

# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Madden Developments Pty v Queensland Building and Construction Commission* [2020] QCAT 97

PARTIES: **MADDEN DEVELOPMENTS PTY LTD**  
(applicant)

v

**QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION**  
(respondent)

APPLICATION NO/S: GAR076-19

MATTER TYPE: General administrative review matters

DELIVERED ON: 24 March 2020

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Howe

ORDERS: **The decision of the Queensland Building and Construction Commission made 29 January 2019 to issue a direction to the applicant to rectify defective building work is confirmed.**

CATCHWORDS: PROFESSIONS AND TRADES – BUILDERS – STATUTORY POWER TO REQUIRE RECTIFICATION OF DEFECTIVE OR INCOMPLETE BUILDING WORK – where applicant seeks to review two related decisions by QBCC to not issue directions to rectify – where the applicant sought review of a decision by QBCC to issue a direction to rectify defective building work – whether the scope of work under the contract extended to waterproofing masonry walls – where it was found not to be within the scope of work of the contract – whether it was fair in that circumstances to issue a direction to rectify – where the builder understood before contract and in the course of construction that there was an obligation to waterproof the walls – where the builder attempted to do that but the work was inadequate – where it was not unfair to direct rectification

*Building Act* 1975 (Qld), s 14(2), s 31  
*Queensland Building and Construction Commission Act* 1991 (Qld), s 20K, s 72(3), s 72(5), Schedule 1 s 76(1)  
*Codelfa Construction Pty Ltd v State Rail Authority of*

*NSW (1982) 149 CLR 337*

REPRESENTATION:

Applicant: M Campbell, Crouch & Lyndon, Solicitors  
 Respondent: M Guiney, Senior Principal Lawyer, Queensland Building and Construction Commission

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] The applicant ('the builder') entered into a written contract with Mr and Mrs Pickering ('the owners') on 17 October 2017 to build a residential townhouse for them at Maroochydore.
- [2] The price was \$285,425.34. The work was completed on or about 20 June 2018.
- [3] On 22 July 2018 the owners complained to the Queensland Building and Construction Commission ('QBCC') about 22 items of alleged defective building work, including the builder's failure to render and paint external walls to make them waterproof.
- [4] The initial decision by QBCC was that the complaint about walls was a contractual dispute, not defective building work, and therefore a direction to rectify would not be issued.
- [5] The owners sought internal review of that decision. On internal review the decision was made that irrespective of any contractual dispute the failure to apply a suitable waterproofing coating to the external masonry walls was defective building work.
- [6] The builder has now sought a review of that internal review decision in the Tribunal.

**The contract**

- [7] The builder maintains sealing two side external block walls was not part of the contract.
- [8] The contract was a HIA Queensland New Homes Construction Contract. By item 16 of schedule 1 to the contract '*Build Specifications Set: J 124Chest 171010085309079 Issue Two 16/10/2017 Plan Set: 17L124CH Pickering Prelim Issue 5 121017*' formed part of the contract in addition to any special conditions.
- [9] The build specifications referred to provided at item 13 that external walls would be a variety of finishes and claddings as per the elevations on the plans.
- [10] By item 32 external wall finishes 'shall be painted to render and clad areas.'
- [11] The plans (4 of 7) include elevation drawings. On plan 4, elevation drawings 2 and 4 depict the side walls in issue. On drawings 2 and 4 the only words added are 'masonry blockwork'. The front and back elevations, drawings 1 and 3, refer by contrast to 'rendered and painted blockwork' and there is an arrow from those words pointing to either both endings of the masonry walls in elevation 1 and one masonry wall ending in elevation 3, or to the side walls of the building which are not shown.

The majority of the face areas to elevations 1 and 3 also refer to different types of cladding.

- [12] Elevations 2 and 4 make no mention of rendering or painting blockwork.
- [13] The builder maintains the side walls of masonry block were never intended to be rendered or painted. It was unclear what type of homes would be built abutting the townhouse on either side, and until they were built it was pointless doing any rendering or painting without knowing what areas of masonry blockwork would not be covered up by the adjacent buildings. Covered areas would not require waterproofing.
- [14] The adjacent buildings have been built and part of the masonry blockwork is not covered up by those new buildings. The owners say it was always part of the contract that all side walls would be rendered and painted. The builder denies that.
- [15] This matter was originally listed for an oral hearing before me on 31 October 2019. By consent the parties asked that the matter be decided on the papers.
- [16] The parties made submissions in accordance with a directed schedule. Subsequent to that the builder sought to file additional material which I permitted, allowing QBCC to respond in turn.
- [17] Part of the additional material from the builder included statutory declarations sworn by Mr Chapman (the nominee for the company) referring to discussions between the owners and him in which he made it clear to them that sealing the block walls would form no part of the contract work and they agreed to that.
- [18] In response QBCC filed statutory declarations by the owners claiming it had been agreed with the builder prior to execution of the contract that any exposed areas of blockwork would be rendered and painted.
- [19] The parol evidence rule excludes the use of extrinsic evidence in the form of pre-contractual negotiations and statements of the intentions of parties for the purpose of construction of the terms of a contract.
- [20] There are a number of exceptions and one such is evidence of surrounding circumstances of the contract as explained by Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of NSW*:<sup>1</sup>
- The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning.
- [21] This exception to the parol evidence rule only applies however when the terms of the contract are ambiguous. Are the terms of the contract ambiguous? It seems to me the terms are simple and clear. Evidence of what was said between the parties prior to contract is therefore not available to change the plain meaning of the contract.
- [22] Here the contract provided that the specifications and plans formed part of the contract. The specifications provided at item 13 that external walls would be a variety of finishes and claddings as per the elevations on the plans.

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<sup>1</sup> (1982) 149 CLR 337, 352.

- [23] The elevation plans could have been drawn with more graphical precision perhaps in respect of the notation about rendering and painting of the end walls. However I conclude that each elevation bears a notation or notations that refers to and explains and is limited to the particular elevation concerned. The details concerning elevations 2 and 4, which deal with the side walls, do not show them as rendered and painted. If that was intended that could have been added but it has not. I determine, given the absence of any reference to rendering and painting to the side elevations, that that was not within the scope of work of the contract.

### **The BCA**

- [24] The National Construction Code ('NCC') comprises three parts. Part 2 contains the construction requirements for residential buildings and together with Part 1 is referred to as the Building Code of Australia ('BCA').
- [25] Under the *Planning Act 2016* (Qld) assessable development is assessed against assessment benchmarks. By s 31 of the *Building Act 1975* (Qld) ('BA'), the BCA is an assessment benchmark for the *Planning Act 2016* (Qld).
- [26] Accordingly building work which is approved development requires compliance with the BCA and by s 14(2) of the BA, building work complies with the BCA only if it complies with all relevant performance requirements under the BCA.
- [27] Additionally (and applying in circumstances where the work is not approved development), s 20K of the *Queensland Building and Construction Commission Act 1991* (Qld) ('QBCC Act') provides that in carrying out the Queensland Building and Construction Commissioner's responsibilities the Commissioner must give effect to any policy of the Queensland Building and Construction Board. The Rectification of Building Work Policy<sup>2</sup> is a current policy of the Board<sup>3</sup> and that policy states that defective building work means building work that is faulty or unsatisfactory, and includes, for example, work that does not comply with the BA, BCA or an applicable Australian Standard. The policy provides that a building contractor who carries out defective building work should be required to rectify that work. The Policy is a statutory instrument and subordinate legislation<sup>4</sup> with current legislative force and effect.<sup>5</sup>
- [28] The development approval for the townhouse provided as standard conditions that masonry construction comply with BCA Part 3.3, which Part extends to waterproofing requirements.<sup>6</sup>
- [29] QBCC say regardless of contractual obligations it remained incumbent on the builder to satisfy the requirements of the BCA and the BCA requires waterproofing of external walls.
- [30] The BCA provides:
- P2.2.2 Weatherproofing
- A roof and external wall (including openings around windows and doors) must prevent the penetration of water that could cause —

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<sup>2</sup> 10 October 2014.

<sup>3</sup> QBCC Act, Schedule 1 s 76(1).

<sup>4</sup> *Statutory Instruments Act 1992* (Qld), s 7 and s 9.

<sup>5</sup> QBCC Act, Schedule 1 s 76.

<sup>6</sup> Statement of Reasons page 430 item 6.

(a) unhealthy or dangerous conditions, or loss of amenity for occupants;  
and

(b) undue dampness or deterioration of building elements.

- [31] QBCC say the performance requirement P2.2.2 has not been achieved. The walls will allow water into the dwelling and that could cause unhealthy conditions, loss of amenity, undue dampness or deterioration of building elements.
- [32] The builder concedes that the failure to seal the external masonry walls was defective building work if 'left unattended to and remain [sic] unsealed.'<sup>7</sup> However the builder claims this was raised with the owners on numerous occasions and the builder's offers to seal the walls were rejected by the owners. The owners should have taken steps to render the walls immediately after taking possession of the dwelling, because it was their obligation under estate covenants they were subject to applying to the building.
- [33] The builder also claims however that there is no evidence of water ingress, merely the possibility that it might happen in the future and therefore QBCC does not have jurisdiction to issue a direction to rectify defects that may only potentially come into existence at a future date. The defect must be real and apparent at the time of investigation.
- [34] Finally the builder says it would be unfair and unreasonable to issue a direction to rectify in circumstances where sealing the external block walls was no part of the contract.

### **Discussion**

- [35] Dealing first with the builder's submission that QBCC does not have jurisdiction to issue a direction to rectify defects that may only potentially come into existence at a future date.
- [36] Section 72 of the QBCC Act provides that if QBCC is of the opinion that building work is defective or incomplete QBCC may direct the person who carried out the building work to rectify the building work.
- [37] There is no additional requirement imposed on QBCC in s 72 that defective building work first manifest in evident failure before QBCC is entitled to direct rectification.
- [38] The builder also claims however that whilst BCA performance requirement P2.2.2 was not followed, an alternate solution was found and followed which achieved the necessary outcome of preventing the penetration of water that could cause unhealthy or dangerous conditions, or loss of amenity for occupants and undue dampness or deterioration of building elements.
- [39] The alternate performance solution was to install furring channels on to the inside of the block walls during construction. That created a cavity between the masonry and the internal plasterboard which allowed for ventilation and achieved the necessary performance requirements.
- [40] Compliance with performance requirements for external masonry walls can be achieved either by using the deemed to satisfy solution or another performance solution (alternative performance solution).

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<sup>7</sup> Builder's submissions filed 4 November 2019, [14].

[41] As set out above, performance requirement P2.2.2 requires that a roof or external wall (including openings around windows and doors) prevent the penetration of water.

[42] Part 3.3.4 of the BCA deals with weatherproofing of masonry in particular and provides:

Appropriate Performance Requirements

Where an alternative weatherproofing system is proposed as a Performance Solution to that described in Part 3.3.4, that proposal must comply with—

(a) Performance Requirement P2.2.2

[43] Performance Requirement P2.2.2 is satisfied for weatherproofing of masonry if it is carried out in accordance with a number of Australian Standards, none of which includes the furring channel solution used by the builder.

[44] Part A2 of the BCA contains compliance requirements for an alternative solution. By A2.3:

Deemed-to-Satisfy Solution

(1) A solution that complies with the Deemed-to-Satisfy Provisions is deemed to have met the Performance Requirements.

(2) A Deemed-to-Satisfy Solution can show compliance with the Deemed-to-Satisfy Provisions through one or more of the following Assessment Methods:

(a) Evidence of suitability in accordance with Part A5 that shows the use of a material, product, plumbing and drainage product, form of construction or design meets a Deemed-to-Satisfy Provision.

(b) Expert Judgement.

[45] Under BCA Schedule 3 definitions:

Expert Judgement means the judgement of an expert who has the qualifications and experience to determine whether Performance Solution or Deemed-to-Satisfy Solution complies with the Performance Requirements.

[46] There is no evidence that an appropriate expert, such as the certifier, has approved the alternative performance solution suggested by the builder. In the absence of evidence of independent expert approval of an alternative solution, the builder's use of furring channels between masonry and plasterboard was not an acceptable alternative performance solution.

**Unfair to issue direction to rectify**

[47] The QBCC Act provides:

**72 Power to require rectification of building work and remediation of consequential damage**

...

(3) In deciding whether to give the direction, the commission may take into consideration all the circumstances it considers are reasonably relevant and, in particular, is not limited to a consideration of the terms of the contract for carrying out the building work (including the terms of any warranties included in the contract).

...

- (5) The commission is not required to give the direction if the commission is satisfied that, in the circumstances, it would be unfair to the person to give the direction.

*Example for subsection (5)—*

The commission might decide not to give a direction for the rectification of building work because an owner refuses to allow a building contractor to return to the owner's home or because an owner's failure to properly maintain a home has exacerbated the extent of defective building work carried out on the home.

- [48] I have found that waterproofing the external masonry walls was not within the scope of work of the builder's contract. Is it unfair to give a direction to rectify defective work to the builder in that circumstance?
- [49] Given the wide terms of s 72(3), the fact that the work was not included in the contract is not determinative of the issue. Section 72(3) extends to just such circumstance as presents itself in the matter at hand.
- [50] After the parties asked this matter be dealt with on the papers, the builder sought to file additional evidence. That was opposed by QBCC but I allowed it and gave QBCC an opportunity to respond. The builder filed a statutory declaration sworn by Mr Chapman. In it he deposed to paying extra to install furring channels as an alternative solution to waterproofing the walls 'to ensure that is [sic] would comply with the performance provisions of the NCC. Even though I was entitled to charge a variation for this additional cost no variation was ever charged to the clients.'<sup>8</sup>
- [51] Mr Chapman also swore a statutory declaration<sup>9</sup> deposing to a discussion he had with the owners before signing the contract in which he stated 'I sat with them in a face to face meeting and explained to them that their block walls would need sealing and that was not currently included in their contract.' He said he suggested using a particular waterproofing product being added to the concrete filler of the blocks called Xypex but the owners rejected that proposal.
- [52] The owners provide an entirely different version of the discussion. They say they were surprised when Mr Chapman told them, after the construction finished, that rendering the external side walls was not part of the contract. In a supplementary statement of evidence by the owners<sup>10</sup> they say that at the meeting with Mr Chapman that he refers to they were the ones who told Mr Chapman they wanted to add a waterproof additive to the block filler, but his response was that it was not necessary because any exposed areas would be rendered and painted by him.
- [53] It is unnecessary to reach a conclusion about whose version is preferred given QBCC say using Xypex added to the corefill of the block work would not have waterproofed the walls anyway. That is because moisture would still be able to pass through the concrete blocks and through the mortar joints between blocks. I accept QBCC's statement about this.

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<sup>8</sup> Statutory declaration sworn 18 November 2019.

<sup>9</sup> Sworn 1 November 2019.

<sup>10</sup> Dated 28 November 2019.

- [54] The builder's excuse for omitting waterproofing from the contract that it was unclear what type of homes would be built adjacent to the townhouse and until they were built what part of the walls would not be covered up and require rendering and painting.
- [55] At minimum, what is clear is that the builder understood he had waterproofing obligations in respect of the block walls. He was well aware of those obligations before development approval was given and it was reinforced in the development approval.
- [56] This matter does not involve a builder following erroneous plans drawn by somebody else upon whom the builder relied believing all statutory obligations were met in doing so. Rather it involves a builder who knew his statutory obligations and despite that failed to appropriately address those obligations, first in drawing up his contract, and then in carrying out the building work. It appears, despite the contract, the builder tried to waterproof the walls but used inadequate means (furring channel) to achieve that.
- [57] In these circumstances I see nothing unfair in requiring the builder to do it correctly in accordance with accepted BCA requirements.
- [58] The builder raises an issue about not being allowed back to rectify the work, however the offer to return to seal the exposed walls was not made until 21 June 2019, well after the internal review decision was made on 29 January 2019 directing rectification.
- [59] The internal review decision to issue a direction to rectify defective work is confirmed.