

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Taki v Queensland Building and Construction Commission* [2021] QCAT 46

PARTIES: **KIMIHIRO TAKI**
(applicant)

v

QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION
(respondent)

APPLICATION NO/S: GAR103-19

MATTER TYPE: General administrative review matters

DELIVERED ON: 3 February 2021

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Traves

ORDERS: **The reviewable decision of 22 November 2019 not to issue a direction to remedy consequential damage is set aside and substituted with the following decision:**

(a) Shane Were is directed to remedy consequential damage to the vinyl flooring at the site address.

CATCHWORDS: GENERAL ADMINISTRATIVE REVIEW – BUILDING – INTERNAL REVIEW OF DECISION NOT TO ISSUE A DIRECTION TO RECTIFY – whether internal vinyl flooring damaged by defective building work – whether “consequential damage” within the meaning of s 71H – whether a direction to remedy consequential damage should be issued

Queensland Building and Construction Commission Act 1991 (Qld), s 71H, s 72
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 20, s 24

Lawless v Queensland Building and Construction Commission [2019] QCAT 32

REPRESENTATION:

Applicant: Self-represented

Respondent: HWL Ebsworth

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] On 20 March 2019 Mr Taki applied to the Tribunal for review of the internal review decision by the Queensland Building and Construction Commission (QBCC) dated 22 November 2018 which was a decision not to issue a decision to rectify in respect of alleged “consequential damage” to Mr Taki’s vinyl floor coverings.
- [2] Mr Taki is the owner of a property at Upper Coomera. On 8 June 2018 Mrs Taki lodged a complaint form with the QBCC alleging the following works were defective:
- External pavers gradient, in adequate site drainage and final surface levels are causing slab edge dampness to occur.
- [3] The QBCC’s initial inspect report concluded that:
- (a) The segmental paving elements adjacent to the external walls of the dwelling has not been constructed with adequate falls away from the building and constructed at heights less than the minimum required by AS 4773.2-2015; and
 - (b) Mr Were was responsible for remedying the defects.
- [4] On 21 September 2018 Direction to Rectify No 0103887 (DTR) was issued to Mr Were.
- [5] A request for internal review was made by email on 26 October 2018 which asked that the DTR be amended to include that Mr Were “is also responsible for dampness inside or outside as NJA consulting report confirm”.
- [6] On 22 November 2018 the QBCC communicated its internal review decision to Mr Taki which concluded that:
- (a) A direction to rectify would be issued in relation to item 1 of the complaint (Part A); and
 - (b) A direction to rectify would not be issued in relation to the internal damage to the vinyl floor coverings (Part B).
- [7] On 5 December 2018 the QBCC issued DTR No 0104138 (DTR2) to give effect to its decision.
- [8] On 20 March 2019 Mr Taki applied for review of Part B of the internal review decision, being the decision not to issue a direction to rectify in relation to the internal damage to the vinyl floor coverings. In the application under the heading which requires the applicant to state why they think the decision being reviewed is wrong, Mr Taki states:

Internal damages, including Vinyl Floor Coverage, should be considered as consequential damage. QBCC Act 71H 72 (sic) does not limit that the phrase “consequential damage” only to apply on building works. Therefore, a direction should be issued to a person whose work caused the damage.

- [9] There is no dispute that the landscaping work as originally carried out by Mr Were was defective building work. A direction to rectify was accordingly issued under s 72 of the *Queensland Building and Construction Commission Act 1991* (Qld) (QBCC Act) which required Mr Were to rectify the external paving adjacent to the external walls of the dwelling which did not comply with the Building Code of Australia, in particular clause 3.1.2.3 Surface Water Drainage or with the Australian Standards, in particular AS 4773.2, in that the minimum distance of 75mm from the DPC had not been maintained, resulting in moisture from the ground entering due to the house being too low in the ground, causing undue dampness and deterioration of the building elements. I note that the decision to issue this direction was subsequently set aside on re-consideration by the QBCC by decision dated 17 December 2019. The reasons for the decision was that, as the dampness issue had been rectified by the builder; the homeowner did not want a direction to be issued to the applicant for landscaping works, the landscaping work has been changed and no longer resembles the original work, it would be unfair to issue a direction.
- [10] A direction to remedy consequential damage was not issued in relation to the internal vinyl floor covering, in effect, because it was concluded that s 71H which defines consequential damage did not apply to the damage caused to the vinyl floor coverings. Further, a direction to rectify defective building work was not issued with respect to the vinyl floor covering because the laying of vinyl is excluded from the definition of “building work” by operation of s 30 of Schedule 1 to the *Queensland Building and Construction Commission Regulation 2018* (Qld) and the QBCC was of the view, it was therefore unable to issue a direction to rectify in relation to the damage to the vinyl flooring.¹
- [11] Section 72 of the QBCC Act gives the QBCC power to require the rectification of defective building work and to remedy consequential damage. Section 71H defines “consequential damage” as damage caused by, or as a consequence of carrying out building work. The issue in this review is whether the damage caused to the vinyl floor covering is “consequential damage” within the meaning of s 71H, and, if so, whether a direction to rectify should be issued in respect of that damage.

Relevant provisions

- [12] The provisions governing the rectification of building work and the remediation of consequential damage are contained in Part 6 of the QBCC Act. Section 72 provides:

**72 POWER TO REQUIRE RECTIFICATION OF BUILDING WORK AND
REMEDICATION OF CONSEQUENTIAL DAMAGE**

(1) This section applies if the commission is of the opinion that—

(a) building work is defective or incomplete; or

(b) consequential damage has been caused by, or as a consequence of, carrying out building work.

¹ QBCC’s Statement of Reasons for Decision filed 8 January 2020, at 15.

(2) The commission may direct the person who carried out the building work to do the following within the period stated in the direction—

(a) for building work that is defective or incomplete—rectify the building work;

(b) for consequential damage—remedy the damage.

(2A) The commission must make the direction no later than the end of the period prescribed by regulation.

(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).

(4) The period stated in the direction must be the period prescribed by regulation unless the commission is satisfied that, if the direction is not required to be complied with within a shorter period—

(a) a substantial loss will be incurred by, or a significant hazard will be caused to the health or safety of, a person because of the defective or incomplete building work or consequential damage; or

(b) the defective or incomplete building work, or consequential damage, will cause a significant hazard to public safety or the environment generally.

(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.

(6) The commission may, before it considers whether building work is defective or incomplete, require the consumer for the building work comply with a process established by the commission to attempt to resolve the matter with the person who carried out the work.

(7) In subsection (3), a reference to a contract for carrying out building work includes a reference to a domestic building contract for managing the carrying out of building work.

(8) To remove any doubt, it is declared that the commission may act under this section in relation to consequential damage whether or not an owner or occupier has made a request under section 71J.

[13] Section 71H defines “consequential damage” and provides:

71H WHAT IS CONSEQUENTIAL DAMAGE

(1) "Consequential damage" is damage—

(a) caused by, or as a consequence of, carrying out building work at a building site (the "relevant site"), regardless of any intention, negligence or recklessness of the person carrying out the work; and

(b) to a residential property at the relevant site, containing the relevant site or adjacent to the relevant site.

(2) In this section—

"building work" includes any work prescribed by regulation.

"damage", to a residential property, includes any of the following—

- (a) the impairment of drainage at the property;
- (b) the undermining of a fence, retaining wall or other structure along the boundary of the property;
- (c) the compromising of the structural integrity of a building, swimming pool or wall on the property;
- (d) the cracking, lifting or cratering of a driveway or pathway on the property;
- (e) water penetration of the property;
- (f) infestation of the property by termites.

...

Consideration

[14] A decision not to issue a direction to rectify is a reviewable decision under s 86(1)(e) of the QBCC Act. Section 86E(b) has the effect of making an internal review decision of a decision under s 86(1)(e) also reviewable. Section 87 provides that a person affected by a reviewable decision may apply for review.

[15] The purpose of a review is to make the correct and preferable decision.² The Tribunal is required to hear and determine the review by way of a fresh hearing on the merits.³ The Tribunal, on review, may:

- (a) Confirm or amend the decision; or
- (b) Set aside the decision and substitute its own decision; or
- (c) Set aside the decision and return the matter for reconsideration to the decision-maker for the decision, with the directions the Tribunal considers appropriate.⁴

[16] In my view, the issues for determination are whether:

- (i) There is damage to the vinyl floor covering on the ground level of the dwelling;
- (ii) Whether the "damage" is damage contemplated by s 71H;
- (iii) If so, whether it was caused by, or as a consequence of, carrying out building work at a building site;
- (iv) If so, who was the person that carried out the "building work" that caused the consequential damage; and

² *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCAT Act), s 20(1).

³ QCAT Act, s 20(2).

⁴ QCAT Act, s 24(1).

- (v) Whether it would be unfair to give a direction to remedy the damage to that person.

[17] The QBCC made the following submissions regarding the meaning of “damage” for the purposes of s 72:

- (a) Whether the damage to the vinyl floor covering is covered is a question of statutory interpretation;
- (b) The ‘damage’ referred to in s 71H must be sustained to a “residential property” which is defined in s 71H(2) which means, in effect, that the damage must be sustained to a residential structure;
- (c) Vinyl floorings fall outside the definition of “residential property” because they are neither a single detached dwelling, duplex, lot, common property or other similar structure;
- (d) The phrase “includes any of the following” in s 71H(2) arguably means that the only types of damage to which s 71H applies are those specifically listed in subsections 71H(2)(a) to 71H(2)(f) and no others;
- (e) The types of damage in subsections 71H(2)(a) to 71H(2)(f) are all of a kind that affect the structural performance of the ‘residential property’;
- (f) The term ‘damage’ should be interpreted narrowly so as to only include damage of a kind as severe as the examples in s 71H(2)(a) to 71H(2)(f);
- (g) The objects of the QBCC Act in achieving a ‘reasonable balance’ between the interests of building contractors and consumers are not met by requiring a contractor to remedy any and all damage, no matter how minor, caused as a consequence of carrying out building work at a building site

[18] The approach to definitions in a statute was considered by the High Court in *Gibb v Federal Commissioner of Taxation*⁵ where it was held:

The function of a definition clause in a statute is merely to indicate that when particular words or expressions the subject of definition are found in the substantive part of the statute under consideration, they are to be understood in the defined sense – or are to be taken to include certain things which, but for the definition, they would not include. Such clauses are, therefore, no more than an aid to the construction of the statute and do not operate in any other way...⁶

[19] The use of the word “includes” in a definition has been held to be expansionary, to make clear that the word is not limited to its ordinary meaning. In my view, the list of damage in s 71H(2) is illustrative only of the word defined and is not to be taken as covering its field of operation.⁷ I note this is contrary to the approach to interpretation applied by the Tribunal in *Lawless v Queensland Building and Construction Commission*⁸ where it was held that the defective building work (a failure to install articulation joints), was not responsible for any damage of the kind

⁵ (1966) 118 CLR 628.

⁶ Ibid at 635.

⁷ *Commonwealth Bank of Australia v Reeve* [2012] FCAFC 21.

⁸ [2019] QCAT 32.

set out in s 71H(2) and that, accordingly, the dwelling had not sustained consequential damage as a result.

[20] I do not accept the submissions of the QBCC that “damage” for the purposes of s 71H must be construed narrowly so as to only include damage of a kind “as severe” as the examples in s 71H(2)(a) to 71H(2)(f).

[21] The definition of “damage” in s 71H is inclusive and not limited to those examples. In any event, the examples include damage in the nature of “water penetration to the property”. In my opinion, the definition of “damage” in s 71H captures damage caused to internal flooring by slab edge dampness for the purposes of this review.

[22] The evidence as to the damage caused to the vinyl flooring is somewhat limited.

[23] It can be summarised as follows:

- (i) Reference to “damage” to the vinyl flooring in the QBCC’s Statement of Reasons at [4.4]:

The Respondent was not satisfied that the *damage to the vinyl floor coverings* inside the property was of such a significant nature so as to come within the definition of ‘damage’ in section 71H of the QBCC Act.

...

Accordingly, the Respondent formed the view that it was unable to issue a direction to rectify in relation to the *damage to the vinyl flooring*.(emphasis added)

- (ii) Photos 15 to 18 attached to the Report by NJA Consulting Pty Ltd dated 12 June 2018 (NJA Report) which report was commissioned by the QBCC and annexed to its Statement of Reasons. The photographs show sections of the flooring adjacent to the wall which have been removed to reveal a wet floor underneath. There does not appear from the photographs that there is any damage to the vinyl floor itself. There is no reference to damage to the vinyl flooring otherwise in the Report.
- (iii) A reference in a letter from Mr Taki’s house and contents insurer dated 19 August 2020 which refers to rainwater entering the building as a result of building defects (vapour barrier and concrete paving) allowing water ingress into the downstairs bedrooms and damage to the vinyl plank flooring.

[24] There are other references in the Reports annexed to the QBCC’s Statement of Reasons which indicate that the flooring was contributing to the issue of slab edge dampness and was not “fit for purpose”. The NJA Report concludes, relevantly, that the vinyl flooring “effectively prevents the surface of the slab at the building edge from drying out”. The NJA Report Recommendations for rectification works to rectify the slab edge dampness problem, include, relevantly:

- Internal floor coverings within 1000mm of the edge of the floor of the dwelling could be removed and the surface of the slab (1000mmwide) in affected areas should be water proofed. Prior to water proofing being undertaken, the surface of the slab should be should be carefully cleaned to remove any salt deposit present. This cleaning should not involve the use of water...

- On-going monitoring of the extent and severity of the slab edge dampness problem that is present should be undertaken with an aim at determining whether further rectification works are required. Moisture sensitive floor coverings shall not be replaced until it can be demonstrated that the slab relative humidity is less than 75%....
- Any floor coverings that are replaced in the future should not be moisture sensitive. Ceramic floor tiles would be a more appropriate floor covering.⁹

[25] The Second Supplementary Report by NJA Consulting dated 19 August 2019 (Second NJA Report) stated:

- The pervious presence of vinyl flooring also created conditions conducive to slab edge dampness, where any under-flooring moisture was effectively trapped in position.¹⁰

[26] I am satisfied that the vinyl floor covering is wet underneath in places. I am also satisfied that, due to the slab edge dampness problem that used to exist, that such “moisture sensitive” flooring was unsuitable for the dwelling and that ceramic tiles were a better option.

[27] Although there is no direct evidence on the point, it appears from an email from Kimi Taki to QCAT and the QBCC dated 25 March 2020 that the vinyl flooring has been removed, at least in the 3 bedrooms. The email states:

At this very moment, we are still unable to use any of our 3 bedrooms downstairs as a result of the moisture damage caused by the builder. Those rooms downstairs have no floor coverages.

[28] Although the evidence is unsatisfactory, I am prepared to accept that the vinyl flooring was, in part, damaged, due to moisture and that it needed to be removed for that reason. Whether it also needed to be removed to allow the slab to dry out does not, in my view, mean it was not “damaged”. I am satisfied that the floor covering was moisture sensitive, that it was wet underside and that the removal of the floor covering was a direct consequence of the slab edge dampness problems with the dwelling.

[29] Turning then to the issue of whether the damage to the flooring was caused by “building work”. It was submitted by the QBCC in this respect:

In short, it appears that the building work undertaken by both the original builder and Mr Were at the property was causing slab edge dampness, which was worsened by the presence of the vinyl floor coverings installed by the Applicant.

However, there is no evidence before the Tribunal to demonstrate that the building work undertaken by the original builder and/or Mr Were at the property directly caused or contributed to any alleged damage to the vinyl flooring. Specifically, it is unclear if the vinyl flooring was lifted up to investigate the slab edge dampness issues or in order to mitigate the slab edge dampness, and whether the vinyl flooring was the subject of any other damage.¹¹

⁹ NJA Report, at 14.

¹⁰ Second NJA Report, at 6.

¹¹ Submissions of the Respondent filed 25 August 2020 at [6.4]-[6.5].

- [30] It is not in dispute that the slab edge dampness problems experienced by the dwelling were caused by defective building work and that there was potentially more than one cause. I am satisfied that the slab edge dampness caused damage to the flooring. If there had been no slab edge dampness problems, the flooring would still be in place and would not have been damaged by moisture. While I accept that vinyl flooring exacerbated the slab edge dampness because moisture was, in effect, trapped, I do not agree that it was a cause of the slab edge dampness.
- [31] The remaining issues are therefore, whether the slab edge dampness was caused by defective work carried out by Mr Were and, whether, in view of the extent of his responsibility, it is unfair to issue a direction.
- [32] In summary, the dwelling the subject of the complaint has a waffle pod slab. A waffle slab is supposed to have a vapour barrier underneath it to keep it dry. The vapour barrier is supposed to finish level with the finished surface outside the dwelling. That way, the slab edge remains dry and, provided the ground is appropriately graded away from the dwelling, there should not be slab edge dampness problems.
- [33] It appears the concrete waffle pod slab had a plastic vapour barrier under the slab and that this plastic barrier terminated at the base of the external concrete edge of the waffle slab edge beam. It appears that, at least initially (although later rectified by the builder) there was no plastic barrier or liquid waterproof membrane applied to the exposed external face of the slab. The builder was also responsible for the placement of fill/clay material above the vapour barrier and against the exposed slab edge. The evidence of the QBCC was that this contributed to the exposure of the slab edge to stormwater. Further, that the dampproof course had been rendered over, which permitted stormwater to bypass the dampproof course, thereby contributing to rising damp. It was concluded that the termination of the vapour barrier, exposure of the slab edge and placement of the fill material against the slab was done in contravention of the engineering design, National Construction Code Vol 2 Part 2.2.3, 3.1.2.3 and AS2870 cl 5.2.1. This was building work for which the builder was responsible.
- [34] Mr Were completed landscaping work at the property. As part of that work Mr Were installed graded blue stone (crusher dust) over the site fill/clay to provide a level plane and bedding sand over the blue stone for installation of the segmental paving. The installation of blue stone was considered by the QBCC to be contrary to engineering principles adjoining class 1 structures and to have “contributed significantly to the slab edge dampness”.¹² It is a natural stone used for compacting purposes. Due to its properties however, overland and subterranean stormwater that permeates through or below the stone layer is captured in the sense that the stone layer inhibits normal evaporation. It also causes stormwater to pond for extended periods of time below the layer. The stormwater that then comes into contact with the unprotected slab edge, transfers to the slab edge and the evaporation process occurs in part through the slab resulting in slab edge dampness and loss of amenity within the dwelling. Mr Were was considered responsible for poor site drainage, including the blue stone installation. Finally, Mr Were was considered responsible for the installation of the segmental paving at a non-compliant height which compromised the dampproof course and also contributed to slab edge dampness.

¹² QBCC Internal Review Investigation Report dated 26 August 2019 at 3.

The landscaping work he completed, as described above, was considered by the QBCC to be in contravention with the NCC Vol 2 Part 2.2.3, Part 3.1.2.3, AS4773.2, cl 9.6 and the engineering design.

- [35] I am satisfied that the installation of the blue stone and of the segmental paving elements adjacent to the external walls of the dwelling contributed significantly to the slab edge dampness which in turn caused consequential damage to the internal flooring.
- [36] The issue is whether, in the circumstances, it would be unfair to issue a direction to remedy consequential damage to Mr Were. I have not received any submissions addressing this issue from either party, or from Mr Were. I note that, although Mr Were was aware of the proceedings,¹³ he did not file an application to be joined, nor did Mr Taki or the QBCC apply to join either Mr Were or the builder.
- [37] In any event, in my view, the fact that another person, namely the builder, may also be responsible for the consequential damage, does not, of itself, make it unfair to issue a direction to a person who is also responsible. I am satisfied that the defective building work undertaken by Mr Were was a significant cause of the consequential damage and, in those circumstances, it is not unfair to issue a direction to remedy to him.
- [38] I note, in the event the vinyl flooring the subject of this review has now been removed, that any direction to remedy consequential damage to it would sensibly include replacement of flooring reasonably required as a consequence of the damage.
- [39] Accordingly, the internal review decision of the QBCC of 22 November 2018 not to issue a direction to Mr Were to remedy consequential damage at the site address is set aside and substituted with the following decision:

Shane Were is directed to remedy consequential damage to the vinyl flooring at the site address.

¹³ QBCC Decision Notice of Reconsideration of Decision made 17 December 2019 refers to the external review of the “consequential damage aspect of the internal review decision”