

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Riley v Queensland Building and Construction Commission* [2019] QCAT 121

PARTIES: **TRACEY RILEY**
(applicant)
v
QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION
(respondent)

APPLICATION NO/S: GAR322-17

MATTER TYPE: General administrative review matters

DELIVERED ON: 1 May 2019

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Hughes

ORDERS: **The decision of the Queensland Building and Construction Commission dated 28 September 2017 is set aside and substituted with a decision to approve a claim under the Queensland Home Warranty Scheme on the basis that residential construction work is taken to have started.**

CATCHWORDS: INSURANCE – PROPERTY AND PECUNIARY LOSS INSURANCE – DOMESTIC BUILDING CONSTRUCTION INSURANCE – where insurer approved claim to maximum refund of deposit only – whether work ‘physically starts’ – where provision to be read in way that is practical, as a whole and intending to achieve balance between outcomes – where purposive interpretation preferred – where requirements of provision for whether erection or construction of footing system or slab ‘physically starts’ will vary according to whether work is for new build or renovation of existing home – where contract to renovate existing home – where contract included footing system or slab – whether work started on erection or construction of footing system or slab – where builder installed props to lift house – where installing props to lift house was integral part of erection or construction of footing system or slab – whether ‘reviewable decision’ – where substantive effect of decision to allow a claim under statutory insurance scheme was to not allow claim to maximum extent permitted by law and therefore disallow claim in part –

where purpose of statutory insurance scheme is to provide assistance to consumers

Acts Interpretation Act 1954 (Qld), s 14A
Queensland Building and Construction Act 1991 (Qld), s 3, s 67X, s 86
Queensland Building and Construction Regulation 2003 (Qld), s 26L
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 20, s 24

Buckman (HC) & Son Pty Ltd v Flanagan (1974) 133 CLR 422
Harley v Department of Justice and Attorney-General [2012] QCAT 620
K & S Lake City Freighters Pty Ltd v. Gordon & Gotch Ltd (1985) 157 CLR 309
Kehl v Board of Professional Engineers of Queensland [2010] QCATA 58
King v QBCC [2014] QCAT 471
Lewiac Pty Ltd v Gold Coast City Council [2011] QPELR 494
Mills v Meeking (1990) 169 CLR 214
Norton v Long [1967] VR 221
O'Brien v Gladstone Regional Council [2015] QCATA 82
Omae v QBSA [2012] QCAT 80
Project Blue Sky Inc. v Australian Broadcasting Authority (1998) 194 CLR 355
Tucker v QBCC [2017] QCAT 80
Westfield Management Ltd v Pine Rivers Shire Council [2004] QPELR 337
Zappala Family Co. Pty Ltd v Brisbane City Council [2014] QCA 147

**APPEARANCES &
REPRESENTATION:**

Applicant: Self-represented
 Respondent: Self-represented

REASONS FOR DECISION

What is this application about?

- [1] Tracey Riley understandably feels let down by the system designed to provide remedies for home owners who have incomplete or defective building work.

- [2] Some two months after paying \$26,000 of a \$45,000 contract to a builder for ‘alteration and renovation’ of her home,¹ the builder stopped work. His licence had been suspended. Ms Riley filed a claim against the builder in the Tribunal who then agreed to return to the site to complete the work. He did not.
- [3] Ms Riley then made a non-completion claim under her home warranty insurance with the Queensland Building and Construction Commission.² After ensuring the Ms Riley had properly terminated the contract and arranging an inspection and ‘Scope of Works’, the Commission approved the Scope of Works and notified Ms Riley in these terms:
- I am writing to let you know that the Scope of Works has been received from Sergon Building Consultants and accepted...
- Sergon will use the accepted Scope of Works which details the necessary building work, to get quotes and then choose a licenced contractor(s) from their approved panel to carry out the work.³
- [4] The Scope of Works to complete the job came to a total of \$69,355.00.
- [5] Unfortunately for Ms Riley, that was not the end.
- [6] To Ms Riley’s dismay – and contrary to its earlier decision – the Commission informed her that because construction of the footing or slab system had not commenced, she was only entitled to a refund of her initial deposit of \$2,250.⁴
- [7] Ms Riley sought internal review of that decision by the Commission, who confirmed its original decision.⁵
- [8] Ms Riley then applied to the Tribunal for external review of the Commission’s decision.

What does the Tribunal do?

- [9] In a review application, the Tribunal’s purpose is to produce the ‘correct and preferable’ decision by way of a fresh hearing on the merits.⁶ This means that Ms Riley need not prove any error by the Commission in its original decision – the original decision is not presumed correct.⁷
- [10] The Tribunal effectively “stands in the shoes” of the Commission and makes its own decision.⁸

¹ Contract dated 30 November 2016.

² Non-completion Claim Form dated 7 July 2017.

³ Letter QBCC to Tracey Riley dated 31 August 2017.

⁴ QBCC Decision dated 7 September 2017, Terms of Cover, s 5.

⁵ QBCC Internal Review Decision dated 28 September 2017.

⁶ *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 20.

⁷ *Harley v Department of Justice and Attorney-General* [2012] QCAT 620, [8], citing with approval *Kehl v Board of Professional Engineers of Queensland* [2010] QCATA 58, [9].

⁸ *O’Brien v Gladstone Regional Council* [2015] QCATA 82, [18].

- [11] The Tribunal may therefore confirm or amend the decision, set aside the decision and substitute its own decision or return the matter for reconsideration by the Commission.⁹

Did work start as required by section 26L of the *Queensland Building and Construction Regulation 2003 (Qld)* (now section 43 of the *Queensland Building and Construction Regulation 2018 (Qld)*)?

- [12] In deciding to approve Ms Riley's claim to a maximum entitlement of a refund of deposit only, the Commission purported to apply section 26L of the *Queensland Building and Construction Regulation 2003 (Qld)* (now section 43 of the *Queensland Building and Construction Regulation 2018 (Qld)*). Section 26L provides:

26L When work is taken to have started

- (1) For section 71F of the Act, residential construction work is taken to start for the purposes of part 5 of the Act when –
- (a) if the work includes the erection or construction of a footing system or slab or the provision of sewerage or drainage on a site – the erection or construction of the footing system or slab, or the provision of sewerage or drainage, physically starts on the site; or
 - (b) otherwise – work for the renovation, alteration, extension, improvement or repair of an existing building on a site physically starts on the site.
- (2) In this section –
- physically starts**, for residential construction work, does not include starting any of the following –
- (a) the preparation of plans or specifications for the performance of the work;
 - (b) design work;
 - (c) administration services;
 - (d) earthmoving or excavating;
 - (e) site work related to the residential construction work.

- [13] The Commission submitted that section 26L(1)(a) specifically applies to work that includes the erection or construction of a footing system or slab, regardless of whether the works are for a new build or constitute renovation works. The Commission then reasoned that a strict reading of the text of the legislation meant that the works done on Ms Riley's home did not extend to the erection or construction of the footing system or slab, as required by section 26L(1)(a).¹⁰

⁹ *Queensland Civil and Administrative Tribunal Act 2009 (Qld)*, s 24.

¹⁰ QBCC Internal Review Decision dated 28 September 2017.

- [14] However, the provision is to be read in a way that is practical, as a whole and as intending to achieve balance between outcomes:¹¹

... to read the section in isolation from the enactment of which it forms a part is to offend against the cardinal rule of statutory interpretation that requires the words of a statute to be read in their context... Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise.¹²

- [15] The literal rule of construction must give way to a statutory injunction to prefer a construction that would promote the purpose of an Act to one that does not, particularly where that purpose is set out in the Act.¹³ The interpretation that will best achieve the purpose of an Act is preferred.¹⁴
- [16] The purpose of the statutory insurance scheme is to assist consumers for loss arising from defective or incomplete work. Consistent with this purposive interpretation, the requirements of section 26L(1)(a) for whether erection or construction of a footing system or slab ‘physically starts’ on a site will vary according to whether the work is for a new build or renovation of an existing home. Erecting or constructing a footing system or slab for an existing home would usually start at an earlier stage than it would for a new build.
- [17] Or put another way, while section 26L may apply to both a new build and a renovation, the work required to erect or construct a footing system or slab will vary according to whether it is a new build or renovation. This gives section 26L a flexible operation¹⁵ consistent with both the objects of the *Queensland Building and Construction Commission Act 1991* (Qld) and the statutory insurance scheme itself:

3 Objects of Act

The objects of this Act are –

...

(b) to provide remedies for defective building work;¹⁶

...

67X Statutory insurance scheme

¹¹ *Zappala Family Co. Pty Ltd v Brisbane City Council* [2014] QCA 147, [56], citing *Westfield Management Ltd v Pine Rivers Shire Council* [2004] QPELR 337 and *Lewiac Pty Ltd v Gold Coast City Council* [2011] QPELR 494.

¹² *K & S Lake City Freighters Pty Ltd v. Gordon & Gotch Ltd* (1985) 157 CLR 309, 314 (Mason J).

¹³ *Mills v Meeking* (1990) 169 CLR 214, 235; *Buckman (HC) & Son Pty Ltd v Flanagan* (1974) 133 CLR 422, [11].

¹⁴ *Acts Interpretation Act 1954* (Qld), s 14A.

¹⁵ This interpretation still ensures that s 26L(1)(b) has work to do for renovations without footing systems or slabs - an interpretation that gives meaning and effect to a provision is preferred to an interpretation that would render a provision inoperative or inept – *Project Blue Sky Inc. v Australian Broadcasting Authority* (1998) 194 CLR 355, 382 (McHugh, Gummow, Kirby and Hayne JJ), *Norton v Long* [1967] VR 221, 221-4 (Winneke CJ).

¹⁶ *Queensland Building and Construction Commission Act 1991* (Qld), s 3(b).

...

(2) The purpose of the statutory insurance scheme is to provide assistance to consumers of residential construction work for loss associated with work that is defective or incomplete.¹⁷

- [18] Where renovation works include erection or construction of a footing system or slab, an integral part of constructing the slab or footing is lifting the existing home (as opposed to building a new home where laying the slab or footing does not require lifting of an existing home).
- [19] The works done on Ms Riley's home were:
- (a) demolition of existing brick walls from lower level;
 - (b) demolition of isolated concrete posts; and
 - (c) installation of isolated props to support the upper level.¹⁸
- [20] In essence, the builder lifted Ms Riley's home as an integral part of the erection or construction of the footing system or slab. By installing the props to lift the house, the builder did more than simply demolish existing structures to start site work¹⁹ related to the residential construction work. Installing the props to support the upper level was a function of building the footing system or slab. By doing this, the work 'physically starts' – there was no other reason to lift the home.
- [21] I am therefore satisfied that residential construction work did start for the purposes of the statutory insurance scheme under part 5 of the Act.

Is the decision reviewable?

- [22] The Commission also submitted that the Tribunal does not have jurisdiction to review the decision because it is not a 'reviewable decision' under section 86 of the *Queensland Building and Construction Commission Act 1991 (Qld)*.²⁰ The Commission reasoned that a proper characterisation of the decision was not a decision to disallow Ms Riley's claim in part, but rather to allow her claim to the maximum extent permitted by law.²¹
- [23] Section 86 relevantly provides:

86 Reviewable decisions

- (1) Each of the following decisions of the commission under this Act is a *reviewable decision* –

...

¹⁷ *Queensland Building and Construction Commission Act 1991 (Qld)*, s 67X(2).

¹⁸ Serгон Non-Completion Assessment Report dated 30 August 2017.

¹⁹ Without evidence or submissions on the definition of 'site work' and whether it has a trade or technical meaning, it is not necessary for the Tribunal define the scope of 'site work'. It is sufficient for present purposes that the Tribunal makes a finding that the work was more than starting site work.

²⁰ QBCC Written Submissions In Response dated 19 October 2018, [34].

²¹ QBCC Written Submissions In Response dated 19 October 2018, [30].

(g) a decision about the scope of works to be undertaken under the statutory insurance scheme to rectify or complete tribunal work;

(h) a decision to disallow a claim under the statutory insurance scheme wholly or in part.²²

- [24] To support its submission, the Commission cited a passage²³ from *Tucker v Queensland Building and Construction Commission*²⁴ as follows:

A claim would only be allowed in part if the claim related to two or more insured events and the insurer accepted liability in respect of one or more events but denied liability in respect of one or more other events.²⁵

- [25] Unfortunately, the passage appears to have been cited out of context. The full passage reads (underlining added):

The Commission's view... seems to be that “allowing” a claim merely encompasses accepting that the insurer has a liability. It does not extend to accepting the amount claimed as payable in respect of the claim or the basis on which that amount should be calculated.

On that view, I assume, a claim would only be allowed in part if the claim related to two or more insured events and the insurer accepted liability in respect of one or more events but denied liability in respect of one or more other events.

The Commission has not referred to, nor have I located, any authorities or extraneous materials that shed light on what s 86(1)(h) means when it refers to a decision to disallow a claim wholly or in part.²⁶

- [26] A full reading of the relevant passage from *Tucker* thus reveals that the learned Member was only recounting the Commission's view of how the provision was to be interpreted – the same interpretation as the Commission urges the Tribunal to adopt here.

- [27] The learned Member then went on to specifically reject the Commission's view of how section 86(1)(h) is to be interpreted. It is worthwhile to set out the learned Member's reasoning in full:

On an ordinary reading of the provision, I am unable to agree that disallowing a claim is limited to denying liability and does not extend to accepting that there is a liability but declining to pay the amount claimed.

The Commission had several opportunities to make submissions on the meaning of s 86(1)(h). It has not directed attention to anything in the context of s 86 or other provisions of the Act; its evident policy or legislative history; extraneous materials; previous authorities in this or other contexts; or evidence of trade or technical meanings, which would support the Commission's more restrictive reading of s 86(1)(h).

²² *Queensland Building and Construction Commission Act 1991* (Qld), s 86(1)(h).

²³ QBCC Written Submissions In Response dated 19 October 2018, [24].

²⁴ [2017] QCAT 80.

²⁵ *Tucker v QBCC* [2017] QCAT 80, [18].

²⁶ *Tucker v QBCC* [2017] QCAT 80, [17] to [19].

I have considered whether the presence of s 86(1)(g) – which provides separately for decisions relating to the scope of works to be carried out under an insurance policy to rectify defective work to be reviewable – indicated that s 86(1)(h) is to have a more restrictive meaning. That is to say, whether s 86(1)(g) would be unnecessary on the broader construction of s 86(1)(h).

However, even on the broader view of s 86(1)(h), s 86(1)(g) has remaining work to do. It allows a claimant whose claim under a policy for rectification has been wholly accepted by the Commission – that is, where the Commission both accepts liability and accepts that rectification is appropriate – to seek review of the actual work considered to be necessary to carry out rectification work.

In the absence of any other contrary indicators, I consider that the more natural characterisation of the Commission’s decision in this case is that it has not allowed Mr Tucker’s claim in full. It has disallowed the claim in part because it has not accepted Mr Tucker’s claim for rectification of the faulty work and instead has determined to pay the lesser amount calculated by reference to the reduction in value of Mr Tucker’s residence.²⁷

- [28] Similar reasoning applies here. To allow a claim for only a refund of deposit of \$2,250.00 on the basis of work not starting, was to disallow the claim for the reasonable cost of completion on the basis that work had already commenced.
- [29] In deciding Ms Riley’s claim to what it considered to be the ‘maximum extent permitted by law’, the Commission did not correctly apply the provisions of the statutory insurance scheme in construing when work was deemed to start.
- [30] The substantive effect of the decision was therefore to *disallow Ms Riley’s claim to the maximum extent permitted by law* and therefore disallow her claim under the insurance scheme in part.²⁸
- [31] Consistent with the learned Member’s reasoning in *Tucker*,²⁹ I am satisfied that section 86(1)(h) is broad enough to cover a decision to allow a claim under the insurance scheme where the substantive effect of doing so is to not allow the claim to the maximum extent permitted by law. This interpretation is consistent with the purpose of the statutory insurance scheme to provide assistance to consumers of residential construction work for loss associated with work that is defective or incomplete.³⁰
- [32] The decision is therefore a ‘reviewable decision’ by the Tribunal.

What is the correct and preferable decision?

²⁷ *Tucker v QBCC* [2017] QCAT 80, [23] to [27].

²⁸ Unlike *Omae v QBSA* [2012] QCAT 80 where the homeowner simply disagreed with the builder quotation procured by the Commission and *King v QBCC* [2014] QCAT 471 where the applicant was not the person making the claim under the policy.

²⁹ *Tucker v QBCC* [2017] QCAT 80, [23] to [27].

³⁰ *Queensland Building and Construction Commission Act 1991* (Qld), s 67X(2).

- [33] The correct and preferable decision is to set aside the decision of the Queensland Building and Construction Commission dated 28 September 2017 and substitute it with a decision to approve a claim under the Queensland Home Warranty Insurance Scheme on the basis that work is taken to have started.