

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Pritchard & Anor v Saaroq Pty Ltd t/as Stroud Homes Wide Bay* [2020] QCAT 135

PARTIES: **RUTH PRITCHARD**
RONALD PRITCHARD
(applicants)

v
SAAROQ PTY LTD T/AS STROUD HOMES WIDE BAY
(respondent)

APPLICATION NO/S: BDL030-19

MATTER TYPE: Building matters

DELIVERED ON: 29 April 2020

HEARING DATE: 6 December 2019

HEARD AT: Bundaberg

DECISION OF: Member Milburn

ORDERS: **1. The application is dismissed.**
2. The applicants must pay costs, fixed in the sum of \$6,000.00, to the respondent within 14 days.

CATCHWORDS: CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – OTHER MATTERS – where applicants contracted with respondent for the performance of building work – where applicants sought damages for rusting nails – costs

Queensland Building and Construction Commission Act 1991 (Qld), s 77
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 3, s 47, s 107

Amos v Monsour Pty Ltd [2009] 2 Qd R 303
Bartlett v Contrast Constructions Pty Ltd [2016] QCATA 199
Nursing and Midwifery Board of Australia v Tainton [2014] QCAT 161
Partington & Anor v Urquhart (No 4) [2019] QCATA 96
Rainbow Builders Pty Ltd v The State of Queensland through the Department of Housing and Public Works (No 2) [2016] QCAT 497

APPEARANCES &

REPRESENTATION:

Applicant: Self-represented
 Respondent: M Campbell, Counsel and Director of Crouch & Lyndon
 Lawyers

REASONS FOR DECISION

- [1] Mr and Mrs Pritchard ('the Applicants') own a property at 31 Sea Esplanade, Elliott Heads ('the Property'). They selected Saaroq Pty Ltd, trading as Stroud Homes Wide Bay ('the Respondent'), to build their family home, and, on 5 September 2016, they entered into a contract for the construction of a new dwelling for \$334,423.57 ('the Contract').
- [2] On 20 September 2018,¹ the Applicants noticed signs of surface rust and they acted, through both the Queensland Building and Construction Commission ('the QBCC') and this Tribunal, against the Respondent.
- [3] The Applicants were dissatisfied with the result of their attempts before the QBCC, because, after initially issuing the Respondent with a direction to rectify, the QBCC reconsidered its original decision and refused to issue the notice.
- [4] The Applicants then initiated an application before this Tribunal ('the Application'). The Application was difficult to categorise because, in part, it appeared to be based on a desire to have this Tribunal review the decision of the QBCC and, in part, it appeared to be a claim for damages made directly against the Respondent.
- [5] This Tribunal has jurisdiction to consider the claim for damages.
- [6] The Applicants sought the following order from the Tribunal:
- To rectify the rusting nails in accordance with the Building Code of Australia dated 2016.²
- [7] The Application was supplemented by an 'Alleged defective work/incomplete work schedule' noting one entry only, as follows:
- Rusting nails around hole [sic] house, first noticed on 20 September 2018.³
- [8] In support of their application, the Applicants produced written evidence from Mr Bradley James Warren, of Warren Family Homes in Bundaberg. However, the Applicants did not produce Mr Warren for cross examination at the Tribunal hearing. Therefore, the Tribunal attributes limited weight to his untested evidence.
- [9] Beyond that, the Applicants had little independent corroborative evidence to support their claims.

The Tribunal's jurisdiction

- [10] Section 77 of the *Queensland Building and Construction Commission Act 1999* (Qld) gives jurisdiction to make orders in relation to a building dispute application.

¹ Alleged defective work/incomplete work schedule, dated 29 January 2019, 2.

² Application dated 29 January 2019, 7.

³ Alleged defective work/incomplete work schedule, dated 29 January 2019, 2.

Chronology

[11] The events relevant to this case are:

- (a) on 3 August 2016, the Applicants accepted the Respondent's quotation for the construction of a new dwelling;
- (b) on 5 September 2016, the parties entered into a HIA building contract for the construction of a new dwelling ('the House') at the Property;
- (c) on or about 27 April 2017, works the subject of the Contract reached practical completion;
- (d) on or about 8 May 2017 the Applicants moved into the House;
- (e) on or about 2 October 2017, the Applicants notified the Respondent of a water ingress issue;
- (f) later, the water ingress issue was investigated, and approval was given for rectification of the issue through the Respondent's insurer;
- (g) on or about 20 November 2018, the QBCC inspected the House and the Property;
- (h) following the inspection, the QBCC issued a direction ('the Direction') to the Respondent to rectify two items, being:
 - (i) the replacement of fasteners to the external fibre cement planning (showing sign of surface rust); and
 - (ii) a small section of corners and internal plasterboard not having an 'acceptable finish';
- (i) The Respondent requested an internal review application of the Direction Decision;
- (j) on 21 January 2019, after consideration of the material filed by the Respondent in the internal review process, the QBCC reversed its decision, determining that it was not appropriate to issue the Respondent with a direction to rectify; and
- (k) on 31 January 2019, the Applicants filed the Application in this Tribunal.

Direction about the provision of evidence

[12] On 12 November 2019, the Tribunal issued a direction that no party will be allowed present evidence not contained in the statements without justifying the need. The Tribunal ordered that all witnesses must attend for cross examination, with applications to attend by remote means only by 21 November 2019, and if a party wished to rely upon a quote, as evidence of defective or incomplete work, the author must attend the hearing to give evidence and be available for cross examination.

Material lodged by the Respondent with the QBCC as part of its internal review process application

[13] The Respondent lodged detailed material as part of its successful application for the QBCC internal review process. The submissions included statements that:

- (a) the cladding used for the construction at the Property was 6mm Hardieflex, fastened with galvanised steel nails;
- (b) the Building Code of Australia, Volume 2, requires that for a property located in a moderate zone (being located more than 100m from saltwater but not subject to breaking surf) four options of fasteners are acceptable;
- (c) Stroud Homes used hot dip galvanised 300g/m² for the installation, which is the requirement for a property in a severe zone and is therefore more than the requirements; and
- (d) the QBCC's reference to Australian Standard AS4680/1999 is a standard for the use of screws as fasteners, not nails as has been used in the construction of the Applicant's home.

The evidence of Mr Warren of Warren Family Homes Pty Ltd

- [14] The evidence of Warren Family Homes Pty Ltd took the form of a quotation dated 10 October 2019 ('Mr Warren's Quotation') and a letter dated 24 October 2019 explaining the need for the work referred to in Mr Warren's Quotation.
- [15] Mr Warren's Quotation was for the sum of \$73,820 including GST to 'repair damaged soffits and wall cladding to existing home', as follows:

Inclusions List

Date: 24th October 2019

Client Name: Ron & Ruth PRITCHARD

Job Address: Lot 39, No.31 Sea Esplanade, Elliott Heads, Qld, 4670

PRELIMINARY INCLUSIONS

1. Site investigation by WFH director - Completed
2. QBCC, Construction & Public Liability insurances
3. Full site supervision as required by Warren Family Homes director

WORKPLACE HEALTH and SAFETY CONSIDERATIONS

4. Full perimeter steel scaffolding as required to carry out rectifications safely
5. All workplace health and safety costs, including signage, edge protection, fall protection and site barricading as necessary
6. Workplace health and safety site consultant, including a site specific safety plan for all workers
7. Waste bin removal service for all building waste
8. Temporary portable onsite toilet for all workers
9. Site kept tidy at all times

SITE ACCESS and POWER

10. It is the owner's responsibility to ensure we have safe & reasonable access to site at all times
11. Owner to supply safe access to power and water at all times during works

STORMWATER & DOWNPIPES

12. Stormwater down pipes disconnected on second level, and replaced and repainted at end of works including stainless steel wall brackets

INSULATION

13. Builder's green sisalation and damp proof course to all external walls as required

14. R2.0 fibreglass insulation batts installed to all external walls of the top floor

EXTERIOR FINISHES

15. Remove all soffit sheets and timber mouldings from eaves and de-nail framework

16. Remove all external wall claddings and timber cover strips and de-nail framework

17. Remove Colorbond flashings at base of cladding over brickwork

18. Remove entry patio ceiling sheets and de-nail framework

19. Remove side patio ceiling sheets and de-nail framework

20. Remove ground floor front patio (in front of garage door) ceiling sheets and de-nail framework

21. Remove top floor downpipes

22. Dispose and dump all above materials at waste facility

23. Supply & install new Colorbond flashings with appropriate fall at base of cladding over brickwork

24. Colorbond head flashings above all windows and doors as necessary

25. Supply & install 6mm Hardiflex [sic] flat sheet cladding to top floor external walls as per original design, with 42mm x 19mm preprimed pine timber cover strips over joints

26. Supply & install Hardies Stria 325mm horizontal cladding to top floor external walls as per original design above Hardiflex [sic] flat sheet cladding

27. 66mm x 42mm preprimed pine 'picture framing' to all windows and doors on flat sheet cladding

28. Continuous preprimed pine external and internal corner trims

29. Hardies Joint Sealer used behind all cladding joints, joints, intersections and where necessary

30. Soffits battened at 300mm centres & lined with Hardiflex [sic] with plastic joiner strips, excluding vent sheets due to ocean proximity. Moulded to wall intersection with 31mm x 12mm p/p pine

31. Entry patio ceiling battened at 400mm centres, lined with Hardiflex [sic] and timber cover strips

32. Side patio ceiling battened at 400mm centres, lined with Hardiflex [sic] and timber cover strips

33. Ground floor ceiling in front of garage door battened at 400mm centres, lined with Hardiflex [sic] and timber cover strips

34. Note: All external nails to soffits and wall claddings to be stainless steel

35. Note: All timber cover strips to be preprimed 42mm x 19mm pine

36. Note: Rear alfresco ceiling & top floor alfresco ceiling are not being rectified in this quotation

ELECTRICAL

37. Electrician to come and go as necessary to terminate and make safe areas where exposed wires are accessible. Disconnect any light fittings & reconnect all points at completion of works

PAINTING

38. All new works fully painted with 3 coats [of] quality 'Taubmans All Weather' paint

39. Low sheen finish to patio ceilings, cladding and soffits

40. Note: You are allowed three base colours for the outside of the home (flat sheet, timber cover strips, downpipes and window picture framing colour, horizontal cladding colour, soffit colour). If you choose a higher number of colours, or select colours that require additional coats to achieve proper coverage (example white, very light, or dark) there will be an additional cost for paint supply & labour

OTHER INCLUSIONS

41. Builder's clean to the external work area & all building waste removed from site at completion

42. Warranty supplied on all building works as per the QBCC regulations

43. Whilst all due care and attention will be taken, we won't be held responsible for any damage caused to grass, gardens or landscaping

Quotation

Date: 24th October 2019

Client Name: Ron & Ruth PRITCHARD

Job Address: Lot 39, No.31 Sea Esplanade, Elliott Heads, Qld, 4670

Job: To repair damaged soffits and wall cladding to existing home as per the inclusions list.

Seventy-three thousand, eight hundred and twenty dollars

\$73,820.00

Price includes GST of \$6,710.91

This price is

- Valid for 60 days only.

Thank you for the opportunity to quote on the repairs to your home. If you have any questions, wish to make alterations, or proceed to contract, please do not hesitate in calling myself at our office on 41 590 222.

Thank you

Brad Warren
Owner / Director - Warren Family Homes Pty Ltd

- [16] Mr Warren signed a letter dated 24 October 2019 outlining his reasoning, where he stated:

I, Bradley James Warren, Director and owner of Warren Family Homes Pty Ltd, provide the following information without bias:

I was requested by the applicant to inspect their property at Sea Esplanade, Elliott Heads in October 2019, and supply a quotation on what I deemed to be necessary of rectification due to rusting fixings being evident on the external claddings of the building.

Whilst I understand that the QBCC had inspected the property in November 2018 and advised there were a 'few' rusted nails, upon my inspection almost a year later, a few turned into most!

There are a substantially large number of rusted nails now showing on both the soffit linings of the eaves and the external wall claddings. Due to the number of rusted fixings that would require replacing now (and obviously this matter has only gotten worse over time and will continue to worsen as the years go on), I would not accept that punching the nails through and bogging the holes, then installing new fixings and repainting would be a job acceptable to the applicants. It is my opinion that all claddings and soffits need to be replaced in their entirety, including new flashings as most flashings we identified did not have fall away from the building.

The applicants [sic] brand new ocean front home should not be made to look like a fix up job at barely three years old. Had the correct fit for purpose fixings been used in the first place, or perhaps proper paint coverage over the fixings be [sic] used, this situation would not have arisen.

I understand on further review that the wall insulation was not requested to be replaced by the QBCC so upon request, I can provide a new quotation with this item removed if necessary.

- [17] The Respondent formally advised the Tribunal that it had no objection to the provision of the statement of Mr Warren as evidence, and it did consent to Mr Warren giving evidence by telephone if necessary.⁴
- [18] But Mr Warren did not attend the hearing, in person or by telephone, to give oral evidence or to be cross examined.

The Applicants' evidence

- [19] The Applicants produced written materials:
- (a) The original home quotation presented to them by the Respondent, dated 3 August 2016, which they accepted on the same day.
 - (i) By handwritten notes, from an undisclosed person, but presumably by one of the Applicants, there were statements that various items were included in the quotation but not 'received', being R2.5 grade ceiling batts to roof and walls, magnetic doorstops, hills plastic clothesline and upgrade to HS TP system to smaller design.

⁴ Email by Mardee Campbell, Crouch & Lyndon Lawyers to the Tribunal dated 2 December 2019.

- (b) The HIA contract was signed on 5 September 2016.
 - (i) By handwritten notes, from an undisclosed person, but presumably by one of the Applicants, there were statements that ‘no rock breaker required’ and ‘path to door credit’.

[20] It was not clear from the material what orders the Applicants sought or upon what evidentiary basis they called upon the Tribunal to make findings of fact consistent with the orders that they might seek. In the interests of natural justice, the Tribunal did grant leave to the Applicants to provide oral evidence.

[21] One of the Applicants, Mr Ronald Prichard, gave oral evidence at the Tribunal hearing.

[22] Mr Ronald Prichard gave evidence that:

- (a) the key issue relates to the ‘faulty fasteners’;
- (b) he rejects the builder’s suggestion that this is a maintenance issue;
- (c) he enquired of ‘someone’ who said that ‘they’ recommend washing down the external parts of the building once every two months;
- (d) washing the building every two months is not financially feasible;
- (e) that would require permanent scaffolding;
- (f) the builder used the wrong nails;
- (g) the builder used galvanised nails;
- (h) the nails should have been stainless steel;
- (i) this is a structural issue because the nails the builder used do deteriorate;
- (j) stainless steel nails cost \$3.50 per 100 more than galvanised nails; and
- (k) he has a quote for \$73,820 to fix the problem.

The Respondent’s evidence

[23] The information provided by the Respondent about the fastening process was drawn from its submissions presented in the QBCC internal review process, as follows:

- (a) The cladding used for the construction at the Property is 6mm Hardiflex [sic], fastened with galvanised steel nails;
- (b) The Building Code of Australia, Volume 2, requires that for a property located in a moderate zone (being located more than 100m from salt water but not subject to breaking surf) 4 options of fasteners are acceptable;
- (c) Stroud Homes used hot dip galvanised 300g/m² for the installation, which is the requirement for a property in a severe zone; and
- (d) The QBCC's reference to Australian Standard AS4680/1999 is a standard for the use of screws as fasteners, not nails as has been used in the construction of the Applicant's home.⁵

⁵ The submission is Annexure AJW-1011 of the Statement of Aletha Jane Walters dated 2 July 2019, 87.

- [24] In deciding that the QBCC would not issue a direction to rectify to the Respondent, the QBCC determined⁶ that:

In the IRU report, [the original inspector] has determined that there is no requirement that the fibre-cement nails used for the fixing of fibre cement wall claddings be manufactured of stainless steel. Accordingly, the galvanised nails used by [the Respondent] are suitable in their application for rust and provide corrosive protection. That said, [the original inspector] has noted that the mechanical fixing of the nails has dislodged a small amount of galvanised coating from some of the nail heads. Although it is noted that this occurrence is largely unavoidable, [the original inspector] has found that the rusting or corrosion of damaged nail fasteners amounts to non-structural defective building work for the purposes of the QBCC Act and Rectification of Building Work Policy.

... It would be unfair to issue a direction to rectify to the Applicant for non-structural defective work.

- [25] The Respondent produced evidence from two witnesses, being its directors Mr and Mrs Walters.

The evidence of Mr Slade Damien Walters

- [26] Mr Slade Damien Walters is one of the directors of the Respondent. He provided a statement to the Tribunal dated 2 July 2019, where he stated (adopting the original numbering):

5. I confirm that I understand that the issue the Applicant [sic] is complaining about is the rusting of some of the nails used to secure the external cladding to their house.

6. The external cladding on the Applicant's house is a James Hardie product, namely a 6mm Hardieflex. The cladding was fastened to the Applicant's house with galvanised steel nails, in accordance with the manufacturer's specifications and the National Construction Code.

7. At page 4 of the Applicant's material, pictures of types of nails have been included, with comments by the Applicant. I note:

(a) The product information for 50 x 2.8mm weathertex galvanised nails are listed on the specification as not being suitable for coastal areas. The Applicant appears to rely on this to show that the installation by Stroud Homes is somehow defective. However, these nails are for use for the fixing of hardboard planking. This is not the product that has been installed on the Applicant's property;

(b) The product information for 40 x 2.8mm fibre cement stainless steel nails are for specific use with fibre cement sheeting. The Applicant appears to rely on this to demonstrate that the installation by Stroud Homes is defective. These nails are for use with a product that has not been installed on the Applicant's house and is therefore irrelevant.

8. The 6mm Hardieflex that was installed at the Applicant's property has been installed in accordance with the Building Code of Australia, Volume 2, Table 3.4.4.2. Attached hereto and marked "SDW-2" is a copy of the table from the [Q]BCC.

⁶ Decision made by Jonathan Pacey, A/Manager Internal Review Unit on 16 January 2018, 2-3.

9. For the Applicant's property, which is located in a Moderate Zone (in that it is located more than 100m from salt water but not subject to breaking surf) and [sic] of the 4 options listed would have been an acceptable product to use. Stroud Homes has actually used Hot dip galvanise 300g/m² for the installation, which is Option 2 for a Severe environment. In other words, Stroud Homes has actually used a product in the installation that exceeds the requirement of the [Q]BCC.

10. The rust that is appearing on the nails in the external cladding at the Applicant's property is quite normal surface rust for this area. However, the rust is surface rust only and is not impacting the structural functionality of the nails in anyway. If the Applicant was diligent in maintaining their house with frequent cleaning (which is recommended for this area) then it is possible the nails would not be showing any signs of surface rust.

11. The surface rust on the nails is not a structural defect. There is no risk to the structural integrity of the Applicant's house. I cannot accept that anyone has told the Applicant that the house is "condemned" and that they should evacuate. This is an owner maintenance issue and nothing to do with defective building work undertake [sic] by Stroud Homes.

“SDW-2” Building Code of Australia, Volume 2, Table 3.4.4.2.
FRAMING

Table 3.4.4.2 PROTECTIVE COATINGS FOR STEELWORK

ENVIRONMENT	LOCATION	MINIMUM PROTECTIVE COATING	
		General structural steel members	
MODERATE More than 1 km from <i>breaking surf</i> or more than 100 m from salt water not subject to <i>breaking surf</i> or non heavy industrial areas	INTERNAL	No protection required in a permanently dry location ^{Note}	
	EXTERNAL	Option 1.	2 coats alkyd primer
		Option 2.	2 coats alkyd gloss
		Option 3.	Hot dip galvanise 300 g/m ² min
		Option 4.	Hot dip galvanise 100 g/m ² min plus—
		(a)	1 coat solvent based vinyl primer; or
		(b)	1 coat vinyl gloss or alkyd.
SEVERE Within 1 km from <i>breaking surf</i> or within 100 m of salt water not subject to <i>breaking surf</i> or heavy industrial areas	INTERNAL	Option 1.	2 coats alkyd primer
		Option 2.	2 coats alkyd gloss
	EXTERNAL	Option 1.	Inorganic zinc primer plus 2 coats vinyl gloss finishing coats
		Option 2.	Hot dip galvanise 300 g/m ²
		Option 3.	Hot dip galvanise 100 g/m ² min plus—
		(a)	2 coats solvent based vinyl primer; or
		(b)	2 coats vinyl gloss or alkyd.
Notes: 1. Heavy industrial areas means industrial environments around major industrial complexes. There are only a few such regions in Australia, examples of which occur around Port Pirie and Newcastle. 2. The outer leaf and cavity of an external masonry wall of a building, including walls under open carports are considered to be external environments. A part of an internal leaf of an external masonry wall which is located in the roof space is considered to be in an internal environment. 3. Where a paint finish is applied the surface of the steel work must be hand or power tool cleaned to remove any rust immediately prior to painting. 4. All zinc coatings (including inorganic zinc) require a barrier coat to stop conventional domestic enamels from peeling. 5. Refer to the paint manufacturer where decorative finishes are required on top of the minimum coating specified in the table for protection of the steel against corrosion.			

[27] The legal representative for the Respondent sought leave of the Tribunal to call Mr Walters to provide oral evidence on the basis that the information contained in his statement was technical in nature. The application to call Mr Walters to give evidence in chief was not opposed by the Applicants. The Tribunal did grant leave to the legal representative to take Mr Walters through his evidence. The Tribunal was satisfied that it was appropriate to do so given the technical nature of the evidence and the benefit to the Tribunal in having that evidence explained.

[28] Mr Walters provided oral evidence at the Tribunal hearing, which included the following content:

- (a) he is a registered builder;
- (b) the Applicants are concerned about the cladding process;

- (c) he used James Hardie ('the Manufacturer') products, and he followed the guidelines for installation;
- (d) he used a larger nail than required;
- (e) the Manufacturer recommends the use of 30 mm to 50 mm length nails and he opted to use 50 mm length nails;
- (f) the Manufacturer says that galvanised nails may be used;
- (g) products will break down from exposure to salt;
- (h) if stainless steel nails were used, it would still be an issue as stainless steel nails are not stainproof;
- (i) the nails suggested by Mr Prichard would not be suitable;
- (j) he rejects the content of the letter from Mr Warren as overkill;
- (k) there is no suggestion of anything other than surface rust which is cosmetic, and not structural;
- (l) the Applicants do have options for maintenance; and
- (m) the Applicants live on a coastal property.

The evidence of Ms Aletha Jane Walters

[29] Ms Aletha Jane Walters is one of the directors of the Respondent, and she provided a statement to the Tribunal dated 2 July 2019, where she stated (adopting the original numbering):

4. On or about 5 September 2016, Stroud Homes entered into a HIA Queensland New Homes Construction Contract (QC1 2015) with Ronald and Ruth Pritchard (the "Owners") for the construction of a two story house with face brickwork and cladding at lot 39, Sea Esplanade, Elliot Heads (the "Property") for the contract price of \$334,324.57 (the "Contract"). Attached hereto and marked "AJW-2" is a true and correct copy of the Contract.

5. On or about 22 December 2016, I caused for Stroud Homes to send a letter to the Owners in relation to a dispute that arose about the position of the house as depicted on the plans as opposed to where the Owners wanted the house to be positioned, as well as failing to pay a progress claim. Annexed hereto and marked "AJW-3" is a true and correct copy of the letter sent to the Owners.

6. I recall that in or around April 2017, the Owners raised a dispute with a variation and an extension of time claim in relation to the necessity to remove excess rock from the site.

7. Throughout the construction process, the Owners would frequently attend the site in contravention of the Contract and would inspect the works and then send letters to Stroud Homes commenting on and complaining about the works. Attached hereto and marked "AJW-4" is a true and correct copy of a letter received on or about 17 April 2017.

8. The Owners also parked outside the Property during construction and handed out flyers containing disparaging remarks about Stroud Homes. Attached hereto and marked "AJW-5" is a true and correct copy of one of the flyers.

9. Despite all of the difficulties on the job, Stroud Homes brought the works the subject of the Contract to practical completion on 27 April 2017. An independent inspection was undertaken of the works by Handover.com on or about 4 May 2017, which is the practice of Stroud Homes to ensure an independent person has inspected the constructed dwelling and identified any minor defects and/or omissions. Attached hereto and marked "AJW-6" is a true and correct copy of the Handovers.com report as to the defects.

10. On 8 May 2017, the Owners sent a letter to Stroud Homes in relation to the completion of the works. Attached hereto and marked "AJW-7" is a true and correct copy of the Owners [sic] letter.

11. I understand that the Owners moved into their house around 24 of May 2017.

12. On or about 2 October 2017, Stroud Homes was notified by the Owners of a water ingress issue at the Property which, after some initial investigation, Stroud Homes agreed to rectify through an insurance claim.

13. I recall that the outcome of the insurance investigation was that the issues complained of by the Owners were caused by storm damage, not defective building work.

14. The rectification of the works was to be undertaken over a period of a few days, during which the Owners were meant to vacate the Property. The Owners did not, and the issue of access and rectification was debated back and forth for a number of months. During this time, the Owners made a complaint to the QBCC about the items that Stroud Homes had already agreed to fix.

15. At this point I did not really understand why the QBCC got involved in the matter, as the works that were going to be undertaken where [sic] works covered by Stroud Homes insurance and it was just a matter of getting access.

16. The background information outlined above highlights the issues and difficulty that we have experienced in dealing with the Owners throughout this whole matter from the time we signed the contract to having to now respond to these proceedings.

QBCC Direction

17. The Owners made a formal complaint to the QBCC in relation to 12 items they claimed were defective.

18. On 20 November 2018, the QBCC undertook an inspection at the Property. As a result of the inspection, the QBCC issued Stroud Homes with Direction to Rectify and/or Complete number 0104092 for the rectification of two items, namely in relation to the fasteners to the external fibre cement cladding and a small section of cornice and internal plasterboard not having "acceptable finish" (the "Direction"). Attached hereto and marked "AJW-8" and "AJW-9" respectively is a true and correct copy of the Inspection Report and the Direction.

19. In accordance with its right to seek an administrative review of the QBCC's decision to issue the Direction, Stroud Homes lodged an internal review application with the QBCC in relation to the Direction. Attached and marked "AJW-10" is a copy of the internal review application submitted.

20. On 21 January 2019, the QBCC Internal Review Unit made a decision, following consideration of the material provided to it in the internal review process, that it was not going to issue Stroud Homes with a direction in

relation to the items for the reasons outlined in the Internal Review decision attached at "AJW-11" to this statement.

21. I say that if the Owners were unhappy with this decision, the option for them would have been to externally review the decision not to issue a direction to Stroud Homes. Instead, the Owners have filed these proceedings.

The Current Proceedings

22. To be honest, it is not clear to me what the Applicant (on behalf of the Owners) is trying to achieve through these proceedings.

23. In the application filed by the Applicant, the only request appears to be "to rectify the rusting nails in accordance with the Building Code of Australia dated 2016". I notice that the application refers to 4 attachments, none of which have been provided to Stroud Homes.

24. In the material filed by the Applicant on 6 May 2019, I say:

(a) The direction to rectify referred to by the Applicant has been set aside following an internal review of the decision by the QBCC. The QBCC's current position is that the rusty nails are not a defect;

(b) There is no evidence that Mr Stephen Bennett has given any opinion, expert or otherwise, as to the alleged defect and this statement should be disregarded;

(c) There is no evidence from the Applicant's insurance company, AAMI, about the alleged defect and this statement should be disregarded;

(d) There is no evidence that the Owners have been asked to evacuate their home, or that their home has been condemned. This statement is without merit, outrageous and should be disregarded.

25. I also note that the Applicant has failed to provide any expert evidence for the contentions raised and is not appropriately qualified to give evidence herself about technical matters.

26. I have read the Statement of Slade Damien Walters and agree with the contents of the statement in relation to the technical matters.

27. Stroud Homes does not consider that there is any basis upon which the "defects" the Applicant complains of are items that should be rectified by Stroud Homes. Stroud Homes does not consider that the nails are defective or pose any short or long term risk to the structural integrity or functionality of the Applicant's home.

[30] Ms Walters provided a further statement to the Tribunal dated 7 November 2019, where she stated (adopting the original numbering):

1. I refer to my previous Statement dated 2 July 2019, filed in these proceedings (the "First Statement").

2. I have been informed by my solicitor, Mardee Campbell of Crouch & Lyndon, Lawyers, and verily believe that during a Directions Hearing before Senior Member Brown on 10 October 2019, the Applicants were informed of their obligation to prove their case, which included obtaining proper expert evidence as to the cost to rectify the alleged defects contained in their application.

3. I have received the material filed by the Applicants on 24 October 2019 and consider it to be mostly irrelevant and unhelpful to the Tribunal's consideration of this matter.

4. I say that the quotation received and submitted by the Applicants in this matter is mostly irrelevant on the basis that:

(a) At the original inspection of the property by the QBCC on 20 November 2018 the report confirmed that on the right and left-hand side of the Applicant's house some of the nail heads in the fibre cement sheeting were starting to show rust spots. This is noted at page 75 of the annexures to my first statement;

(b) The QBCC further noted in its report that if the works were to be rectified it would only be [a] matter of removing and replacing the external fasteners on the left and right-hand sides of the dwelling;

(c) The direction issued to Stroud Homes only required that the fasteners be replaced, and this is noted on the direction which is attached at page 86 of my first statement;

(d) The direction to rectify issued in relation to the alleged defective building work was set aside following an internal review filed by Stroud Homes. The internal review decision is contained at page 94 of my first statement and confirms that the slight rusting to some of the nails in the cladding of the Applicant's house was not a defect that required rectification or impacted the structural integrity or functionality of the Applicant's home;

(e) The QBCC had incorrectly classified the sheeting on the Applicant's dwelling in that it thought it was fibre cement sheeting however this is incorrect as outlined in paragraphs 6 to 10 of the statement of Slade Damien Walters dated 2 July 2019 and filed in these proceedings; and

(f) The quotation provided by the Applicants by Warren Family Homes is excessive, unnecessary and unreasonable in that it includes the provision for insulation, removal of all of the external wall claddings, flashings, patio ceiling sheets, and proposes to supply and reinstall the same product that has been installed by Stroud Homes as well as associated painting and clean up. This is unnecessary as the insulation was installed and there is no need to remove anything from the house.

5. These works are not necessary or reasonable to attend to the rectification of the alleged defect as is my understanding, was "some" nails that were showing signs of surface rust and may have required replacement.

6. I refer to pages 75-77 of my previous statement which is the portion of the report from the QBCC which details the nails that appeared to be showing rust.

7. The quotation obtained by the Applicants does not meet the scope of work originally contemplated by the QBCC (namely the removal and replacement of the few rust affected nails) and the quotation should be disregarded by the Tribunal in these proceedings.

8. I do not consider that a few rusted nails is a structural defect and matters such as this are not indicative of defective building work, but of poor owner maintenance.

9. I also note that the Applicant has filed a single handwritten page dated 23 February 2017. I do not know what this document is and am unable to comment on it.

[31] The Applicants did not call for Ms Walters to be cross examined.

The Applicants' arguments

[32] The Applicants argue that the damage caused by the rusting nails is structural in nature, based on information provided to them from their insurance company. The (unnamed) representative of the company was provided with a copy of the QBCC Report and responded by saying as it was a structural defect the builder was responsible.

[33] The Applicants argued that:

... All of the expert evidence suggests that the defects pose a risk to the structural integrity of the home and that this should be rectified at the cost of Stroud Homes Wide Bay as a matter of urgency.⁷

[34] During the hearing, the Applicants stated that they should have obtained an engineer's report. The Applicants submitted that given Mr Warren was not available to provide evidence, that the Tribunal should adjourn the proceedings to enable them to secure an engineer's report. That application was opposed by the Respondent on the basis that the Applicants have had ample opportunity to obtain such a report and that at a directions hearing the presiding senior member encouraged the Applicants to obtain their evidence prior to the hearing.

[35] The Tribunal rejected the application for the adjournment given that both parties closed their case. In any event, the Tribunal had clearly indicated in its directions to the parties on 12 November 2019 that no new evidence would be introduced at the hearing unless the Tribunal felt that it was justified. The Tribunal did not feel that the delay was justified to enable the Applicants an opportunity to reopen the case to obtain fresh evidence.

The Respondent's arguments

[36] At the outset of the hearing, the Tribunal rejected arguments advanced by the legal representative for the Respondent that the Tribunal did not have jurisdiction to hear the matter, that the application was misconceived, and the application was lacking in substance to the point where it should be summarily dismissed. The Respondent invited the Tribunal to make a finding dismissing the Applicant's building dispute application pursuant to section 47 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('the QCAT Act') on the basis of the evidence, or lack thereof, submitted on behalf of the Applicants.

[37] The Tribunal determined that it was appropriate to hear the matter in full.

[38] At the conclusion of the hearing, the Respondent argued that:

- (a) Mr Warren's Quotation was excessive, without any justification or evidence by way of photographs to substantiate its contents; and
- (b) the surface rusting of nails at the Property is not a structural defect, but the product of a lack of owner maintenance.

⁷ Statement of Ruth Prichard, [25].

The Tribunal's deliberations

- [39] At the outset of the hearing, the Tribunal enquired of the Applicants as to what they sought from the Tribunal. The response was that they seek an order to rectify what they believe to be faulty works. On its face, that is a request of this Tribunal that is within the jurisdiction of the Tribunal. Often, the Tribunal faces a particular difficulty in dealing with applications that contain scant, or even ambiguous, material in that the proceedings are conducted with relative informality. The Tribunal may inform itself in such ways it sees fit, and it does so without the benefit of pleadings. In court proceedings, where pleadings are provided, the issues are clearly defined and the arbiter of fact is then asked to consider the issues as defined in the pleadings, within the context of the legal framework. In this jurisdiction, where the documentation is often presented in a more informal manner, particularly in relation to those people that are self-represented, it is sometimes difficult to ascertain the nature of the order sought by an applicant. But it is not the case that this Tribunal has a responsibility to parties, particularly those that are self-represented, to simply receive a bundle of material with a request that amounts to 'here, make something of this'. That is not the role of the Tribunal and it is incumbent upon an applicant to outline their position and the orders that they seek with some degree of clarity. However, the Tribunal prides itself on promoting principles of natural justice and ensuring that everyone who believes they have a legitimate claim has an opportunity to present that claim in the best possible way. At the hearing, the Applicants were self-represented. That presents another difficulty for the Tribunal in that, whilst maintaining its objectivity, fairness and independence, it must assist those parties who do not have the benefit of lawyers. The Tribunal is required to maintain its independence and objectivity even though it is providing some degree of assistance to self-represented parties. In this case, the Application was vague, and it was not supported by evidence of substance, but it was not misconceived. Whilst the Tribunal does accept from the material that the Applicants have consistently referred to what appears to be a request for an order of this Tribunal outside its jurisdiction, ultimately there was sufficient material to enable the Tribunal to proceed on the basis of an Application which is within the jurisdiction of the Tribunal.
- [40] But the application lacked substance. Taken at its highest, the Applicants' case was deficient.
- [41] The Applicants did not identify any appropriate cause of action, nor have they produced any probative evidence in support of the vague request made by them of the Tribunal.
- [42] The Applicants have made some vague assertions, which have not been supported by corroborative evidence. In the Application, the Applicants sought 'rectification of the rusting nails' at the Property. The Applicants:
- (a) have failed to provide any independent expert evidence that the nails showing surface rust are a structural defect; and
 - (b) have failed to provide any evidence of the following assertions in the Statement of Ruth Pritchard dated 21 August 2019:
 - (i) at paragraph 20: '...I have followed the advice given by Mr Bennett in commencing the claim on foot [sic]';

- (ii) at paragraph 21: ‘...we phoned our insurance company, AAMI and explained the problem. We also sent them a copy of the QBCC Report and they advised us it was a structural defect and that the builder was responsible’;
 - (iii) at paragraph 24: ‘...we have relied on expert advice for guidance in this claim’; and
 - (iv) at paragraph 25: ‘...all of the expert evidence suggests that the defects pose a risk to the structural integrity of the home and that this should be rectified at the cost of Stroud Homes Wide Bay as a matter of urgency.’
- [43] None of the matters asserted in the Applicants' statement have been supported by any evidence whatsoever and as such, these comments must be given little to no weight by the Tribunal when considering the matter.
- [44] The building inspection report relied on by the QBCC in making the original decision is no longer relevant as it was overturned in the internal review process.
- [45] At its highest, the Applicants have established that some nails have rusted, but there is nothing in their material that causes the Tribunal to believe that such issues go beyond mere maintenance. The Tribunal notes that the Property is on an esplanade directly opposite a beach and accepts the suggestions made by the Respondent that in those circumstances the Applicants do need to be diligent in maintaining their property.
- [46] The Tribunal notes that it is not clear what information was provided to Mr Warren for the purposes of providing his quotation. Accordingly, the Tribunal gives the evidence of Mr Warren little weight in its deliberations.
- [47] The evidence of Mr Prichard at the Tribunal hearing was vague. Likewise, the written material provided by the Applicants was scant in detail and vague. In short, the Applicants were able to produce only minimal probative evidence to support their claim.
- [48] The Applicants have failed to establish their claim. They have failed to:
- (a) provide sufficient evidence that the alleged breach of contract has in fact caused a loss to them;
 - (b) establish any form of loss that is not too remote; and
 - (c) in any event, they have failed to mitigate any alleged loss.
- [49] The Respondent's evidence is cogent and probative. It outlines, with clarity, the work undertaken by the Respondent in fulfilling its obligations under the Contract in such a way as to defeat any vague suggestions made by the Applicants that the Respondent has failed to fulfil its commitment in relation to the matter complained of by the Applicant.
- Costs**
- [50] Given that the Application is dismissed, in the circumstances of this case, the question is whether it should follow that an order be made that the Applicants pay the Respondent's legal costs of and incidental to the proceeding.

- [51] At the conclusion of the hearing, the Tribunal invited the parties to make submissions in relation to costs.
- [52] The Applicants made no application for costs, nor did they provide the Tribunal with any submissions in relation to the matter of costs.
- [53] The Respondent applied for its costs arising from having to respond to the Application. The Respondent sought an order that the Applicants pay the Respondent's costs of and incidental to the proceedings on a standard basis on the District Court Scale of Costs as agreed, or failing agreement, as assessed.⁸
- [54] The Respondent stated that it had incurred legal costs in the sum of \$9,294.12.⁹ That amount appears to be appropriate, on a solicitor/client basis, to address the Application, with the degree of complexity involved.
- [55] Section 77(3) of the *Queensland Building and Construction Commission Act 1991* (Qld) ('the QBCC Act') states that the Tribunal may award costs. Section 77(3)(h) is a 'modifying provision', so that it prevails over both sections 100 and 102 of the QCAT Act.¹⁰
- [56] The Tribunal must determine whether an award of costs is justified in the circumstances, noting that in building cases, unlike under the QCAT Act, there is no strong contra-indication against a costs order.¹¹
- [57] Therefore, when exercising the discretion toward costs, the Tribunal must consider, as a starting point, the proposition that it is just and reasonable that a party who causes another to incur costs should reimburse the other party for those costs. The Tribunal must exercise its discretion judicially and, in accordance with established principles, generally a successful litigant in a building dispute should be entitled to an award of costs.¹²
- [58] Rule 85 of the QCAT Rules provides that if the Tribunal makes an order against a respondent (other than a proceeding for a minor civil dispute), the Tribunal may order a respondent to pay the prescribed fee which was paid on filing an application.
- [59] Rule 87 of the QCAT Rules provides for how costs are to be assessed under section 107 of the QCAT Act if the Tribunal makes a costs order that requires the costs to be assessed under the rules.
- [60] The Tribunal must attempt to fix costs if possible.¹³
- [61] The Tribunal is persuaded that this is a case where it is appropriate, in the interests of justice, to make an award of costs against the unsuccessful Applicants. The Tribunal does not do so lightly.
- [62] The Applicants persisted with the Application, which on the evidence presented, had little prospect of success. The Applicants did not produce Mr Warren to face cross examination. The Respondent consistently maintained its position.

⁸ Respondent's Submissions on Costs dated 17 December 2019, [4].

⁹ Ibid, [38].

¹⁰ *Partington & Anor v Urquhart (No 4)* [2019] QCATA 96 [11], [13].

¹¹ *Bartlett v Contrast Constructions Pty Ltd* [2016] QCATA 199.

¹² *Rainbow Builders Pty Ltd v The State of Queensland through the Department of Housing and Public Works (No 2)* [2016] QCAT 497.

¹³ QCAT Act, s 107(1).

- [63] It is appropriate to refer to the District Court scale because of the complexity of matters, in large part caused as result of the Applicants' failure to properly present their case. Due allowance must be made for the fact that the Tribunal is to deal with matters in a way that is economical.¹⁴
- [64] The Tribunal determines that an appropriate order, that is fair and reasonable,¹⁵ for costs is fixed in the sum of \$6,000 which is approximately 65% of the legal fees incurred by the Respondent. It is a figure that is in line with a reasonable calculation based on the District Court Scale of Costs, and it allows for the usual reduction of 'solicitor and own client' costs, when assessed on a standard basis. That level of costs also avoids the burden of an indemnity costs order that may be crushing.¹⁶

Orders

- [65] The orders are as follows:
1. The application is dismissed.
 2. The applicants must pay costs, fixed in the sum of \$6,000.00, to the respondent within 14 days.

¹⁴ Ibid, s 3.

¹⁵ *Amos v Monsour Pty Ltd* [2009] 2 Qd R 303.

¹⁶ *Nursing and Midwifery Board of Australia v Tainton* [2014] QCAT 161, [40].