

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Widdows v Pacific Blue Painting Pty Ltd & Anor* [2022]
QCAT 114

PARTIES: **PETER WIDDOWS**
(applicant)

v

PACIFIC BLUE PAINTING PTY LTD
(first respondent)

LUKE WILLIAM HOWE
(second respondent)

APPLICATION NO/S: BDL149-21

MATTER TYPE: Building matters

DELIVERED ON: 25 February 2022

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Senior Member Brown

ORDERS:

- 1. The application for miscellaneous matters filed 27 September 2021 is refused.**
- 2. The matter is listed for a Compulsory Conference in Brisbane at a date and time to be advised.**
- 3. The parties must attend the Compulsory Conference by remote conferencing.**

CATCHWORDS: CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – THE CONTRACT – where respondents contend that the proceedings should be dismissed for non-compliance with s 77(2) of the QBCC Act – finding by the tribunal that compliance achieved before commencement of proceedings.

Queensland Building and Construction Commission Act 1991 (Qld) s 77(1), s 77(2), sch 1B s 4(1)(b), sch 2.

Contrast Constructions Pty Ltd v Allen & Anor [2020] QCAT 194

Allen & Anor v Contrast Constructions Pty Ltd (No 2) [2021] QCATA 43

APPEARANCE: 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 25 February 2022 I refused an application by the respondents to dismiss the proceedings. These are my reasons.
- [2] These proceedings involve a dispute between the parties in relation to painting work undertaken at the applicant's home. The applicant and the first respondent entered into a contract for the performance of the works. The second respondent is the director and nominee of the first respondent. In these reasons I will refer to the first and second respondents collectively as the respondents.
- [3] The applicant claims damages for the cost of rectifying defective work undertaken by the respondents. The respondent denies that the work was defective.
- [4] It does not appear to be contentious that:
- (a) The applicant is a building owner;¹
 - (b) The respondent is a building contractor;²
 - (c) The work undertaken by the respondents was domestic building work;³
 - (d) The dispute is a domestic building dispute.⁴
- [5] A person involved in a building dispute may apply to the tribunal to have the tribunal decide the dispute.⁵ A person may not apply to the tribunal unless the person has complied with a process established by the Queensland Building and Construction Commission (the QBCC) to attempt to resolve the dispute.⁶ Compliance with s 77(2) of the *Queensland Building and Construction Commission Act 1991* (Qld) (the QBCC Act) is mandatory. If there is a process established by the QBCC to attempt to resolve a building dispute, that process must be complied with before proceedings are commenced in the tribunal.
- [6] In *Contrast Constructions Pty Ltd v Allen & Anor*⁷ the tribunal held:
- [44] In circumstances where the QBCC is satisfied that a party to a building dispute has complied with a process established by the commission for the purposes of s 77(2), what form that process might take, and whether parties to a building dispute have complied with such a process, is a matter for the QBCC. (emphasis added)
- [7] On appeal, the Appeal Tribunal stated in *Allen & Anor v Contrast Constructions Pty Ltd (No 2)*⁸:
- [25] The homeowners rely on *Redding v Simmons* as authority for the proposition that s 77(2) requires submission of a building dispute to the QBCC's dispute resolution process which is not satisfied by simply obtaining a letter advising of the outcome. The homeowners say that the

¹ *Queensland Building and Construction Commission Act 1991* (Qld), schedule 1B, s 1.

² Ibid.

³ Ibid, schedule 1B, s 4(1)(b).

⁴ Ibid, schedule 2.

⁵ Ibid, s 77(1).

⁶ Ibid, s 77(2).

⁷ [2020] QCAT 194.

⁸ [2021] QCATA 43.

intent and objects of s 77 require the entire building dispute plus contract to be submitted to the QBCC, which was not done. In our view, *Redding v Simmons* is distinguishable because in that case the builder did not engage with the QBCC at all, in circumstances where there was an applicable established dispute resolution process for the relevant dispute. In any event, we disagree that s 77 imposes any such requirements for referral.

[26] The nature and extent of the process established by the QBCC for the purposes of s 77(2) was in issue in *Kime v Klepper*. In *Kime* it was held that there was no dispute resolution process established by the QBCC as contemplated by s 77(2) of the QBCC Act which deals with a commercial building dispute or a domestic building dispute in circumstances where the contract has been terminated. Accordingly, it was held that in circumstances where a domestic building contract had been terminated, it would not be a breach of s 77(2) of the QBCC Act for the applicants to have omitted to attempt to participate in a process established by the QBCC to resolve the dispute.

[27] Here, the builder did attempt to comply with a process established by the commission to attempt to resolve the dispute. The builder received a formal notification from the QBCC that it had attempted to do so but was outside the scope of the established process. In our view, this is sufficient to comply with s 77(2) of the QBCC Act. If there is no process to deal with the dispute then there is no “established” process to deal with the dispute within the meaning of s 77(2). It follows that a person can not be in breach for a failure to comply with a process that does not exist, to resolve their dispute.

[28] Having said that, the builder here applied to the Commission in any event. This is a prudent step to take, particularly when it is not clear exactly what the established process is or to which disputes it applies. It also avoids the Tribunal having to determine the extent of its jurisdiction by reference to the nature and extent of the QBCC’s dispute resolution processes that may have existed at the time. In that respect we note the Consumer Building Guide published pursuant to s 46 of Schedule 1B of the QBCC Act which provides that the QBCC’s EDR (early dispute resolution) process is a free service which offers a facilitation-based approach to resolving disputes while the contract is “still on foot”. There are also fact sheets which refer to the EDR process published from time to time by the QBCC which refer to contracts which are “still active”, in which case EDR will aim to facilitate an acceptable agreement between both parties.

[29] Accordingly, in circumstances where the building contract was terminated and the builder had attempted to comply with the QBCC’s dispute resolution process before applying to the Tribunal, we find that the builder had complied with s 77(2) of the QBCC Act.

...

[31] *There was no error in the Senior Member’s interpretation or application of s 77 of the QBCC Act and this proposed ground of appeal cannot succeed.* (emphasis added).

[8] Accompanying the originating application, the applicant filed a letter from the QBCC to the applicant dated 8 June 2021 (the compliance letter). The letter states in part:

- OUTCOME:** The QBCC cannot take any further action in this matter.
This case has been finalised.
- WHY:** The QBCC's ability to assist is subject to the contractor being given reasonable access, during work hours, to carry out the rectification work.
This access was not granted.
The *Queensland Building and Construction Commission Act 1991* only allows the QBCC to direct a contractor if it is fair to do so.
It is not fair for the QBCC to take action against a contractor when access to the site to carry out the work has not been provided.

[9] The letter goes on to say:

...

If you wish to pursue the matter further, you may now apply to QCAT for assistance.

This correspondence serves as notification you have participated in the QBCC's dispute resolution as prescribed by the legislation and your case has now been finalised.

...

- [10] There can be no doubt, as was the case in *Contrast Constructions*, that the reference in the compliance letter to 'the QBCC's dispute resolution process' is a reference to the process identified in s 77(2) of the QBCC Act.
- [11] The respondents say that if the applicant failed to comply with a series of actions contemplated by the QBCC dispute resolution process, or some particular action in that series, the applicant will not have complied with s 77(2) of the QBCC Act and the proceeding should be dismissed.
- [12] The respondents rely upon the refusal by the applicant to permit access to the property by the respondents to inspect the work. They say that the applicant required compliance by the respondents with a number of unreasonable conditions before he would permit the respondents access to his property. The respondents say that as a result the QBCC closed the complaint
- [13] The respondents say that the refusal by the applicant to allow access to his property compels the conclusion that there has not been compliance by the applicant with the dispute resolution process.
- [14] The applicant says that he was prepared to permit the respondents access to the property subject to the respondents producing a valid certificate of insurance and taking precautions to prevent further damage to the property. The applicant says that the respondents refused to provide a copy of their insurance policy. The applicant subsequently advised the QBCC that he was not comfortable allowing access to the property in the absence of a certificate of currency of insurance. The applicant says that four days later, the QBCC issued the compliance letter. The applicant says that the compliance letter is prima facie evidence of the satisfaction by the QBCC that

the applicant had complied with the dispute resolution process as required by s 77(2) of the Act.

- [15] In response the respondents say that compliance with a process as required by s 77(2) of the QBCC Act is a jurisdictional fact, the non-existence of which deprives the tribunal of jurisdiction. They say that the determination by the QBCC in respect of compliance with a dispute resolution process may carry ‘significant weight’ however the tribunal cannot accept that decision as being determinative of its jurisdiction.
- [16] Accepting for present purposes the submission by the respondents that compliance with s 77(2) is a jurisdictional fact, the objective evidence supports the conclusion that the applicant complied with s 77(2) before commencing the proceedings. The letter from the QBCC to the applicant dated 8 June 2021 is, in my view, clear evidence that the QBCC was satisfied that the applicant had complied with a process established by the QBCC to attempt to resolve the dispute.
- [17] As was held at first instance in *Contrast Constructions* what form the process identified in s 77(2) might take, and whether parties to a building dispute have complied with such a process, is a matter for the QBCC. As I have observed, this finding at first instance in *Contrast Constructions* was not disturbed on appeal. The respondents’ submissions call for conjecture and the drawing of inferences as to the nature of the dispute resolution process and the parties’ compliance with that process. There is nothing before the Tribunal to suggest, for example, that the process required the applicant to grant access to his property as opposed to the process simply requiring the applicant being requested by the QBCC to provide such access. It is not contentious as between the parties that the applicant was prepared to permit the respondents access to his property on conditions. When the basis upon which the inspection take place could not be agreed, the QBCC issued the compliance letter. The inference to be drawn from these undisputed facts is that the QBCC was satisfied that these steps were sufficient to satisfy compliance with a dispute resolution process to *attempt* to resolve the dispute.
- [18] Finally, it should be noted that the respondents’ submissions do not address why the letter of 8 June 2021 should not be accepted as prima facie evidence of compliance by the applicant with s 77(2). Indeed, there is a general flavour to the respondents’ submissions that they are attempting to have the tribunal administratively review the decision of the QBCC regarding compliance. Any such attempt is misguided. Firstly, the decision by the QBCC about s 77(2) compliance is not a reviewable decision.⁹ Secondly, if the respondents seek to have the decision judicially reviewed they must do so elsewhere.
- [19] The application to dismiss the proceedings is refused. I will make directions to progress the matter to a compulsory conference.

⁹ QBCC Act, s 86.