

# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Bitossi v Queensland Building and Construction Commission* [2021] QCAT 131

PARTIES: **NICOLE MICHELLE BITOSSI**  
(applicant)

v

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

APPLICATION NO/S: GAR355-19

MATTER TYPE: General administrative review matters

DELIVERED ON: 9 March 2021

HEARING DATE: 16 February 2021

HEARD AT: Brisbane

DECISION OF: Member Hughes

ORDERS: **1. The decision of the Queensland Building and Construction Commission dated 13 August 2019 to partly disallow a claim under the Queensland Home Warranty Scheme is confirmed.**

CATCHWORDS: PROFESSIONS AND TRADES – BUILDERS – STATUTORY INSURANCE SCHEME – where applicant sought review of decision by Commission to partly disallow claim under the Queensland Home Warranty Insurance Scheme – where Commission’s experts found no defective workmanship – where applicant failed to adduce independent expert evidence of defective workmanship – where Commission’s decision confirmed

*Queensland Building and Construction Commission Act* 1991 (Qld), s 3, s 7

*Queensland Building and Construction Commission Regulation* 2018 (Qld), s 19

*Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 20, s 24, s 28(3)(a)

*Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175

*Breezeway Developments Pty Ltd v ADG Hydraulics Pty Ltd* [2010] QCATA 69

*Briginshaw v Briginshaw* (1938) 60 CLR 336

*Clarke v Cascade Pools (Qld) Pty Ltd* [2010] QCAT 323  
*Cormack v Queensland Police Service – Weapons Licensing Unit* [2015] QCATA 115  
*Creek v Raine & Horne Real Estate Mossman* [2011] QCATA 226  
*Harley v Department of Justice and Attorney-General* [2012] QCAT 620  
*Harris v Foxworth Pty Ltd* [2013] QCATA 133  
*Kehl v Board of Professional Engineers of Qld* [2010] QCATA 58  
*Laidlaw v Queensland Building Services Authority* [2010] QCAT 70  
*Ramke Constructions Pty Ltd v Queensland Building Services Authority (No. 2)* [2013] QCAT 575  
*Rayner & Anor v Trabme Pty Ltd t/as Elders Redcliffe* [2013] QCATA 212  
*Walker v Queensland Building and Construction Commission* [2014] QCAT 228

#### APPEARANCES & REPRESENTATION:

Applicant: K Bitossi  
 Respondent: A Meginyte, In-house Lawyer

#### REASONS FOR DECISION

##### What is this application about?

- [1] Nicole Bitossi disputes a decision by the Queensland Building and Construction Commission on 13 August 2019 to partly disallow a claim under the Queensland Home Warranty Insurance Scheme.
- [2] Ms Bitossi says that the Commission incorrectly classified the beach entry as only one item, whereas it comprised two separate items: four spa jets; and the in-floor advantage system not installed.

##### What does the Tribunal do in a review application?

- [3] 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.<sup>1</sup> This means that Ms Bitossi need not prove any error by the Commission in its original decision – the original decision is not presumed correct.<sup>2</sup>
- [4] The Tribunal may confirm or amend the decision, set aside the decision and substitute its own decision or set aside the decision and return the matter for reconsideration with appropriate directions.<sup>3</sup>

##### What is the Decision under review?

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<sup>1</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 20.

<sup>2</sup> *Harley v Department of Justice and Attorney-General* [2012] QCAT 620, [8] citing with approval *Kehl v Board of Professional Engineers of Qld* [2010] QCATA 58, [9].

<sup>3</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 24.

- [5] The Commission disallowed claims for these items:
1. Beach entry
  2. (a) In-floor cleaning system not complete (air valves)  
(b) In-floor cleaning system not complete (in-floor cleaning system)
  3. Tiling not level – water feature
  4. Main pool shell not sealed
  5. Wrong beach entry supplied
  6. Fence panels damaged
- [6] The Commission disallowed items 1, 2, 4 and 5 because no evidence was adduced of defective workmanship.
- [7] The Commission disallowed item 3 because it was excluded under Schedule 6 of the *Queensland Building and Construction Commission Regulation 2018 (Qld)* (QBCC Regulation).
- [8] The Commission disallowed item 6 because it was excluded as ‘associated building work’.
- [9] Following a compulsory conference, the Application to review proceeded only for items 1, 2(b), 3 and 5 on the basis that Ms Bitossi no longer sought a review of items 4 and 6.<sup>4</sup>

### **Is Item 3 excluded?**

- [10] Schedule 6 of the QBCC Regulation excludes “Work associated with the erection, construction or installation of the swimming pool, including, for example, paving, supplying or installing water features...”.<sup>5</sup> The words mean what they say. Item 3 relates to the tiling of a water feature. It is therefore excluded from the Home Warranty Scheme.
- [11] Item 3 is therefore disallowed.

### **What do the Commission’s experts say about Items 1, 2(b) and 5?**

- [12] The Commission’s experts, Chris O’Shannessy, Senior Building Inspector and Robert Hughes, Consulting Engineer inspected the property on 4 July 2019. The Commission’s experts relevantly found no defective workmanship for items 1, 2(b) and 5.<sup>6</sup>

### **What is the Applicant’s evidence?**

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<sup>4</sup> Direction 3 dated 2 April 2020.

<sup>5</sup> QBCC Regulation, Schedule 6, s 19(a)(iii).

<sup>6</sup> QBCC Statement of Reasons dated 13 November 2019.

[13] Conversely, Ms Bitossi did not engage any independent experts to inspect the pool and prepare reports. Instead, she relied upon the following evidence:

- (a) Contract Schedule;
- (b) Two undated black and white photographs;
- (c) Letter Scott Mewitt, Technical Service Manager of Compass Pools to Mr Bitossi dated 20 June 2018;
- (d) Various emails of complaint;
- (e) Vantage in-floor cleaning system outline undated;
- (f) Bundle of 14 colour photographs undated; and
- (g) Document entitled “7.1 Deflection limits”.

### **What is the correct and preferable decision?**

[14] Ms Bitossi’s case is essentially that the Commission relied upon incorrect advice from the pool manufacturer and the items were defective. Ms Bitossi submitted that the evidence and information supplied to the Commission from Rickard Engineering and Chris Bailey was a conflict of interest and that Mr Bailey had not attended the site since approximately August 2018.

[15] Even if this is correct, it does not in itself prove that the Commission’s decision was not the correct and preferable decision. This is because in review proceedings, Ms Bitossi has an evidential onus to provide appropriate material to support the decision she seeks:

Generally there is no onus. However, practically, a party will want to adduce evidence which supports the party’s case, since the Tribunal can only make its decision on the material before it. In the absence of appropriate evidence the tribunal will not be free to make the decision sought by the party. This has sometimes been described as an evidentiary burden, but there is no formal onus of proof. The question is whether the Tribunal is satisfied that the provision under consideration can be invoked on the information or material before it.<sup>7</sup>

[16] This has also been described as a ‘practical onus’.<sup>8</sup> The difficulty is that none of Ms Bitossi’s assertions was supported by any independent expert evidence of her own. The evidence of Ms Bitossi and her husband, Keith Bitossi was neither independent nor objective.<sup>9</sup> Mr Mewitt is a representative of the manufacturer but did not attend to give evidence. The Tribunal must observe procedural fairness.<sup>10</sup> If a party is relying upon an expert, they are obliged to make that expert available for cross-examination by the other party. The Tribunal is unable to attach weight to the letter from Mr Mewitt without him attending the hearing to test his evidence.

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<sup>7</sup> *Walker v Queensland Building and Construction Commission* [2014] QCAT 228, [23] citing with approval *Laidlaw v Queensland Building Services Authority* [2010] QCAT 70, [23].

<sup>8</sup> *Cormack v Queensland Police Service – Weapons Licensing Unit* [2015] QCATA 115, [33].

<sup>9</sup> *Ramke Constructions Pty Ltd v Queensland Building Services Authority (No. 2)* [2013] QCAT 575, [39] to [40].

<sup>10</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 28(3)(a).

- [17] This means that Ms Bitossi adduced no independent expert evidence to show:
- (a) whether the work was not to the appropriate standard;
  - (b) whether the work was defective;
  - (c) causation;
  - (d) remedial work required as a result of the alleged defective workmanship; and
  - (e) whomever was responsible for whatever was causing any issues.
- [18] The relevant standard was also not produced in evidence. The Tribunal is unable to determine non-compliance with a standard not in evidence. Ms Bitossi's photographs were undated. It is unclear whether they were taken before, during or after the work was done. They show debris. The Tribunal is not satisfied they are evidence of defective workmanship.
- [19] The Tribunal cannot make findings of defective workmanship without proof. No independence expert evidence was adduced of defective workmanship or causation. The Tribunal cannot make findings of fact where the evidence is insufficient – parties must take responsibility to prepare their own case.<sup>11</sup> A homeowner must prove their claims to the reasonable satisfaction of the Tribunal. As the High Court has held:
- ... 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect references...<sup>12</sup>
- [20] Ms Bitossi has an obligation to act in her own best interests.<sup>13</sup> The onus is always upon Ms Bitossi to present her case.<sup>14</sup> It is not the job of the Tribunal to guess:<sup>15</sup>
- In the context of the legislation and the demands upon public resources like those which fund QCAT it is not unreasonable to impose, upon a party, an expectation and an obligation that it will ensure it acts in its own best interests, or accept the consequences...<sup>16</sup>
- [21] Conversely, the Commission's expert, Mr O'Shannessy did attend the hearing to give evidence. Ms Bitossi was given the opportunity to cross-examine him and test his evidence. In performing its role as a statutory authority to achieve a reasonable balance between the interests of building contractors and consumers,<sup>17</sup> the Commission is entitled to obtain information from both home owners and

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<sup>11</sup> *Clarke v Cascade Pools (Qld) Pty Ltd* [2010] QCAT 323, [3].

<sup>12</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336, 346.

<sup>13</sup> *Creek v Raine & Horne Real Estate Mossman* [2011] QCATA 226, [13], citing with approval *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, 217.

<sup>14</sup> *Rayner & Anor v Trabme Pty Ltd t/as Elders Redcliffe* [2013] QCATA 212, [47]; *Harris v Foxworth Pty Ltd* [2013] QCATA 133, [18]; *Breezeway Developments Pty Ltd v ADG Hydraulics Pty Ltd* [2010] QCATA 69, [9].

<sup>15</sup> *Clarke v Cascade Pools (Qld) Pty Ltd* [2010] QCAT 323, [56].

<sup>16</sup> *Breezeway Developments Pty Ltd v ADG Hydraulics Pty Ltd* [2010] QCATA 69, [12] - [13].

<sup>17</sup> *Queensland Building and Construction Commission Act 1991* (Qld), s 3, s 7.

contractors, using the skill and expertise of its experts to consider that information and prepare reports to assist in its decisions.

- [22] Mr O'Shannessy's findings were made having regard to relevant legislation, regulations, codes and standards.<sup>18</sup> Mr O'Shannessy is a licensed builder with tertiary qualifications in building and construction, waterproofing, training and over 20 years' experience.<sup>19</sup> During his evidence-in-chief and under cross-examination, Mr O'Shannessy impressed me as a straight-forward, honest and even-handed witness. His sworn oral evidence was reasoned and consistent.
- [23] The Tribunal is satisfied that Mr O'Shannessy turned an independent mind and exercised his considerable industry experience in making his findings. No expert evidence was given to the contrary. The Tribunal therefore accepts Mr O'Shannessy's findings and is satisfied they provide sufficient basis to disallow Items 1, 2, 4 and 5.
- [24] Unfortunately for Ms Bitossi, the weight of the evidence is that Items 1, 2(b), 4 and 5 were neither defective nor incomplete. The appropriate order is that the decision of the Queensland Building and Construction Commission dated 13 August 2019 to partly disallow the claim under the Queensland Home Warranty Scheme is confirmed.

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<sup>18</sup> Statement of Christopher James O'Shannessy sworn 9 July 2020, [13].

<sup>19</sup> Statement of Christopher James O'Shannessy sworn 9 July 2020, [4].