent accepted this repudiation and bringing the settlement agreement contract to an end it to an end. The QBCC submitted (footnotes omitted where submissions are referenced):[8]

> *'It is open for the Tribunal to find that the term of the Settlement Agreement requiring the Applicant to carry out the works identified in the QBCC inspection report within 3 months was an essential promise entitling the Second Respondents to terminate for the Applicant's breach at the expiry of the 3 month period.'* The submission referred to the authority of Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd. It was is submitted that the conduct of the Applicant constituted an unlawful repudiation of the Settlement Agreement so as to entitle the Second Respondents to terminate the contract for the Applicant's breach at common law.

[62] The QBCC submitted in essence that the garage door was not really a problem. Mr Nicholls simply had to resolve building it to 2.4m. The clarification of 8 November 2016 had no contractual status and Mr Nicholls should not have been distracted by it:[9]

[63] In summary it was submitted:[10]

> 1. The Settlement Agreement was a contract for the carrying out of residential construction work for the purposes of s.68H(1)(a)(ii) of the QBCC Act and, as a result, cover under the Statutory Insurance Scheme established under the QBCC Act came into force in respect of the Settlement Agreement;
>
> 2. That on 6 February 2017 the Second Respondents properly terminated the Settlement Agreement;
>
> 3. This termination allowed the Second Respondents to claim for non-completion of the Settlement Agreement under the Statutory Insurance Scheme.

The Second Respondents' Submissions (Mr and Mrs Rae)

[64] The Second Respondents requested that the Tribunal find that the original contract was on foot at the conclusion of the settlement agreement; that the original contract was varied by the settlement agreement; that this original contract as varied by the settlement agreement was a contract for the carrying out of residential construction work for the purposes of s 68H(i) and (ii) of the Act; and that cover was established under the Statutory Insurance Scheme.

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8 Ibid, paras [81] - [87].
9 Submissions of the First Respondent filed 23 January 2018, paras [89]-[91].
10 Ibid, p 20 – 21.

[65] Further, it was submitted that the entitlement of the Second Respondents to terminate the original contract (as varied by the settlement agreement) for breach by the Applicant was not affected by the consent order dated 4 August 2016 (sic).

[66] As a result of unlawful repudiation by the Applicant of the varied original contract on 6 February 2017, the Second Respondents terminated the contract as required by clause 1.2 of the insurance policy conditions which allowed them to then claim non completion of the work.

[67] The Tribunal notes that the relevant provisions of the Act for the purposes of the statutory insurance scheme as it relevant to the circumstances of the current proceedings are s 68B, s 68H(1)(a)(2), s 86(1)(i) and s 87 of the QBCC Act. The Insurance Policy Conditions that apply in this case are Edition 8 , effective from 1 July 2009 and the specific clauses applicable are 6.15 (release of QBBC obligations if contractor released from obligations) and clause 1.2.

Alternate Claim

[68] The Second Respondent's submitted that that the settlement agreement was a contract for carrying out residential construction work and the insurance cover as provided for under the Statutory Scheme was in force in respect to the settlement agreement. Further the entitlement of the Second Respondent to terminate the contract was unaffected by the consent order.

[69] As a result of the Applicant's unlawful repudiation of the settlement agreement on 6 February 2017 the Second Respondents properly terminated the agreement.

[70] The Second Respondents submitted that that settlement agreement was a contract for carrying on residential construction work and insurance cover was in force in respect to the settlement agreement.

[71] The Second Respondents submitted that the QBCC's decision 21 March 2017 should be substituted with a decision that the contract dated 17 March 2015, as varied by the settlement agreement dated 4 of August 2016 but made on 9 August 2016, was properly terminated by the Second Respondents as required by clause 1.2 of the insurance policy with the consequence of allowing the Second Respondents to claim for non-completion of contract

[72] That the Applicant pay the Second Respondents' costs of the proceedings.

Evidence

[73] At the Tribunal hearing, the Mr Nicholls, Mr Hills, Mr Luckan, Mrs Rae and Mr Rae all provided oral evidence.

[74] The Applicant, Mr Nicholls, agreed under cross-examination by Mr Ensby on behalf of the QBCC that in commencing the proceedings in BDL115-15, he was seeking to have the Tribunal determine that he had successfully terminated the original building contract with the Raes. It was put to him that it was his position from the time of lodging the application on 22 June 2015 until the hearing a little over a year later in August 2016. Although Mr Nicholls stated he was confused and sought to

evade answering the question, eventually under cross-examination he did agree that termination of the contract was one of the determinations that he had been seeking.

[75] Further, under cross-examination Mr Nicholls disagreed with the proposition that he understood that the QBCC were to set the scope of works under the settlement agreement. He said that he thought that the contract, namely the original contract of 2015, was continuing. Mr Nicholls maintained this view despite his own conflicting evidence on the point.

[76] Mr Nicholls submits that the original building contract remained in force and that settlement agreement was merely a variation of this. This was despite Mr Nicholls accepting under cross-examination that initially he had sought an order from the Tribunal that that contract had been terminated and that it was no longer in force at the time of the hearing in 2016. Mr Nicholls, at times, said he was *'confused*' and he did not always directly answer the questions put to him. He suggested that he thought throughout the proceeding that the contract was the original contract, despite having made a number of statements in his applications to QCAT, and in his statements and some concessions in cross-examination, that he had believed that there was a termination and he was seeking what he referred to as a ruling from QCAT that there was a termination.

[77] During her evidence in chief, Mrs Rae gave evidence that, despite initially filing a statement in the Tribunal to the contrary, she believed the agreement was an extension of the work that was originally agreed to.[11] Mrs Rae stated that the agreement had some provisions to vary the original contract.

[78] During evidence in chief and cross-examination, Mrs Rae agreed that initially she and her husband had applied in a counter-application in the matter of BDL115-15 to have a declaration from the Tribunal that they had correctly terminated the original contract, thus indicating that the contract was at an end at the time of the compulsory conference in 2016. Mrs Rae stated in her evidence in chief that she had learned through investigation that the settlement agreement may in fact be a second contract:[12]

> We had no other way of understanding this, other than – well, we took it to be that, because we didn't have anything else to base it on. So our position in this statement is that, at the time this statement was written, we thought it was a second agreement, a second contract. We really didn't know. We didn't have the legal support that we needed at the time to know any different. We still go back to the idea that we think that we should've been finishing the original contract. There were too many things that actually implied that we were finishing the original contract.

[79] When asked for a clarification of her evidence, Mrs Rae gave evidence that she believed that the contract had been terminated when she came to QCAT initially. She stated that she was in a difficult position and that they believed that they had to terminate the contract of 2015, in order to draw on the insurance. She said:[13]

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11 T1-96, L29-30.
12 T1-97, L5-15.
13 T1-97, L23-25.

> So we took advice, we got a lawyer, we went through all that process, except that the applicant had already gone to QCAT and we had to follow, so we had to defend ourselves as well as try and put a counter-claim in.

[80] When asked in cross-examination by the legal representative for Mr Nicholls as to where she got the idea that she could terminate the contract arising out of the settlement agreement, Mrs Rae stated:[14]

> We believed that – we didn't know for certain. We were accepting some elements that maybe there was a second contract place, or we were continuing on from the first one. So, whatever way it went, we believed that – from the fact that there were contracts, a contract of sorts, that we had the right to terminate after the agreement period was officially over, and that's exactly what we did. We waited until the QCAT agreement period had expired, and then we terminated.

[81] With regard to further questioning on this issue of Mrs Rae's belief that she could terminate a decision of the Tribunal by written notice, Ms Rae replied:

> No, not precisely. We believed we were terminating an agreement contract, not the decision. We never, ever believed we were terminating the decision – never. We always believed it to be a contract or agreement, which was a form of contract, I suppose.[15]

[82] She further said:[16]

> We understood the decision to be a ratification of the agreement for the purposes of engaging QBCC. That was our original understanding of what happened that day at QCAT at the conference because without that decision we could not approach QBCC and ask them for their – or invite them to assist with this process. Otherwise, it would have been just an agreement between parties. The decision was the thing that actually gave QBCC the formal invitation to assist, and they had the right to say no.

[83] While being cross-examination by the legal representative for the QBCC, Mrs Rae was asked what her position was in relation to the termination to the contract of 2015, from the period of the filing of Mr Nicholls' first matter in QCAT (BDL115-15) until the date of the compulsory conference. Mrs Rae said:[17]

> I understand what you're saying. We were going through the process to terminate to gain the insurance, tap into the insurance. We were waiting for confirmation. Once that confirmation came through, it was done and we were going to go through that process…
>
> It never got to that because we got to the compulsory conference.

[84] Mr Ensby put to Mrs Rae that she had terminated the contract on her view asking her to '*correct me if I am wrong about this…?*' Mrs Rae replied '*Yep… I'm not*

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14 T1-100, L27-33.
15 T1-101, L13-15.
16 T-101, L17-23.
17 T1-104, L42-45; T1-105, L1.

denying that'.[18] When asked whether the Raes were seeking a determination that the contract was terminated, Mrs Rae said '*Yep, to confirm that… Yes, that's fair*'.[19]

[85] When Mr Ensby asked her to look at the settlement agreement and take into account what she thought she was agreeing, Mrs Rae agreed that she did not know the exact scope of works at the time of entering into the agreement. She stated:[20]

> We knew that there was an ending to the contract to happen with the work, we knew that there was some – probably – some defective work to be dealt with and we knew that there were some deviations from the approved plans.

[86] In her evidence, Mrs Rae agreed with the proposition put to her by Mr Ensby that the QBCC could have decided anything with regards to the scope. She said that was correct and, in fact, that was told to her. She was of the understanding that they 'definitely had to compromise on things'.

[87] When describing the day of the conference, Mrs Rae said:[21]

> So we were quite concerned. We were embracing the idea our building was going to get finished and some of this would get sorted. We were happy with that, sort of. But we were prepared to go with it. We also knew that ---
>
> …
>
> --- we may not get everything that we believed was applicable to the contract. We had to rely on the QBCC to pick things up. They got some of it right. And some of it we were disappointed with, but that was the way we agreed…

[88] Under cross-examination, Mrs Rae agreed ultimately that she thought that they were bound by the terms of the agreement and its intent. She also said under cross-examination:[22]

> In fact, it was even said at the conference that if new plans were needed, because we did talk about that, and QBCC felt that, they could be drawn up at that time. That was mentioned.

[89] When questioned about her statement (Exhibit 6), and the comment that she thought that the settlement agreement was a variation of the original building contract. Mrs Rae's answer was:[23]

> Honestly? Truthfully, we – and this is why here we're here now, for the truth of it – we thought it was a continuation. Until we understood why our termination had failed, we always thought it was a continuation. Once we learned that our termination from the March contract had failed and that it – we were in a second agreement or second contract, we just accepted that then and we didn't – we didn't have anywhere else to go with it.

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18 T1-105, L3-6.
19 T1-105, L8-12.
20 T1-105, L43-46.
21 T1-107, L7-16.
22 T1-107, L42-44.
23 T1-108, L33-38.

[90] In his evidence in chief, Mr Rae indicated that with regard to the first statement that he and his wife had filed with the Tribunal, he said that the QBCC made a decision that the agreement was a full standalone contract, that he did not agree with that and his legal advisor did not agree with that, but his legal advisor had said 'they were covered either way'.[24]

[91] Under cross-examination by Mr Ensby on behalf of the QBCC, Mr Rae agreed that initially he had sought a determination from the Tribunal that the contract of 2015 had been validly terminated. He agreed that that was what was initially sought.[25] He agreed under cross-examination that his position initially was, before he went to the Tribunal, that he had terminated the contract on 26 June 2015. He said he had no idea whether or not he had legally terminated the contract.[26]

[92] Mr Rae agreed with the proposition put to him by Mr Ensby that the scope of work to be performed under the settlement contract was agreed by the parties to be those works decided by the QBCC.[27] He gave the explanation that the member conducting the compulsory conference had said if they had agreed to the settlement they would have to agree to the scope of works that the QBCC decided. He stated:[28]

> If we didn't agree with that, Member Brown said we had to come back and start a whole new application again, because the old – or the original BDL115 would be dismissed when QBCC said they would take on that role.

[93] Mr Ensby put to Mr Rae, 'All right. In terms of resolving the dispute that was on at the time and that's how you agreed?' and Mr Rae replied '*Yeah*'.[29]

Analysis and findings

[94] It was submitted to the Tribunal by the first Respondent's legal representative that the Tribunal should make a finding about the status of the original agreement and whether it had come to an end prior to or at the time of the settlement agreement. This was due to both the Applicant and the Second Respondent in the current Tribunal proceedings pursuing the position that they had not entered into a new and separate contract but were merely continued their original contract.

[95] Objectively the facts before the Tribunal were that as at June 2015 both parties (Applicant and Second Respondents) filed submission in BDL115-15 seeking orders that they had successfully terminated the original building contract.

[96] It was agreed by all parties (variously under cross-examination and in evidence in chief) that upon coming to the Tribunal in August 2016 it was still their position that each party believed that they had terminated the contract. As there was no other evidence before the Tribunal on this point and these claims could not be tested, the Tribunal is not in a position to make a determination as to whether or not this original contract of March 2015 was effectively terminated prior to the entry into the settlement agreement on 9 August 2016.

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24 T1-113, L25-30.
25 T1-115, L13-19.
26 T1-116, L17-20.
27 T1-117, L43-45.
28 T1-117, L9-11.
29 T1-117, L13-14.

[97] Another possibility that was raised in the submissions of the First Respondent is that the original contract agreement came to an end prior to or at the time of the settlement agreement either by this contention by both parties that they had properly terminated the contract and/or that both parties had abandoned the contract. Again both of these remain possibilities however with the lack of evidence to determine these claims the Tribunal is not in a position to declare which of these had occurred. Other pathways put to the Tribunal for the ending the original contract either by i) novation which is referred to in paragraphs [35] – [38] of the First Respondent's submissions or ii) accord and satisfaction at paragraphs [39] – [42] of the First Respondent's submissions or iii) implied recession as a result of the settlement agreement at paragraphs [43] – [46] of the First Respondent's submissions.

[98] On balance and based on the evidence and submissions in this proceedings the Tribunal is of the view that ii) and iii) appear to be the most likely to have occurred. However all of these may in fact be correct and maybe more than one is. In light of this the Tribunal finds that on the basis all and each of i) novation, ii) accord and satisfaction or iii) implied rescission, the original contract did not continue to be in force after the making of the settlement agreement. The Tribunal had regard to the terms in the settlement agreement itself which states at clause three:

> the parties have agreed to resolve the dispute on the terms outlined here in full and final satisfaction of all claims by them arising out of or in connection with the building work the subject of the dispute and to avoid the costs of ongoing litigation.

[99] It is from terms such as this in the agreement that the Tribunal drew the conclusion that the parties agreed to bring to an end, if it had not already ended, the original contract.

Final decision of the Tribunal in BDL115-15 and Settlement Agreement Status

[100] An object of the QCAT Act is that it deals with matters in a way that is accessible, fair, just, economical informal and quick.[30] Chapter 2 Part 6 Division 2 of the QCAT Act specifically provides for Compulsory Conferences, and amongst other things, their purpose, the procedure to be adopted and the orders and directions which may be made. These provisions must be read in light of s 84 in Part 2 Chapter 6 Division 4 of the QCAT Act, which applies if a settlement is reached at a Compulsory Conference, which empowers the person presiding at the Compulsory Conference to make orders to give effect to the settlement.

[101] At the point that the Member presiding over the Compulsory Conference made an order in relation to the parties' agreements, the agreement at that stage contained a contingency that was out of the control of the parties; the agreement of the QBCC to provide the report. This is described as a promissory condition in *Beverley Yule v Darcy Smith*.[31]

[102] In the present case, like the case of *Yule*, the agreement was binding from the time of execution. Therefore the acceptance of QBCC was not a condition of precedent to formation. The issue is whether it was a condition precedent to performance, in other

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30 QCAT Act, s 3(b).

31 [2013] NSWSC 209.

words a condition subsequent as stated by Gibbs CJ in *Perri v Coolangatta Investments Pty Ltd*:[32]

> .. it probably does not matter whether the condition is described as " precedent" or " subsequent ", provided that it is understood that its non-fulfilment did not prevent a binding contract coming into existence.

[103] In any event such classifications would appear to be a vanity of semantics as the condition was fulfilled by QBCC agreeing to undertake the report.

[104] The question to ask then is, what is the nature of the Tribunal's directions or order made at the Compulsory Conference?

[105] After considering the authorities, including *Lightfoot & Anor v Temple*,[33] and *McEwen v Barker Builders Pty Ltd* (*McEwen*),[34] I note that His Honour, Wilson J QCAT President (as he then was) in *McEwen* stated the following at para [5] (footnotes omitted):

> An agreement to settle an action normally takes effect as a contract, and is binding (subject to the principles under which a contract can be set aside). The prima facie position is that parties who freely and lawfully enter into agreement are bound by its terms unless one party can point to the existence of vitiating circumstances which mean the contract should be set aside.

[106] I refer also to the decision of *Chavez v Moreton Bay Regional Council*.[35] In that case, both parties had agreed to a consent order in relation to settlement of a proceeding and the Court said that the first point to be made was that the consent order was a contract between the parties as well as an order from the court.[36]

[107] The Tribunal considered the decision of *Auret v Queensland Building Services Authority & Anor*.[37] In this case the Tribunal held, quoting the then President Wilson J in *McEwen*, that an agreement to settle normally takes effect as a contract. Member Paratz went on to refer to the authors of standard texts on contracts noting the importance of written terms, namely:

> [47] The authors of one of the standard texts on contract note as to the importance of written terms that [[38]]:
>
> > Where the parties have recorded terms of their contract in a document, the so-called parol evidence rule may apply. It excludes evidence of extrinsic terms that „subtract from, add to, vary or contradict the language of a written instrument"...
> >
> > The rationale of the rule lies in the desirability of preserving "finality in written instruments", and of not allowing "written words to be altered or qualified by the uncertain testimony of slippery memory".

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32 (1982) 149 CLR 537.
33 [2010] QCAT 124.
34 [2010] QCATA 49.
35 [2009] QCA 348.
36 *Chavez v Moreton Bay Regional Council* [2009] QCA 348 citing *General Credits Limited v Ebsworth* [1986] 2 Qd R 162, 164-165; *Fylas Pty Ltd v Vynal Pty Ltd* [1992] 2 Qd R 593, [599].
37 [2013] QCAT 623.
38 Seddon & Ellinghaus, *Cheshire and Fifoot's Law of Contract,* 9th Australian Edition, 2008, [10.4].

[108] Member Paratz went on to say:

> [48] They also note that as to use of extrinsic evidence in the interpretation of documents that [39]:
>
> > There have been many judicial statements seeking to define what evidence may be admitted where the meaning of the language of a document is in dispute, and they cannot all be reconciled. The classic exposition of the law is that of Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 352 that:
> >
> > The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning. When the issue is which of two or more possible meanings is to be given to a contractual provision we look, not to the actual intentions, aspirations or expectations of the parties before or at the time of the contract, except in so far as they are expressed in the contract, but to the objective framework of facts within which the contract came into existence, and to the parties presumed intention in this setting.

[109] Accordingly, in these circumstances, the settlement is to be given its plain ordinary meaning. Clause 3 of the agreement dated 9 August 2016, signed by both Mr Nicholls and the Raes, contains the provision that:

> The parties have agreed to resolve the dispute on the terms outlined herein in full and final satisfaction of all claims by them arising out of or in connection with the building works the subject of the dispute and to avoid the cost of ongoing litigation.

[110] It is from terms such as this in the agreement that the Tribunal drew the conclusion that all relevant parties agreed to bring to an end, if it had not already ended, the existing contract (for the purposes of this discussion the original contract). It is clear that this is a new agreement setting out new obligations, the parameters and scope of work which were to be decided by the QBCC. At the date of agreement, the QBCC had not accepted their role in the process, and the Tribunal's decision, or order, which was issued by Senior Member Brown on 15 August 2016, can only be viewed in similar terms to the words of Member Fitzpatrick in *the Lightfoot & Anor v Temple [2010] QCAT 124 as being 'no more than a mere noting of the record as to the fact of a settlement agreement being entered into by the parties*'.

[111] The QCAT Act defines the meaning of the term '*final decision*'. The definition is to be found in s 129, which talks about the enforcement of a final decision:

> **129 Definition for div 4**
>
> In this division –
>
> ***final decision***, of the tribunal in a proceeding, includes –
>
> (a) an interim order under section 58; and

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39 Seddon & Ellinghaus, *Cheshire and Fifoot's Law of Contract,* 9th Australian Edition, 2008, [10.11].

(b) an injunction under section 59; and

(c) a monetary decision made other than as part of the tribunal's final decision in the proceeding.

[112] If one then turns to Schedule 3 of the QCAT Act, decision is defined as follows:

decision, of the tribunal –

(a) means –

(i) an order made or direction given by the tribunal; or

(ii) the tribunal's final decision in a proceeding; and

(b) for chapter 7 – see section 244.

[113] Final decision is further defined as:

final decision, of the tribunal in a proceeding –

(a) means the tribunal's decision that finally decides the matters the subject of the proceeding; and

(b) for chapter 2, part 7, division 4 – see section 129.

[114] This final decision was Exhibit 13 at the hearing. It was a decision made on 30 August 2016 that the application and counter-application were dismissed. This is the decision that finally disposed of the proceeding before QCAT, not the order made on the earlier date of the agreement between the parties. Once this final decision had been made, the matter was no longer before the Tribunal. It was finalised as far as QCAT was concerned in relation to those proceedings, and QCAT did not have jurisdiction to consider Mr Nicholls' further application for information about how to interpret his contract.

[115] Enforcement of the settlement agreement is a matter for another Court. Sections 131 and s 132 of the QCAT Act deal with enforcement of orders with regard to any orders made by QCAT. QCAT does not enforce its own orders. It is noted in evidence that both Mr Nicholls' and the Raes' legal representatives made the concession that neither party had registered the settlement agreement for enforcement.

[116] The Tribunal is not a party to settlement agreements. The order reflecting the agreement of the parties was not the final order of the Tribunal. The final order of the Tribunal was that the proceedings of application and counter-application were dismissed, which did not take place until sometime after the recording or noting of the terms of the agreement for the parties.

[117] This is of significance, and ultimately weighs against the Tribunal accepting Mr Nicholl's legal representative's submissions urging the Tribunal to adopt the reasoning of His Honour Jackson J in the decision of *Wilson Four Pty Ltd v Shiota*.[40]

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40 [2014] QSC 257.

[118] The Tribunal summarises the relevant issues in that case as follows:

(a) *Nature of Application*

Argument about encroachment resolved by consent order with encroachment (a block wall fence) to be removed on terms, requiring cooperation. It was a compromise of the Plaintiff's claim.[41] If that does not work the Plaintiff goes back to Court seeking to amend, saying they now want an easement instead and the other side had repudiated (by not cooperating with the removal process), which the Plaintiff had accepted. This was set out in an amended pleading.[42]

(b) *Nature of Agreement / Orders – must the orders be set aside?*

His Honour found that although the underlying agreement and the consent orders, which were detailed, co-exist, nevertheless in this situation if there was to be some amendment of performance, the plaintiff needs to seek to amend the orders or set them aside, drawing a parallel with specific performance.[43]

One of the aspects of the decision was that the amended pleading sought quite different, indeed contradictory, relief from the previous agreement/orders.[44]

(c) *Setting aside final orders*

The consent order was a final order, and thus not easy to set aside.[45] Can it be done? Was there an accord and satisfaction? If so, the Plaintiff could **not** rely on the Defendant's non-performance for termination to restore the parties to their previous position, as the former rights had been given up.[46] There may be a distinction where what happened was an **accord executory**, where further working out is required, but His Honour did not decide this.[47] This may be a relevant difference from the present case, where the arrangement was contingent on subsequent actions by a third party (the QBCC). This, as His Honour concedes, tends to the conclusion that the compromise was not, in that sense, intended to be final. Therefore it follows that the Tribunal's order of 9 August 2016 were not intended to be final

A consent order can be impeached, where the judgment is not perfected.[48] Can it be set aside for breach of contract, which does not operate *ab initio*? His Honour concludes not, based on *Harvey v Phillips* (1956) 95 CLR 235.[49] However there does seem to be such a rule in the *Uniform Civil Procedure*

41 Ibid, [2].
42 Ibid, [5], [7].
43 [2014] QSC 257, [21] – [23].
44 Ibid, [19] – [20].
45 Ibid, [28] – [35].
46 Ibid, [38].
47 Ibid, [40].
48 Ibid, [41] – [44].
49 Ibid, [46] – [58].

Rules 1999, r 668 and thus the Plaintiff was not prevented from amending the claim to pursue that remedy.[50]

(d) *Separate proceeding?*

Finally, His Honour concluded that it was not necessary to bring a separate proceeding to set aside the consent order.[51]

[119] Mr Hitchcock on behalf of the Applicant made submissions in relation to the meaning of *Wilson Four Pty Ltd v Sihota & Anor* and while the Tribunal is appreciative of the assistance rendered to help it understand the relevant law in this area the Tribunal finds that that case is distinguishable from these proceedings both on a factual basis and also on the basis that the consent order of the Tribunal (Court) in that matter was in fact the final order of the Tribunal (Court), a separate circumstance to what occurred in this case.

[120] As previously noted the Tribunal is a creature of statute and must find its powers within the QCAT Act or the relevant enabling Act. I refer to the decision of Acting Deputy President Stilgoe OAM (as she then was) and Member Deane in *Goldfield Projects Pty Ltd v Queensland Building and Construction Commission*.[52] In that decision the Tribunal observed that Division 4 of the QCAT Act sets out a number of provisions relating to settlement in different circumstances e.g. settlement in compulsory conference (as is the case here), mediation and other than in compulsory conference or mediation.

[121] Section 84 provides that:

84 Settlement in compulsory conference

(1) This section applies if a settlement is reached in a compulsory conference by the parties to a proceeding.

(2) The person presiding at the compulsory conference may –

(a) record the terms of the settlement in writing; and

(b) make the orders necessary to give effect to the settlement.

(3) This Act applies to an order made under subsection (2) as if –

(a) the compulsory conference were a proceeding before the tribunal; and

(b) the order were an order made by the tribunal constituted for the proceeding.

[122] Section 84(2), in particular, indicates that the person presiding may record the terms of the settlement in writing and make orders necessary to give effect to the settlement. Section 84(3) says that the QCAT Act applies to an order made under

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50 Ibid, [59] – [62].
51 Ibid, [63] – [71].
52 [2015] QCATA 101.

subsection (2) as if the compulsory conference were a proceeding before the Tribunal and the order were an order by the Tribunal constituted for the proceeding.

[123] The use of the term '*may*' in s 84(2) indicates a discretion. There are similar discretions in s 85(2) and s 86(3). There are limits on when an order giving effect to a settlement may be made. That is dealt with in s 87 of the QCAT Act. For example, the Tribunal must be satisfied it could make that decision in terms of settlement or in terms consistent with the settlement. In some circumstances contemplated by Division 4, no final order may be made at the time of the agreement being reached. The Tribunal finds that occurred with the settlement agreement being entered into on 9 August 2016 and the final decision on 30 August 2016.

[124] In the circumstances of this case, a settlement had been reached and terms recorded in writing, but the final order of the Tribunal was not made until 30 August 2016. Therefore, once a final order was made on 30 August 2016, there was no jurisdiction to make any further orders under s 89 of the Act due to the matter no longer being within QCAT's jurisdiction.

[125] In the evidence before the Tribunal, the following parties gave evidence of their views in relation to the status of the original building contract prior to the settlement agreement.

[126] The Applicant, Mr Nicholls, agreed under cross-examination by Mr Ensby on behalf of the QBCC that in commencing the proceedings in BDL115-15, he was seeking to have the Tribunal determine that he had successfully terminated the building contract with the Raes. It was put to him that it was his position from the time of lodging the application on 22 June 2015 until the hearing a little over a year later in August 2016. Although Mr Nicholls stated he was confused and sought to evade answering the question, under cross-examination he did agree that termination of the contract was one of the determinations that he had been seeking.

[127] Further, under cross-examination Mr Nicholls disagreed with the proposition that he understood that the QBCC were to set the scope of works under the settlement agreement. He said that he thought that the contract, namely the original contract of 2015, was continuing. Mr Nicholls maintained this stance despite his own conflicting evidence on the point that appeared in documents before the Tribunal.

[128] During her evidence in chief, Mrs Rae gave evidence that, despite initially filing a statement in the Tribunal to the contrary, she believed the agreement was an extension of the work that was originally agreed to.[53] Mrs Rae stated that the agreement had some provisions to vary the original contract.

[129] Although, during further questions including cross-examination, Mrs Rae agreed that initially she and her husband had applied in a counter-application in the matter of BDL115-15 to have a declaration from the Tribunal that they had correctly terminated the contract, thus indicating that the contract was at an end at the time of the hearing and subsequent compulsory conference. Mrs Rae stated in her evidence

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53 T1-96, L29-30.

in chief that she had learned through investigation that the settlement agreement may in fact be a second contract:[54]

> We had no other way of understanding this, other than – well, we took it to be that, because we didn't have anything else to base it on. So our position in this statement is that, at the time this statement was written, we thought it was a second agreement, a second contract. We really didn't know. We didn't have the legal support that we needed at the time to know any different. We still go back to the idea that we think that we should've been finishing the original contract. There were too many things that actually implied that we were finishing the original contract.

[130] When asked for a clarification of her evidence, Mrs Rae gave evidence that she believed that the contract had been terminated when she came to QCAT initially. She stated that she was in a difficult position and that they believed that they had to terminate the contract of 2015, in order to draw on the insurance. She said:[55]

> So we took advice, we got a lawyer, we went through all that process, except that the applicant had already gone to QCAT and we had to follow, so we had to defend ourselves as well as try and put a counter-claim in.

[131] When asked in cross-examination by the legal representative for Mr Nicholls as to where she got the idea that she could terminate the contract arising out of the settlement agreement, Mrs Rae stated:[56]

> We believed that – we didn't know for certain. We were accepting some elements that maybe there was a second contract place, or we were continuing on from the first one. So, whatever way it went, we believed that – from the fact that there were contracts, a contract of sorts, that we had the right to terminate after the agreement period was officially over, and that's exactly what we did. We waited until the QCAT agreement period had expired, and then we terminated.

[132] With regard to the settlement agreement's construction it was submitted that based on the authority of *General Credits Ltd v Ebsworth*[57] that the underlining agreement can be expressed as a separate document to a consent order being made and also as a separate document that is a written agreement between the parties.[58] This appears to be the circumstance in this case i.e. whether or not the settlement agreement can be construed in such a way as to make it an independent building contract separate to that of March 2015. The Tribunal have referenced the decision of the High Court in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*,[59] which stated:

> It is not a subjective belief or understanding of the parties about their rights and liabilities that governor their contractual intentions. What matters is what each party by words in conduct would lead a reasonable person in the position of the other party to believe.

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54 T1-97, L5-15.
55 T1-97, L23-25.
56 T1-100, L27-33.
57 [1986] 2 Qd R 162.
58 *Attwells & Anor v Jackson Lalic Lawyers Pty Ltd* [2016] HCA 16.
59 [2004] HCA 52; ('*Toll*').

[133] In these circumstances the evidence surrounding the parties' conduct and words would, in the Tribunal's opinion, indicate to a reasonable person that all parties (Mr Nicholls and Mr and Mrs Rae) considered the original contract of March 2015 to be at an end at the time of their entry into the settlement agreement. Where there were differences of a factual nature and of opinion in the evidence of the parties the Tribunal sought to resolve that on the basis of credit; as previously stated Mr Nicholls appeared to either have difficulty remembering or was evasive in giving his answering questions on many salient issues in the proceeding. Mr Rae similarly appeared to tailor his evidence to what he considered to be the most advantageous position for himself. By contrast, Mrs Rae presented in her evidence as an honest person who was able to clearly explain the situation why she thought she was in various situations and why various circumstances applied and she did not back away from inconsistencies in her evidence or seek to change her evidence in relation to her views. Mrs Rae impressed the Tribunal as being the most creditworthy of the parties giving evidence.

[134] It was put to the Tribunal that a decision had to be made about the status of the original agreement and whether it had come to an end prior to or at the time of the settlement agreement. This was due to both the Applicant and the Second Respondents at the current Tribunal proceedings pursuing the view that they had not entered into a new and separate contract but were merely continuing their original contract. As has previously noted by reference to High Court authority, it is not the subjective intention of the parties that assists the Tribunal to come to a determination about whether or not the status of the original contract at the time of the compulsory conference and the entry into the agreement rather to use the test in *Toll*, what matters is what each party by words and conduct would lead a reasonable person in the position of the other party to believe.

[135] Objectively the facts before the Tribunal were that both parties had pleaded in matter BDL115-15 that they had successfully terminated the original building contract, this was as at June 2015.

[136] It was agreed by all parties under cross-examination and in evidence that upon coming to the Tribunal in August 2016 it was still their position – with some degree of reservation about this – that each party believed they had terminated the contract. As there was no evidence before the Tribunal and these claims could not be tested the Tribunal is not in a position to make a determination as to whether or not this contract of March 2015 was effectively terminated prior to the entry into the settlement agreement in August 2016. Another possibility that was raised is that submissions were advanced by both parties to the effect that the original contract agreement came to an end prior to or at the time of the settlement agreement. Thus by this contention by both parties, they had mutually properly terminated the contract and/or that both parties had abandoned the contract. Again both of these remain possibilities however with a lack of evidence to determine these claims the Tribunal is not in a position to declare which of these had occurred. Another pathway was put to the Tribunal for ending the original agreement and that was one of either by novation which is referred to in paragraphs [35] – [38] of the First Respondent's submissions or accord and satisfaction at paragraphs [39] – [42] of the First Respondent's submissions or implied recession as a result of the settlement agreement at paragraphs [43] – [46] of the First Respondent's submissions.

[137] All of these may in fact be correct and as outlined above possibly more than one is. Thus it is concluded that for any or all of these reasons, the original contract did not continue to be in force after the making of the settlement agreement. Evidence further pointing to this apart from the oral evidence of the parties at the hearing is the terms in the agreement itself, which at term three state that the parties have agreed to resolve the dispute on the terms outlined here in full and final satisfaction of all claims by them arising out of or in connection with the building work the subject of the dispute and to avoid the costs of ongoing litigation.

[138] It was agreed by all parties and particularly by Mrs Rae, in what seemed to be a particularly forthright and truthful manner, that the scope of the works to be carried out were to be decided by QBCC. She agreed this was quite separate from what the original agreement had been.

[139] The Tribunal makes the finding that at the time of entry into the settlement agreement the original contract came to an end at that time if it had not already done so by the mechanisms previously discussed. It is clear from the settlement agreement that the parties had agreed to a new set of terms and the scope of works would be set not by the original contract but by the QBCC. In term 24 it is states that if the QBCC confirmed in writing that it was prepared to comply with the terms of the agreement and the consent decision, the parties consented to an order by the Tribunal that the application for a domestic building dispute and counter-application were dismissed.

[140] In the circumstances it would appear that the agreement is clearly, from its wording, a new contract. As outlined above a settlement agreement can be a separate contract and can be dealt with separately to any orders, consent or otherwise, made by the Tribunal see *Wilson Four Pty Ltd v Sihota & Anor*,[60] in that case his Honour Jackson J stated:

> Unless the provisions of the consent order were not contractual terms of a contract of compromise between the parties, there is no reason in law why the plaintiff could not claim damages for breach of contract for the defendants' breach of such a contractual term.

[141] The Tribunal finds that in the circumstances of this case the settlement agreement reached at the compulsory conference of 9 August 2016 indicates that the terms of the settlement agreement are in fact contractual terms. Any other subsequent orders made by the Tribunal with regard to consent orders and the final decision to dismiss the application and the counterclaim have no effect on the fact that a separate agreement exists and the underlying agreement can be enforced as a separate contract.

[142] The Tribunal accepts the submission found at paragraph [45] of the First Respondent's submissions that the objective intention of the parties as revealed by the evidence and matters already discussed support a finding that the effect of the parties entering in to the settlement agreement was to rescind the original contract. Therefore, whether the original contract ended by way of application of novation, accord and satisfaction or rescission or even if the original contract was still on foot prior to the entry into the settlement agreement, it is accepted by the Tribunal that

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60 [2014] QSC 257.

entry into the settlement agreement ended the rights and obligations that arose out of that original building contract.

Status of the settlement agreement as a domestic building contract

[143] For completeness the Tribunal considered the submissions made by the First Respondent and not raised by other parties to this matter i.e s 86(1)(i) of the QBCC Act refers to a domestic building contract having been validly terminated and this having the consequence of allowing a claim for the purpose of non-completion under the statutory insurance, this it is a reviewable decision for the purposes of s 86. It is noted however, that Part 5 of the QBCC Act refers to residential construction work[61] and the contracts carried out for residential work.

[144] There are separate definitions for the meaning of the terms carrying out a contract for residential work and domestic building contract in the QBCC Act, however the Tribunal accepts that there is substantial overlap in respect to these and the words and the terms essentially mean the same thing. For convenience and to simplify understanding the Tribunal refers to whether or not the settlement agreement is a domestic building.

[145] A domestic building contract has a definition in s 3 of the QBCC Act as a contract to carry out building work, construction management contract or another contract perhaps to manage the carrying out of domestic work. Section 4 of the QBCC Act defines 'domestic building work' as meaning:

(a) the erection or construction of a detached dwelling;

(b) the renovation, alteration, extension, improvement or repair of a home;

(c) removal or resiting work for a detached dwelling;

(d) the installation of a kit home at a building site.

[146] It is noted that domestic work also includes associated works such as landscaping, paving, erection or construction of a building or fixture associated with a detached home or dwelling such as driveways, fences, garages, carports, workshops, swimming pools and spas. A 'regulated contract' under the QBCC Act is defined as a domestic building contract for which the contract price is more than the regulated amount defined as $3,300 or a higher amount prescribed by regulation.

[147] The amounts notes in paragraph [11] of the settlement agreement indicate a sum of $14,936.20 taking the contract over the amount required to be a regulated contract. Arguments against the proposition that the settlement agreement amounted to a contract was that it was not expressed to be a contract and also that for the purposes of these reasons the Tribunal accepts the submissions found at paragraph [51] the first respondent's submissions that a reference to domestic contract in s 86(1)(i) of the QBCC Act is intended to mean carrying out of residential construction work as defined in Part of the QBCC Act. In any event the Tribunal accepts the proposition that the settlement agreement as it was written can be interpreted as a contract for the carrying out residential construction work as defined in Part 5 of QBCC Act and

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61 See s 67(x)(2) of the QBCC Act.

also a domestic building contract as defined in s 3 of Part 1 of Schedule 1B of the QBCC Act.

[148] Requirements for a building contract can be found in s 13(3) of the Act; that a contract must include the names of the parties, including the name of the building contractor. Section 13(5) states a contract has effective it complies with s 13(2) that it is in written form dated and signed by each party. These base requirements have been met by the agreement that was signed by both the Applicant and Second Respondents. Section 44 of the QBCC Act notes:

> Unless the contrary intention appears in this Act, a failure by a building contractor to comply with a requirement under this Act in relation to a domestic building contract does not make the contract illegal, void or unenforceable.

Finding re: Status of contract

[149] The Tribunal finds that that the scope of this contract was to be different from the original contract with the scope of the settlement agreement contract to be determined by QBCC and this was a matter in which ultimately all parties agreed in evidence.

Implied Terms

[150] There is an issue as the settlement agreement not containing all the usual building contract terms. Under the QBCC Act, Part 3 deals with implied warranties. By virtue of this provision, statutory warranties are implied including a warranty by Mr Nicholls that the work would be carried out in accordance with all relevant laws and legal requirements. Schedule 1B, Part 3, s 19 deals with implied warranties noting that the warranties mentioned in division 2 are part of every regulated contract therefore those mentioned from s 20 onwards of division 2 indicate that they would automatically be part of the contract without having to be written down. The Tribunal noted that terms can be implied into contracts in law as a necessary incident for the contract or on an ad hoc basis to give business efficacy to a contract. The test for this was included in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*[62] where Mason J (as he then was) restated the five conditions:

(a) It must be reasonable and equitable;

(b) It must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effected without it;

(c) It must be so obvious as to go without saying;

(d) It must capable of clear expression;

(e) It must no contract any express term of the contract.

[151] It would appear in these circumstances that any terms that are not written down in the document could be implied either on a statutory basis or on the basis of business efficacy as set out in *Codelfa*.

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62 [1982] HCA 24.

[152] Thus the fact that the applicable statutory warranties and building standards are not listed in the contract nor is the cooling-off period, which is a statutory warranty, does not prevent a building contract coming in to force, particularly one in which a policy of insurance may come into force under the QBCC Act.

[153] It is clear by virtue of Part 3 of the QBCC Act that warranties cannot be contracted out of merely by leaving them out of the written document as has occurred here.

[154] From the evidence it would appear from the terms of the settlement agreement that the documents that were to be considered by QBCC in undertaking their inspection and subsequent report were outlined in paragraph (a) and include documents that may not have been in existence at the time of the original contract being entered into. Such information lent further weight to the settlement agreement being a new and separate building contract, certainly separate to the original contract of March 2015. This contract (March 2015) had come to an end by one of or more than one of the previously mentioned methods at the date of the entry into the settlement agreement. In paragraph [9] of the agreement the QBCC were required to agree that they would report to the parties with reference to the documents and the contract. It would appear from this that QBCC was to set the scope of the work to be completed in under this new contract and that was agreed by all parties in evidence at the Tribunal.

[155] The Tribunal finds that the original building contract had come to an end either prior to or at the time of the parties entering into the settlement agreement and the original building contract in the settlement agreement could therefore not be a single contract because:

(a) The originally building contract had come to an end; and

(b) Both contracts had fundamental inconsistencies namely they had different scopes and agreements pursuant to each agreement.

(c) They also had different time frames and a variations of other variations.

[156] The Tribunal finds that the issue of *res judicata* or estoppel do not arise in these circumstances as the original matter was not the subject of a determination by the Tribunal. The order of the Tribunal was an interim order relating to a more formal restatement of the parties terms of their settlement agreement.[63]

Was the settlement agreement validly terminated?

[157] Having established that the settlement agreement was an agreement that amounted to a building or residential construction work contract as both defined in the QBCC Act, the next issue is to consider whether or not that contract was correctly terminated.

[158] Valid termination is important to Mr and Mrs Rae's claim in respect of incomplete work under the statutory insurance scheme enacted by Part 5 of the QBCC Act 1991. This Part indicates that there must be valid termination before access to the insurance scheme can be sought.

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63 *Newcrest Mining Ltd v Thornton* [2012] HCA 60, [17].

[159] The issue of a party's right to terminate a contract in claim damages arose in Member Traves decision of *Perkins v The Queensland Building and Construction Commissioner ('Perkins')*.[64] In that decision,[65] in order to have terminated under the contract, the homeowners had to become aware of a substantial breach by the contractor, had given a notice to the contractor which specified the breach, directed it be rectified within 10 working days and stated that if not rectified, that they intended to end the contract.

[160] In the settlement agreement contract the terms[66] provided that within three months from the date of receipt by the parties of the QBCC inspection report referred to in clause 9 of the settlement agreement, the Applicant would undertake the building works as identified in the QBCC report. The settlement agreement was emailed to the Applicant on 3 November 2016, this included the report, and accordingly the Applicant had until 3 February 2017 to carry out the building works identified in the QBCC inspection report. Mr and Mrs Rae purported to terminate the contract on 6 February 2017 as they said that the Applicant had not carried out any of the works identified in the QBCC's report.

[161] It is noted that on 7 January the Applicant filed a Form 40 application in the Tribunal expressly applying to terminate the agreement and to return to the Tribunal for a ruling. It was a subsequent decision of QCAT that there was no matter before it to consider and therefore the application under Form 40 was struck out.

[162] On 6 February 2017, Mr and Mrs Rae purported to terminate the settlement agreement in reliance on the matters set out in a notice dated 2 January 2017. They relied upon the ground of the Applicant's continued failure to commence construction work at the site following the release of the QBCC report on 4 November 2016. The First Respondent contended that it was an essential term of the settlement agreement contract that the Applicant carried out the works identified in the QBCC inspection report within three months. This was so important that it was submitted that the other parties, the Raes, would not have entered into the settlement agreement had they not been given the insurance that the work would be done within three months of the QBCC report being released.[67]

[163] Alternatively, it was submitted by the First Respondent that if the completion of the works or substantial performance of the required works were an essential term, the Applicant had not completed any of the work at the date of termination on 6 February 2017.

[164] In his evidence, Mr Nicholls said that he did not go to the site because of what he considered to be the confusion relating the meeting of the requirements of the QBCC report. It is noted that he embarked upon activities of his own to speak to the inspector Mr Luckan. In evidence Mr Luckan agreed that he was just giving his opinion and this had no formal status, the Tribunal notes that the terms of the contract do not include a provision for staff members of the QBCC to give their own private opinions. It was clear that the issue of the carport construction was a

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64 [2017] QCAT 283.

65 Paragraph [16].

66 Exhibit 2.

67 As to the importance of essential promises see *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* [1989] HCA 23; ('*Laurinda*').

folly of his own that Mr Nicholls embarked upon. He made a determination, perhaps for economic reasons as put to him in cross-examination by Ms Ray that he would not do any work until he could establish exactly how all of the work would be done. In any event it appears that the issues that he considered to be so insurmountable in relation to the garage door were in fact readily surmountable and in relation to the set of directions given (the details of which were not before this Tribunal) it would appear that the building work had in fact been carried out successfully and subsequently passed by QBCC.

[165] The Tribunal is of the view that the email from Bejai Luckan of the QBCC is irrelevant and had no contractual status. The settlement agreement itself clearly set out the terms of the role of the QBCC. They were not a party, they were only to provide a report on the scope of works and a follow up report on how the work was carried out, they were not to assist the builder in finding out how to build items – that remained a matter for him. Therefore the clarification being sought by Mr Nicholls from November 2016 had no contractual status and did not release him from any obligations under the settlement agreement contract. There is no compelling evidence that the Raes made any suggestions or representations that he would need to carry out the works in relation to the carport in a certain way.

Repudiation by Nicholls

[166] What is obvious from the evidence is that the Applicant failed to carry out any work as required by the QBCC report in the three-month period set down in the agreement. He sought to apply to the Tribunal to have the settlement agreement terminated. In these circumstances it would be hard to imagine a clearer case of repudiation of an agreement than a circumstance where none of the work agreed to be undertaken pursuant to the QBCC inspection report of 3 November 2016 was ever carried out. Even taking a generous view of whether or not it was possible to complete the work as set out in the QBCC report for the garage door (and it would appear subsequently that it was) the Applicant gave no reasonable justification in evidence or in any of the material filed for not proceeding with any of the other works. It would appear that this refusal to do so amounted to an economic decision on his part. The Tribunal acknowledges the evidence of Mr Luckan who said that builders usually take the approach that they do everything together but ultimately he did agree that it was possible for Mr Nicholls to do other parts of the work, for example internal work in the bathroom, without having to interfere or start with the garage work.

[167] Therefore, by his actions the Applicant made it clear that he was repudiating the contract and that he had had no intention of undertaking the work that he had agreed to do and would not fulfil the terms of the contract. The Raes' gave their notice purporting to terminate on 2 January 2017, with a notice on 6 February 2017 indicating that the Rae's were terminating the contract.

[168] The Tribunal found that, by his conduct, Mr Nicholls unlawfully repudiated the settlement agreement and Mr and Mrs Rae elected to accept his unlawful repudiation and notified their intention to terminate the settlement agreement by email on 2 January 2017. Ultimately the Rae's sent another email on 6 February 2017 and this was found by the Tribunal to be the date of termination. This finding takes into account that at general law a party has a right to terminate the contract and claim

damages if the other party has renounced his or her liabilities under it (in the sense that there is no longer any intention to be bound by it or fulfil it only in a manner substantially inconsistent with the parties obligations), which is repudiation. Also considered was the circumstance where a breach of the contract by the other party justifies termination. A breach will justify termination where the obligation breached was agreed to be essential or where it was sufficiently serious as a non-essential term. The test for such repudiation is whether the conduct of one party is such as to convey to a reasonable person in the situation of the other the unwillingness or inability to perform either a contract as whole or a fundamental obligation under it.

[169] The Tribunal further considered that case of *Laurinda* as referred to in the decision of Member Traves in *Perkins*, and found, based on the evidence in the current proceeding, that due to the extensive delay in commencing the works (in fact the works were not commenced during the three-month period agreed to under the settlement contract) that Mr Nicholls had repudiated or renounced the contract by this refusal to perform it. Mr Nicholls repudiated the contract by his behaviour and displayed the intention to no longer be bound by the contract or to fulfil it only in a manner substantially inconsistent with his obligations or only if and when it suited him.[68]

[170] If a contract has been repudiated, the repudiation must be accepted by the other party and this brings a contract to an end. Communication of an election to terminate is essential. This has occurred in the facts of this with the email of 6 February 2017 indicating this – see *Maples Winterview Pty Ltd v Liu* [2015] ACTSC 58 at [77].

[171] Despite the amount of time devoted in submissions to Mr Nicholls' state of mind or what he actually intended, this is not in fact a central consideration for the Tribunal. The Tribunal must look objectively at the circumstances and consider if in the circumstances the contract had been probably terminated.

Summary of Findings

[172] The Tribunal made the following findings in summary as to the status of the parties contractual relationships:

(a) The original contract came to an end or was terminated either before or at the time of the settlement agreement being entered into on 9 August 2016.

(b) The settlement agreement is a contract for the carrying out of residential construction for the purposes of s 68H(1)(a)(ii) of the QBCC Act and as a result cover under the statutory insurance scheme established under the QBCC Act came into force in respect of this settlement agreement.

(c) Any recording of the settlement agreement by the Tribunal did not affect the Second Respondent's rights to enforce their rights under the settlement contract.

(d) The Applicant Mr Nicholls unlawfully repudiated the settlement agreement contract by his failure to commence any part of the contractual requirements as defined by the QBCC's scope of work.

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68 *Laurinda.*

(e) As a result of this unlawful repudiation of the settlement agreement contract by the Applicant, the Second Respondents were entitled to terminate the settlement agreement. This occurred on 6 February 2017 and has the consequence of allowing the Second Respondents to claim for non-completion of work agreed to in the settlement agreement contract, therefore bringing them under the statutory insurance scheme.

[173] It is ordered that the QBCC's decision of 21 March that the Settlement Agreement was a building contract and the Second Respondents had terminated it is affirmed.

[174] Parties have one month from the publication of this decision to file with the Tribunal and exchange with each other any submissions on costs.

[175] The issue of costs will be considered on the papers by the Tribunal.