

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Rajagopal v Queensland Building and Construction Commission* [2020] QCAT 154

PARTIES: **RANGANATHAN RAJAGOPAL**
(applicant)

v

QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION
(respondent)

APPLICATION NO/S: GAR223-19

MATTER TYPE: General administrative review matters

DELIVERED ON: 17 March 2020

HEARING DATE: 18 February 2020

HEARD AT: Brisbane

DECISION OF: Member Deane

ORDERS: **The decision of the Queensland Building and Construction Commission made on 14 May 2019 to disallow a claim under the statutory insurance scheme is confirmed.**

CATCHWORDS: ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – GENERALLY – review of a decision to disallow a claim under the statutory insurance scheme – whether the driveway and other defective work was primary building work under the scheme

Acts Interpretation Act 1954 (Qld), s 14A
Queensland Building and Construction Commission Act 1991 (Qld), s 3, s 69, s 69A, Schedule 1 s 66
Queensland Building and Construction Commission Regulation 2003 (Qld), s 9, s 10, s 11
Queensland Building Services Authority Regulation 1992 (Qld), s 4B
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 20, s 24

Jones v Queensland Building Services Authority [2010] QCAT 563
Kehl v Board of Professional Engineers of Queensland [2010] QCATA 58
Rezaee and Anor v Queensland Building Services Authority [2011] QCATA 335

Sauverain v Queensland Building Services Authority
[2000] QBT 87

APPEARANCES &
REPRESENTATION:

Applicant: Self-represented
Respondent: G Phillips, in-house Legal Officer

REASONS FOR DECISION

- [1] Mr Rajagopal's claim under the Queensland Building and Construction Commission's ('QBCC') statutory insurance scheme ('the SIS') was disallowed initially on 19 March 2019 and again upon internal review by decision dated 14 May 2019 ('the Decision'). Mr Rajagopal seeks review of the Decision. The SIS is established under the *Queensland Building and Construction Commission Act 1991* (Qld) ('QBCC Act') as it is now known.¹
- [2] On a review, the Tribunal has power to confirm or amend the decision, set aside the decision and substitute its own or set aside the decision and return it for reconsideration.² The Tribunal's function is to reach the correct and preferable decision after a fresh hearing on the merits.³ There is no presumption that the decision under review is correct.⁴
- [3] The facts are essentially not in dispute. Mr Rajagopal entered into a contract for the construction of a new home with Kurrajong Steel Homes Pty Ltd ('the Builder') on or about 3 May 2012 ('the Contract'). At that time the Builder was licensed by the QBCC. The scope of works under the Contract was for the construction of Mr Rajagopal's home, the driveway, fence and other works.
- [4] As a result of the 2011 Brisbane floods it was an approval requirement to construct the house at a higher ground level than previously required and therefore the building pad was raised. As a consequence, the driveway was required to be of a steeper design than it might have otherwise been. The works reached practical completion on or about 6 March 2013.
- [5] In or about February 2018, Mr Rajagopal observed that the driveway had subsided and engaged with the Builder to seek to rectify the issue, without success. He then sought the QBCC's assistance. The QBCC accepted that the driveway is defective building work. It issued the Builder a direction to rectify the driveway and adjacent fence.⁵ The Builder went into liquidation the day prior to the date by which rectification was to be performed. The QBCC then considered whether Mr Rajagopal had a claim against the SIS.
- [6] The QBCC accepts that the driveway was not built in accordance with the Contract, in particular the engineering drawings and that as designed the driveway slab was to be physically connected to the dwelling slab. However, as constructed, the

¹ Previously *Queensland Building Services Authority Act 1991* (Qld).

² *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 24 ('QCAT Act').

³ *Ibid*, s 20.

⁴ *Kehl v Board of Professional Engineers of Queensland* [2010] QCATA 58, [9].

⁵ Exhibit 5, SOR7.

driveway slab and the dwelling slab were not connected. Mr Hughes, an engineer, gave oral evidence that as designed the driveway had a greater level of connectedness than what he, in his experience, would regard as usual.

- [7] I accept Mr Rajagopal's evidence that the subsidence is becoming worse over time and requires rectification as soon as possible. He has found himself in an unfortunate situation.
- [8] Mr Rajagopal's Application⁶ and his submissions refer to current provisions of the QBCC Act. Provisions and definitions in the current legislation and regulations are not necessarily relevant to the issues I am required to determine.
- [9] The QBCC Act and regulations have been amended since Mr Rajagopal signed the Contract. It is necessary to determine which provisions are applicable. Mr Rajagopal also refers to recent extracts from the QBCC's website. He acknowledges that he did not take steps prior to or at the time of signing the Contract to investigate and understand the extent of coverage the SIS provides to homeowners. There is no contention that the extent of cover was misrepresented by the QBCC to Mr Rajagopal prior to the relevant policy commencing.

What is the applicable legislative framework? Which SIS terms apply?

- [10] The QBCC Act current as at the time of the hearing⁷ provides:
- (a) a policy of insurance that came into force under former part 5 continues in force on the terms stated in the board's policies for that purpose.⁸
 - (b) 'board's policies' is defined to mean the policies of the board made for the purposes of section 19 of the QBCC Act and relating to the SIS.⁹
 - (c) despite the replacement of part 5, the former part 5 continues to apply to a contract for residential construction work if the contract was entered into before the replacement day.¹⁰
 - (d) 'replacement day' is defined to mean the day the former part 5 was replaced under the *Queensland Building and Construction Commission and Other Legislation Amendment Act 2014* (Qld).¹¹
- [11] The 'replacement day' clearly occurred after the Contract was signed.
- [12] As at the date the Contract was signed the relevant reprint of:
- (a) the QBCC Act (as it is now known) was that current as at 1 January 2011. Part 5¹² set out provisions in respect of the SIS. It provided that the statutory policy of insurance comes into force in the terms stated in the board's policies if a consumer enters into a contract for the performance of 'residential

⁶ Exhibit 1.

⁷ Reprint current as at 1 January 2020.

⁸ *Queensland Building and Construction Commission Act 1991* (Qld), Schedule 1 s 66(1) ('QBCC Act').

⁹ *Ibid*, Schedule 1 s 66(5).

¹⁰ *Ibid*, Schedule 1 s 66(2).

¹¹ *Ibid*, Schedule 1 s 66(5).

¹² QBCC Act, reprint current as at 1 January 2011, s 67X to s 71AA (inclusive).

construction work' with a licensed contractor.¹³ Insurance cover commences on the earliest of the following:

- (i) when the contractor pays the premium;
 - (ii) on the date the contract between the contractor and consumer is entered into; or
 - (iii) when the contractor commences the work.¹⁴
- (b) the *Queensland Building and Construction Commission Regulation 2003 (Qld)* (as it is now known)¹⁵ was that current as at 1 January 2012 ('the Regulations'). It provided relevant definitions:
- (i) 'residential construction work' was defined as 'primary building work' and 'associated building work'.¹⁶
 - (ii) 'primary building work' was set out in section 11.
 - (iii) 'associated building work' was set out in section 12.

- [13] I therefore find that the relevant policy came into force on or about 3 May 2012. There does not appear to be any dispute that the policy in force as at 3 May 2012 was set out in Insurance Policy Conditions Edition 8.¹⁷ These terms were effective from 1 July 2009 ('the Policy').
- [14] Clause 4.1 of the Policy provides that the QBCC agrees to pay the cost of rectifying defects in the residential construction work that is primary building work other than for defects from subsidence or settlement referred to in Part 5.¹⁸
- [15] Clause 4.6 of the Policy provides that the QBCC is not liable under this Part for that part of residential construction work that is associated building work.¹⁹
- [16] Clause 5.1(a) of the Policy provides that the QBCC agrees to pay the cost of remedying subsidence or settlement damage to the residential construction work that is primary building work.²⁰
- [17] Clause 5.6 of the Policy provides that the QBCC is not liable under this Part for the cost of remedying subsidence or settlement damage to the residential construction work that is associated building work.²¹
- [18] Clause 11.1 of the Policy sets out definitions of certain terms used in the Policy.²² The terms 'residential construction work', 'primary building work' and 'associated building work' all have the meanings as defined in sections 10, 11 and 12 of the Regulations.

¹³ Ibid, s 69(2).

¹⁴ Ibid, s 69A(2).

¹⁵ Previously *Queensland Building Services Authority Regulation 2003 (Qld)* ('the Regulations').

¹⁶ Ibid, s 10.

¹⁷ Exhibit 5, attachment SOR2.

¹⁸ Ibid, p32 of indexed bundle.

¹⁹ Ibid, p35.

²⁰ Ibid.

²¹ Ibid, p38.

²² Ibid, p59–p64.

- [19] Whether the claim is considered under Part 4 or Part 5 of the Policy, the question to be determined is whether the defective work is ‘primary building work’.
- [20] Mr Rajagopal’s complaint refers to the driveway, the gas bottle screen and the fence. He contends that the subsidence of the driveway is causing the gas bottle screen to rotate and is also causing the issue with the fence. The oral hearing focussed on the subsidence of the driveway, sometimes referred to as the ramp.

Is the driveway/ramp primary building work?

- [21] I find that the driveway/ramp is not primary building work.
- [22] Mr Rajagopal submits that the construction contended for by the QBCC is a semantical position contrary to the intended purpose of the SIS. He contends that the SIS has been established to protect homeowners and should be construed in that light. He urges me to adopt a ‘common sense’ interpretation. He says that when a contract is entered into for the construction of a residence it naturally includes the construction of a driveway so it should not be excluded from coverage under the SIS. He says that this is an exceptional case as the driveway is in the nature of a ramp and is an integral part of his residence.
- [23] The SIS is designed to assist homeowners in certain specific circumstances. It does not respond to all possible unfortunate circumstances, which homeowners may encounter in building a house.
- [24] The Regulations provided at section 9:

residence means a building or part of a building fixed to land and designed to be used for residential purposes, whether or not it is part of commercial or industrial premises, but does not include the following—

- (a) a boat, caravan, manufactured home, motor vehicle, tent, trailer, train or another similar thing;
- (b) a building designed as a temporary building, including, for example, a demountable building.

- [25] The Regulations provided at section 11:
- (1) Subject to subsection (3), for section 10(a), building work mentioned in subsection (2) is **primary building work** if it is—
 - (a) carried out by a building contractor; and
 - (b) for a residence or a related roofed building; and
 - (c) of a value of more than \$3300.
 - (2) For subsection (1), the following is the building work—
 - (a) construction of the residence or related roofed building;
 - (b) building work that affects the structural performance of the residence or related roofed building;
 - (c) building work for relocation or replacement of a roof, wall, internal partition, floor or foundation;
 - (d) building work for replacement or refitting of fixtures or fittings in a bathroom or kitchen in the residence or related roofed building;

(e) building work for an unenclosed, elevated platform or verandah, including a deck, attached to a residence;

(f) building work that increases the covered floor area of the residence or related roofed building;

(g) building work for installation or repair of the primary water supply to, or sewerage or drainage for, the residence or related roofed building.

(3) The following is not primary building work, but may be associated building work—

(a) fencing;

(b) landscaping;

(c) painting;

(d) installation, renovation, repair or replacement of any of the following—

(i) airconditioning;

(ii) driveways, paths or roads;

(iii) units for heating water regardless of the source of energy for heating, and including units for heating swimming pools;

(iv) refrigeration;

(v) roller shades and shutter screens;

(vi) security doors and grills;

(vii) solar power units and associated electrical components;

(viii) swimming pools, or spas that are not part of a bathroom;

(ix) water tanks that are not part of a primary water supply for the residence or related roofed building.

[26] Section 11(1) of the Regulations provides a definition of primary building work expressly subject to the exceptions in section 11(3). Section 11(3) of the Regulations specifically excludes a driveway from the definition of ‘primary building work’.

[27] Mr Rajagopal contends that because of the gradient the driveway should be construed as a ramp rather than a driveway.

[28] The term driveway is not defined. Relevant principles of interpretation:

(a) are to have regard to the plain and ordinary meaning of the word unless the contrary is shown to be required;²³ and

(b) preference is to be given to the interpretation that will best achieve the purpose of the Act over other interpretations.²⁴

[29] The QBCC relied upon the definition in the Macquarie Dictionary (7th ed) being ‘a passage along which vehicles may be driven, especially outside a private house’.

²³ *Rezaee and Anor v Queensland Building Services Authority* [2011] QCATA 335.

²⁴ *Acts Interpretation Act 1954* (Qld), s 14A.

Mr Rajagopal contends that other dictionaries provide other definitions, including the Oxford Dictionary, which provides that a driveway is a private road. This example is not helpful to Mr Rajagopal. The installation of roads is also expressly excluded from the definition of primary building work.²⁵ I accept that other dictionaries may provide other definitions.

- [30] Although Mr Rajagopal says that it is also used for pedestrian access to the house through the internal door, the area which is subsiding is a concrete aggregate expanse which is primarily designed to be used for vehicles to travel from the public road to the garage of his residence. This characterisation remains even though:
- (a) its gradient is greater than some other driveways and may be regarded as a ramp; and
 - (b) as designed there was to be a greater degree of connectedness than usual.
- [31] I find that the defective building work falls within the ordinary meaning of the term 'driveway'. It is not a strained interpretation of the term unlike the circumstances in *Jones v Queensland Building Services Authority*²⁶ which related to the term 'path'.
- [32] Mr Rajagopal points to a recent extract from the QBCC website, which includes a statement that: 'The installation or repair of driveways is not insurable work when done in isolation'. He submits this is evidence that supports his contention that when, as in his case, the driveway forms part of the scope of work under the contract for the residence that it should be included as part of primary building work as it is for a residence as defined in section 11(1) of the Regulations.
- [33] I am required to construe the terms of the Policy which came into force in May 2012. I am not satisfied that recent statements on the QBCC website are relevant considerations. The relevant terms of the Policy and Regulations are not particularly ambiguous. Recourse to such a statement is not required. In any event there is no evidence before me that such a statement relates to Parts 4 and 5 of the Policy.
- [34] It is not in dispute that the purpose of the SIS is to provide consumer protection. However this is to be construed having regard to the objects of the QBCC Act, which include to regulate the building industry to ensure the maintenance of proper standards and to achieve a reasonable balance between the interests of building contractors and consumers.²⁷ In balancing the interests, I am satisfied that the SIS does not provide unlimited consumer protection.
- [35] The clear purpose of section 11(3) of the Regulations is to exclude certain types of work from the definition of primary building work. Many of the excluded items of work are often part of the scope of work under a contract to construct a residence. If it was intended that these works would only be excluded when performed in isolation then it would have been a simple matter for that to be expressly stated. It was not. There is no basis for me to effectively imply that the exclusion only applies where the listed work does not also form part of a contract for the construction of a residence.

²⁵ Regulations, s 11(3)(d)(ii).

²⁶ [2010] QCAT 563.

²⁷ QBCC Act, s 3(a).

Is the fence primary building work?

- [36] I find that the fence is not primary building work.
- [37] Section 11(3) of the Regulations specifically excludes fencing from the definition of ‘primary building work’.²⁸

Is the gas bottle screen primary building work?

- [38] I find that the gas bottle screen is not primary building work.
- [39] The evidence is that the screen is separate from the residence. I am not satisfied that it falls within any of the definitions of primary building work in section 11(2).

Is the driveway/ramp primary building work under section 11(2)?

- [40] In view of my earlier findings it is not necessary to make a finding on this matter.
- [41] I make the following observations.
- [42] As referred to earlier in these reasons, Mr Rajagopal contends that his driveway is an integral part of his residence providing not only vehicular access but the internal door accessed from the garage is the primary point of access to his residence as he and his family rarely use the front door. The QBCC does not dispute that the driveway provides an important functional purpose.
- [43] Mr Rajagopal relies upon the decision of *Sauverain v Queensland Building Services Authority*²⁹ in support of a contention that the defective work is part of the residence.³⁰
- [44] In that case the then Queensland Building Tribunal considered the term ‘residential construction work’ and related definitions and found that on the evidence the driveway was related to a home and fell within the relevant term.³¹ Since that decision residential construction work and related definitions, which were defined in section 4B of the *Queensland Building Services Authority Regulation 1992 (Qld)* (‘the 1992 Regulation’) have been amended by the Regulations, which replaced the 1992 Regulation.³² The Regulations expressly excluded driveways and certain other items of work from the definition of primary building work.
- [45] Given the changes to the definitions I am not satisfied that *Sauverain*’s case supports Mr Rajagopal’s contention that the work falls within section 11(2)(a) of the Regulations.
- [46] The evidence before me is that the defective work affects the functional performance but not the structural performance.³³ I am therefore not satisfied that the driveway/ramp work affects the structural performance of the residence or related roof building for it to be regarded as primary building work under section 11(2)(b) of the Regulations.

²⁸ Regulations, s 11(3)(a).

²⁹ [2000] QBT 87.

³⁰ Regulations, s 11(2)(a).

³¹ *Sauverain v Queensland Building Services Authority* [2000] QBT 87, [55].

³² 31 August 2003.

³³ Exhibit 6.

[47] The driveway/ramp does not appear to fall within any of the other definitions of primary building work in section 11(2) of the Regulations.

Summary

[48] For the reasons set out, the correct and preferable decision is to confirm the Decision.