

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Queensland Building and Construction Commission v Wood* [2019] QCAT 101

PARTIES: **QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION**
(applicant)
v
JOHN THOMAS WOOD
(respondent)

APPLICATION NO/S: OCR260-18

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 16 April 2019

HEARING DATE: 7 March 2019

HEARD AT: Brisbane

DECISION OF: Member Howe

ORDERS: **1. Proper grounds for taking disciplinary action against John Thomas Wood pursuant to section 208 of the *Building Act 1975 (Qld)* are established.**
2. Mr Wood never be re-licensed as a building certifier by QBCC.
3. Mr Wood pay a penalty to QBCC of \$5,000 within 30 days of the date of order.

CATCHWORDS: PROFESSIONS AND TRADES – LICENSING OR REGULATION OF OTHER PROFESSIONS, TRADES OR CALLINGS – OTHER PROFESSIONS, TRADES AND CALLINGS – Building Certifier – Disciplinary Proceedings – where the certifier incorrectly certified numerous breaches relating to fire safety matters – where the certifier’s failure to appropriately certify might have adversely affected the health or safety of the occupants of the units – where joint submissions made – where suggested mitigating factors – where monetary penalty determined to be required as general deterrent despite the agreed joint submission by the parties that no monetary penalty be imposed

Building Act 1975 (Qld), s 204(1), s 204(6), s 208, s 212

APPEARANCES &
REPRESENTATION:

Applicant: N M Cooke instructed by QBCC

Respondent: E M Turnbull, solicitor, Carter Newell

APPEARANCES:

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

REASONS FOR DECISION

- [1] Between 2002 and 2004, a residential housing complex of 302 units known as the Grange was built in 10 stages at Brendale by a builder, No Limit Pty Ltd.
- [2] Mr Wood was the primary building certifier for the building work.
- [3] The construction work had numerous defects principally concerning the fire separation walls between the adjoining residential units, and non-compliant roof spaces in adjoining units.
- [4] The defects were Category 1 defects within the meaning of the Statutory Insurance Scheme because they might have adversely affected the health or safety of the occupants of the units.
- [5] In respect of stages 1(a), 1(b) and 2 to 6, Mr Wood marked the separating walls and frame stage inspections as satisfactory, though they were not, and referred to outstanding matters as minor issues only.
- [6] With respect to stage 7, most of Mr Wood's inspection reports did not record the separating walls and frame stage inspections as satisfactory but nor did he require a reinspection. He did however make mention of outstanding minor issues in similar vein to those noted for stages 1(a), 1(b) and 2 to 6, and in respect of those stages the inspections were all certified as satisfactory. In respect of lots 713 to 719 inclusive and 723 to 726 in stage 7 he marked the inspections as satisfactory without recording any minor defects and certified the fire rated elements (certificates) as satisfactory.
- [7] With respect to stages 8 and 10, again Mr Wood did not record the separating walls and frame stage inspections as satisfactory, but again he did not require a reinspection. Again he certified the fire rated elements (certificates) as satisfactory.
- [8] The QBCC did not sight any stage inspection forms for stage 9 however Mr Wood issued a certificate of classification for all 30 dwellings comprising stage 9.
- [9] Other than for stage 9, the inspection reports confirmed that Mr Wood either considered or inspected the separating walls between the individual units.
- [10] QBCC commenced an audit of Mr Wood's work at the Grange in 2010. That investigation work was put on hold whilst the issue of necessary rectification work was resolved.
- [11] In 2015 QBCC recommenced its audit. QBCC concluded Mr Wood had engaged in professional misconduct. Mr Wood sought internal review of that decision but the decision was upheld.

- [12] Mr Wood then sought external review with an application to the Tribunal that was subsequently withdrawn in February 2018. A related Supreme Court claim involving Mr Wood and others and the issue of costs of rectification at the Grange was finalised in December 2017.

Defects

- [13] According to the QBCC there were numerous defects in the building work. Across nearly all of the units in the Grange development, the fire separation walls between adjoining residential units failed to comply with the requirements of the Building Code of Australia ('BCA'). The defects were category 1 defects as defined in the Statutory Insurance Scheme because it was building work that was faulty or unsatisfactory adversely affecting (or would affect) the health and safety of persons residing in or occupying the buildings.
- [14] Essentially, gaps were left in the fireproofing barriers which meant a fire could easily spread and would not long be retarded by the fireproofing barriers. The fire separating walls within all 302 dwellings contained one or more such fire safety defect.
- [15] All the separating walls required remedial work to address the non-compliance issues and to bring the development within the scope of competent and safe work under the BCA.

The legislation

- [16] By s 204(1) of the *Building Act 1975 (Qld)* ('BA'):
- (1) After investigating a complaint or conducting an audit, QBCC must decide whether or not the building certifier has engaged in unsatisfactory conduct or professional misconduct.
- [17] By s 204(6):
- If QBCC decides the building certifier has engaged in professional misconduct, QBCC must apply to the Tribunal to start a disciplinary proceeding against the building certifier.
- [18] The dictionary to the BA defines professional misconduct as including:
- (a) conduct that—
- (i) shows incompetence, or a lack of adequate knowledge, skill, judgment, integrity, diligence or care in performing building certifying functions; and
- (ii) compromises the health or safety of a person or the amenity of a person's property or significantly conflicts with a local planning scheme;
- [19] By s 208:
- (1) The Tribunal may, on application by QBCC or the local government, conduct a disciplinary proceeding to decide whether proper grounds for taking disciplinary action against a building certifier are established.

(2) For subsection (1), proper grounds exist for taking disciplinary action if the building certifier has behaved in a way that constitutes professional misconduct.

[20] By s 212 if the Tribunal decides that proper grounds exist for taking disciplinary action against a former building certifier in the Tribunal may make various orders as detailed in that provision.

[21] QBCC has decided Mr Wood engaged in professional misconduct and has applied to the Tribunal to start a disciplinary proceeding against him.

[22] The matter came on for hearing on 7 March 2019 with QBCC and Mr Wood filing a joint submission. In the submission the parties say:¹

Proper grounds exist for the applicant to pursue disciplinary action against the respondent for professional misconduct regarding the defects of the separating walls found within the subject building works;

The respondent is willing to allow the applicant's findings against him to be upheld, in that the respondent has behaved in a way that constitutes professional misconduct within the meaning of the Building Act in certifying the subject building works...

[23] The intent of that statement appears to be that Mr Wood accepts that his behaviour at the Grange constituted professional misconduct.

[24] He certainly doesn't challenge the factual scenario presented by QBCC. That factual scenario was essentially that the builder failed to build the 302 houses at the Grange development in accordance with BCA fireproofing requirements and whilst Mr Wood apparently inspected the work of the builder he either failed to notice that the fireproofing requirements of the BCA had not been met or did not understand the BCA requirements about such.

[25] In either case the failure to adequately inspect or maintain knowledge of the applicable rules and standards and to comply with legislative requirements amounted to professional misconduct.

[26] The instances of non-compliance are numerous, repetitive, and from the material tendered, obvious. They should have been easily identified and identifiable by a certifier.

[27] I conclude Mr Wood's conduct showed incompetence or lack of adequate knowledge, skill, judgement, diligence and care in performing his building certification functions.

[28] Fire separating walls protect the health and safety of people and property. They inhibit the rapid spread of fire. Mr Wood's conduct also compromised the health or safety of people or the amenity of their property.

[29] I therefore conclude that proper grounds exist for taking disciplinary action against Mr Wood. I find his behaviour during the construction of the Grange development constituted professional misconduct as a building certifier.

¹ [3a] & [3b].

Appropriate orders

[30] Given my finding that proper grounds exist for taking disciplinary action against Mr Wood I must now consider the appropriate orders that should be made consequent on that finding.

[31] By the joint submission of QBCC and Mr Wood the submission is made that this is a matter in which it may be appropriate for the Tribunal to exercise its discretion to order that Mr Wood never be licensed or re-licensed by QBCC as a building certifier. The further submission however is that, given 'the circumstances' and in light of the following matters, no monetary financial penalty should be imposed:

a. QBCC and Mr Wood have settled the repayment of the value of the rectification work on terms which are satisfactory to the QBCC and QBCC does not seek further reimbursement or compensation from Mr Wood;

b. Mr Wood is a 72-year-old man who is remorseful for his actions, has cooperated with QBCC and who voluntarily revoked his own licence from 4 May 2011 after he retired on 8 April 2011;

c. In addition to handing in his licence Mr Wood has agreed not to undertake certification work in the future and has no intention of returning to work so his acts or omissions will not be repeated and the public will not require further protection;

d. Mr Wood has no history of previous complaints and he has accepted that there are grounds for disciplinary action to be taken against him and he has shown willing to cooperate with QBCC which demonstrates his remorse as well as acceptance of full responsibility for his conduct;

e. There is no suggestion that he was motivated by any improper purpose in relation to the manner in which the certification work was performed;

f. A considerable period of time has elapsed since he issued the certifications between 2002 and 2004;

g. He will be greatly affected by a penalty which, if ordered, will have to be paid by him personally from modest retirement income;

h. His cooperation with QBCC and acceptance that there are grounds for disciplinary action has meant that significant costs have been saved by QBCC and the Tribunal by avoiding the need for a full hearing.²

[32] I have difficulty accepting some of the submissions.

[33] The matter of rectification of the defective building work has been the subject of proceedings in the Supreme Court. The joint submission notes that in the Supreme Court action involving Mr Wood and others, the action was settled with the parties entering a confidential settlement arrangement with respect to costs of rectification. There were insurers involved and Mr Wood had to contribute an insurance

² Ibid [50].

deductible. It was suggested his deductible and therefore his contribution to rectification was somewhere between \$12,000 and \$20,000.³

- [34] Mr Wood has voluntarily handed in his certifier's licence. That happened 8 years ago. Given however that he is presently aged 72 years and he retired the month after handing in his certifier's licence, I cannot see that overmuch weight should be given that occurrence. It may well have been the case that he intended to retire at about the age of 64 years in any case. But again the age of retirement is fairly fluid and no longer commonly 65 years as it once was and that voluntary action is some weight in his favour.
- [35] A difficulty is that there is small evidence of remorse on Mr Wood's part evidenced in the joint submission material. He offers no explanation as to how his numerous mistakes or oversights happened and whether he now has insight into his failings as a certifier. The joint submission simply says Mr Wood is willing to allow the QBCC findings against him to be upheld.⁴ That is no statement indicating either comprehension of his professional shortcomings or recognition of the dire consequences that may have resulted from his mistakes.
- [36] Accordingly I am left unsure whether Mr Wood completely understands the gravity of the dangers that arose consequent on his activities.
- [37] It is true however that the resolution of the proceedings has been brought about without a protracted hearing and that has resulted in significant savings of time and resources of both QBCC and the Tribunal.
- [38] I have no evidence of Mr Wood's present financial standing. There was no material filed to support the claim that a fine penalty will greatly affect him and what is described as his modest retirement income.
- [39] It has been said that the imposition of a monetary penalty will act as a deterrent to others.⁵ Given this will be Mr Wood's first finding of professional misconduct the maximum penalty able to be imposed is a fine equivalent of 80 penalty units which currently translates to a maximum of \$8,800.⁶
- [40] There are a number of comparable decisions referred to in the joint submission, some of which I set out as follows.
- [41] In the matter of *QBCC v Gerhardt*⁷ the certifier had engaged in repeated unsatisfactory conduct at 13 properties. The matter did not proceed to a hearing but was determined at compulsory conference on the joint submissions of the parties. The certifier was reprimanded and a monetary penalty of \$7,500 imposed. There was no order as to costs but there were various additional restorative orders made the extent of which are not disclosed.

³ Counsel indicated the amount was less than all but one penalty imposed in comparable decisions referred to in the joint submission. Of the comparable decisions on penalty handed up, the highest penalty was imposed in *QBSA v Nunn* [2012] QCAT 589, \$20,000, and the next \$12,000 in *QBSA v Chandra* [2010] 451.

⁴ [3b].

⁵ *QBCC v Weber (No. 2)* [2014] 532, [32].

⁶ *Building Act 1975* (Qld), s 212(5)(a); *Penalties and Sentences Act 1992* (Qld), s 5(1)(e)(ii).

⁷ [2018] QCAT (unreported) OCR075-18.

[42] In *QBCC v Mitchell*⁸ the certifier and his company were found to have engaged in professional misconduct in Fortitude Valley by:

- (a) failing to provide the Queensland Fire and Rescue Service with required information when issuing an interim certificate of classification;
- (b) failing to comply with various provisions of the *Sustainable Planning Act 2009 (Qld)*;
- (c) allowing the occupation of a building when fire safety installations were inadequate; and
- (d) in circumstances where there had been previous instances of unsatisfactory conduct.

The certifier was reprimanded and a monetary fine of \$9,000 imposed with the certifier required to pay costs of \$7,500.

[43] Then in like named *QBCC v Mitchell*⁹ the certifier and his company were found to have engaged in professional misconduct at Mackay with multiple contraventions of the *Building Act* including:

- (a) failure to note information on certificates issued and consequential unsatisfactory certification of fire safety issues;
- (b) failure to identify building works non-compliant with a Fire Engineered Alternative Solution report;
- (c) failure to identify building work which did not comply with the BCA; and
- (d) in circumstances where there were previous instances of unsatisfactory conduct.

The certifier was reprimanded and a monetary penalty of \$11,000 imposed and the certifier required to pay costs of \$7,500.

[44] In *QBSA v Nunn*¹⁰ the certifier failed to recognise or act on nine fire protection matters required variously throughout a holiday complex and some occurring as single instances of failure. Some were matters of unsatisfactory conduct and some amounted to professional misconduct. The parties reached agreement on penalty, which was a prohibition on holding a certifier's licence for life and a fine of \$20,000. Mr Nunn was retired as at date of hearing. As in the matter at hand, Mr Nunn initially challenged the QBSA assertions but conceded the claims against him at a compulsory conference. The Tribunal was satisfied that Mr Nunn understood and accepted the need for sanctions to deter those working in the building industry who pay less than scrupulous attention to fire safety provisions.

[45] The matter of *Wilkins v QBSA*¹¹ concerned a certifier who certified a pool fence as compliant with the relevant safety standard when it was not. A toddler drowned as a

⁸ [2017] QCAT (unreported) OCR035-15.

⁹ [2017] QCAT (unreported) OCR098-16.

¹⁰ [2012] QCAT 589.

¹¹ [2012] QCAT 582.

result. Mr Wilkins was found to have engaged in professional misconduct. He had four prior incidents of unsatisfactory conduct where variously no further action was taken, he was cautioned and he was reprimanded. He had very much cooperated with the QBSA during its investigation. He had not been to the site in question nor issued the building approval for the original dwelling. He was reprimanded in relation to his conduct and fined \$4,000, a mid-range figure of possible penalties. The Tribunal orders came approximately 8 years after the certification.

- [46] Finally, in *QBSA v Chandra*¹² the certifier was found to have engaged in professional misconduct relating to fire protection matters amongst other things in issuing certificates of classification in respect of three buildings comprising two duplexes and a unit complex and further professional misconduct in failing to assist and cooperate with the QBSA in its investigation or audit and professional misconduct by repeated unsatisfactory conduct. Though Mr Chandra expressed remorse the Tribunal was concerned 'that the nature of the respondent's realisation of the gravity of the omissions relates more to whether he can retain his licence and his finances, and less to protection of the public.' The respondent had his licence in the class of building surveyor suspended for a period of 8 months, it was ordered he pay to have the work at the duplexes and unit complex rectified and during his 8-month suspension was required to undertake educational instruction. He was also required to pay a monetary penalty of \$7,500.
- [47] The primary role of disciplinary proceedings is protection of the public,¹³ not punishment of the offender whose conduct falls below required standards, although it should provide both an appropriate general as well as specific deterrent.¹⁴
- [48] Given the agreed penalty proposed by the parties in *QBSA v Nunn*, \$20,000, which was accepted by the Tribunal in that matter as appropriate, I do not accept that in the this matter, where there were far more instances of failure concerning fire safety measures on the part of Mr Wood than the certifier in *Nunn*, that no financial penalty is appropriate here. In the matter at hand at minimum a financial penalty is warranted as a general deterrent to others.
- [49] As stated, I am somewhat concerned that there is no clear evidence of remorse shown by Mr Wood, nor that he is cognisant of the gravity of the dangers that arose through his failure to ensure the building work was done to required standards. Additionally, given his age when he voluntarily revoked his licence, it is unclear how much of a detriment or burden that was to him.
- [50] The most significant factor to his credit is the savings effected with his cooperation through an early conclusion to proceedings without hearing.
- [51] I conclude a penalty of \$5,000 is appropriate in the circumstances, and too that as agreed between the parties Mr Wood never be entitled to be licensed as a building certifier again.
- [52] There are no costs sought against Mr Wood.

¹² [2009] CCT QD035-05.

¹³ *Wentworth v New South Wales bar Association* [1992] HCA 24, [13] (Deane, Dawson, Toohey and Gaudron JJ).

¹⁴ *Council of the Queensland Law Society Inc v Cummings; ex parte A-G (Qld) & Minister for Justice* [2004] QCA 138, [22].