QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Symzac Pty Ltd ATF Yourell Family Trust t/as Newport Consulting Engineers v Queensland Building and Construction Commission* [2023] QCAT 414
PARTIES:	**SYMZAC PTY LTD ATF YOURELL FAMILY TRUST T/AS NEWPORT CONSULTING ENGINEERS** (applicant) **v** **QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION** (respondent)
APPLICATION NO/S:	GAR136-19
MATTER TYPE:	General administrative review matters
DELIVERED ON:	30 October 2023
HEARING DATE:	27 September 2023
HEARD AT:	Brisbane
DECISION OF:	Member Gordon
ORDERS:	**1. QCAT Practice Direction No 4 of 2009 (Expert Evidence) shall not apply to this matter.** **2. The reconsideration decision of 4 March 2020 is confirmed.**
CATCHWORDS:	PROFESSIONS AND TRADES – BUILDERS – STATUTORY INSURANCE SCHEME – where there was cracking of a swimming pool built for a dwelling soon after construction due to highly reactive soil conditions – where a claim under the Queensland Home Warranty Scheme was allowed and a decision made about the scope of works – where the engineers who provided the design for the pool applied to review the scope of works – where there is more than one reasonable way to rectify the work – how to reach the 'correct and preferable decision' – considering the 'loss' indemnified by the scheme and other relevant factors – whether the scope of works should be confirmed or amended PROFESSIONS AND TRADES – BUILDERS – STATUTORY INSURANCE SCHEME – where the scope of works under review contained a number of items – where the applicant for review only disputes some of the items and not others – whether the tribunal must reach the

'correct and preferable decision' on each item

Building Act 1975 (Qld), s 5, s 20, s 28, schedule 2
Building Regulation 2021 (Qld), s 5, schedule 1, schedule 2, schedule 5
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 20, s 23, s 24
Queensland Building and Construction Commission Act 1991 (Qld), s 67WC, s 67WD, s 67X, s 68I, s 71, s 71A, s 86
Queensland Building and Construction Commission Regulation 2003 (Qld), schedule 2C, s 15

Bellgrove v Eldridge (1954) 90 CLR 613
Chalet Homes Pty Ltd v Kelly [1978] Qd R 389
Laidlaw v Queensland Building Services Authority [2010] QCAT 70
Morlea Professional Services Pty Ltd v South British Insurance Co Ltd (1987) 4 ANZ Ins Cas 60-777
Potter v Minahan (1908) 7 CLR 277
Queensland Building & Construction Commission v Whalley [2018] QCATA 38
Reynolds v Phoenix Assurance Co Ltd [1978] 2 Lloyd's Rep 440
Ruxley Electronics and Construction Ltd v Forsyth, Laddingford Enclosures Ltd v Forsyth [1996] AC 344
Sartex Quilts & Textiles Ltd v Endurance Corporate Capital Ltd [2020] EWCA Civ 308
Tabcorp Holdings Ltd v Bowen Investments Pty Ltd (2009) 236 CLR 272
Wilkie v Councillor Conduct Tribunal [2022] QCAT 79

APPEARANCES & REPRESENTATION:

Applicant:	Matthew Yourell, director of Symzac Pty Ltd
Respondent:	Scott Seefeld (counsel) for QBCC, instructed by Holding Redlich

REASONS FOR DECISION

[1] This is a review of a scope of works which may have implications for the amount that can be recovered from the applicant under the Queensland Home Warranty Scheme. There was serious cracking in a swimming pool built in the garden of a home in the Toowoomba Region using one of the applicant's designs. This was rectified under the scheme as specified in the scope of works. In this review, the applicant says there was a more efficient way rectify the work.

[2] The purpose of reviews in the tribunal is to produce the correct and preferable decision. Usually there is only one correct decision but here there were several 'correct' ways to rectify the work and it is necessary to find the preferable way. I need to consider how to do this in such a review.

[3] Finding the preferable decision for the scope of works requires me to identify the 'loss' which is indemnified under the insurance scheme, and then to consider the various factors which may be relevant when deciding what should have been in the scope of works.

[4] Depending on my main findings, some items in the scope of works are not in dispute. I need to consider whether it is necessary to find the correct and preferable decision in respect of all items in the scope of works or only those items in dispute.

Factual background

[5] On 8 February 2017 the homeowner entered into a contract with a building contractor for the construction of a concrete reinforced swimming pool in the garden of his home. As can be seen from the pool build contract,[1] the owner was responsible for providing foundation data, but the contractor was responsible for supplying plans and specifications to suit the foundation data.

[6] The foundation data classified the site as an 'E/P' site. At its worst therefore, it was a site with extremely reactive soil conditions. The soil report referred to extremely reactive surface and sub-surface layers of reactive dark grey/black clay soil, and the classification meant that even with good site drainage and maintenance there were potential ground movements of 130mm to 150mm.[2]

[7] The plans and specifications for the pool were provided by the applicant to the building contractor through standard plans which were said to allow for all types of soil conditions.[3] During construction, the applicant and the contractor consulted and because of the soil conditions, the design was changed to strengthen the reinforcing bars and for bored piers for the slab down to below the base of the pool.[4]

[8] The work was completed by May 2017. Only two months later, the owner noticed loss of water from the pool and by mid-December 2017 it was losing 7 inches of water over three days. The owner said that there were several cracks in the pool shell, the tile lines were cracked, and water was leaking where tiles were breaking out. On 18 December 2017, the owner complained to the QBCC about these, and other things.[5] By 14 April 2018 the owner was reporting that leakage had worsened and the pool was losing approximately 4,000 litres a day.[6]

[9] The owner's complaint triggered a sequence of tests, reports and consultations to try to find the cause of the problem and to decide how to resolve it.

[10] On about 16 March 2018, the QBCC decided to issue the building contractor with a direction to rectify on the basis that the contractor was responsible for the cracking in the pool shell, but the contractor requested an internal review of that decision. In that review, on 10 July 2018 the QBCC decided that the contractor was largely not

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1 Master Builders Pool Building Contract Level 2, 04/2016, hearing book page 58.
2 According to AS2870-2011. The foundation report is in the hearing book page 169.
3 The plan is in the hearing book pages 141 to 143.
4 Explained in a letter of 1 March 2018 hearing book page 431.
5 Complaint form hearing book page 77.
6 Hearing book page 481. Subsequently, Reid Consulting Engineers measured and calculated the likely water loss as about 2,000 litres a day between September 2017 and March 2018 based on Council water meter readings, continuing in July and August 2018: hearing book pages 546 and 576.

to blame for the cracks after all, and the direction to rectify was amended and limited to a minor item, which the contractor said had been fixed.[7]

[11] On 6 August 2018 the owner filed an application in the tribunal for review of the decision made on 10 July 2018,[8] but this was subsequently withdrawn.

[12] Meanwhile, an assessment was made by the QBCC under the Queensland Home Warranty Scheme and on 7 September 2018 a decision was made to allow the owner's claim as an insurance claim under the scheme.[9]

[13] This triggered a sequence of reports and consultations to decide what needed to be in the scope of works to rectify the defective work. Reid Consulting Engineers reported on 5 November 2018 about the cause of the cracking and I consider this in more detail below. The report had initially been commissioned by the owner but the QBCC asked for it to be readdressed to them. Reid were firmly of the opinion that it was the design of the pool which was to blame.

[14] The QBCC asked Reid Consulting Engineers to recommend the necessary rectification work and this resulted in a report dated 7 December 2018.[10] For this report, Reid inspected the site again. Of significance, it was noted that the surface of the concourse slab had moved noticeably since their last inspection in August 2018.[11]

[15] Reid Consulting Engineers recommended demolition of the concourse slab, demolition of the existing pool shell and associated works, removal of all extremely reactive soil under the slab or within 1½ metres of the new work, replacement with compacted clay soil, and reconstruction of the pool with new stormwater drainage.

[16] On 10 December 2018 the QBCC issued a scope of works for the rectification work as described by Reid Consulting Engineers.[12]

[17] The applicant requested an internal review of the scope of works issued on 10 December 2018, saying that removing and rebuilding the swimming pool was very costly and it was unnecessary, bearing in mind that the cause of the movement of the pool was 'the stormwater/backwash pit which was on the uphill side of the pool and had the effect of saturating the soil under the pool'. The applicant contended that the rectification work should be relocation of the backwash pit to the downside of the swimming pool, the installation of a tree root barrier or an alternative physical barrier between the house and the pool to prevent the flow of water down the hill towards the pool, exposure of all the cracks in the pool shell and their repair using Xypex or similar high strength cementitious grout.

[18] At this point the QBCC sought the assistance of another engineer, Mr Hughes. After discussions and consultations, there was a revised scope of works dated 18 March 2019.[13] The main change in this revised scope of works was that the existing pool

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7 This could not be tested at the time because the pool was not being filled because of the leaks: inspection report of 27 August 2018 hearing book page 507.
8 GAR269-18.
9 Hearing book page 522.
10 Hearing book page 591.
11 This further movement can be seen from the photographs in hearing book page 597ff.
12 Hearing book page 604.
13 Hearing book page 686.

shell would not be removed, but instead a new reinforced shell would be built inside the old shell.

[19] On 15 April 2019 the applicant applied to the tribunal for a review of the scope of works dated 18 March 2019, but this has now been replaced by a reconsideration decision of 4 March 2020 as explained below.

[20] The reconsideration decision is that the scope of works should be as follows (the numbering is not sequential because of items removed):

Brief Provide all labour and materials to carry out the following works to the swimming pool at *address*

Note 1 All disturbed areas to be made good to the best achievable match of existing finishes. On completion clean and remove all building rubbish from site. (Note: in addition to the standards provided or omitted, all rectification work is to be in accordance with the current requirements of the Building Code of Australia, relevant Australian Standards and any Manufacturer Recommendations).

1. Allow to remove the swimming pool barrier and store for re-instatement at completion of works.

2. Allow to provide compliant fencing during construction as considered necessary.

3. Allow to disconnect all equipment and services.

4. Demolish concourse slab and remove all debris from site.

5.a. Demolish existing pool coping only.

5.b. Excavate to 1 metre to remove all black clay soils from site to the extent of 1 metre outside the edge of the new concrete concourse surround.

6. Undertake earthworks as specified and excavate to expose the underside of the existing pool to enable supervising engineer to assess subsurface soil conditions below the black soil layer and install agricultural drainage as nominated on Drawing No. 21369 Sheet 9 Issue A by RCE.

7. Supply and install replacement medium plasticity clay soils as specified, placing in layers to achieve compaction of *95% Standard Compaction*.

8. Allow to engage Reid Consulting Engineers to undertake compaction testing at representative layers and to test soil prior to delivery to site

- Plasticity testing of proposed samples PC at $250
- Compaction testing PC at $1,000

9. Reconstruct new pool including concourse slab, filtration equipment, pipework inside that section of the existing pool shell which remains, together with all work necessary to complete the installation to fully commissioned functional standard, together with provision of manuals, guarantees etc.

11. Lay new tiles to coping and concourse slabs. Tiles to be of equivalent quality to existing.

12. Reinstate pool fencing, making good and supplementing as necessary to comply with relevant statutory regulations and to achieve equivalent standard as that originally intended by the original installation.

13. Reinstate 20m^2 grassed area with turf that were affected by demolition.

14. Allow for Reid Consulting Engineers Pty Ltd to inspect the rectification work as follows:

    - Pre-start
    - Inspection of soil excavation to confirm limits and provide advice where required
    - Inspection of the concrete work as required
    - Final inspection

15. Allowance for building application, certification fees and provision of final certificate from Building Certifier for pool and pool safety barrier.

[21] The differences between the reconsideration decision and the original decision under review were:

3. The original decision provided for storage of disconnected equipment and services but on further consideration the requirement to store was removed.

5.a. The original decision was for demolition of existing pool coping, existing stairs into the pool, coping tiles and pipework filtration equipment and the top section of the pool wall as nominated on Drawing No. 21369 Sheet 9 by Reid Consulting Engineers and remove all debris from site but on further consideration this was changed to demolish existing pool coping only.

5.b. The original decision was for excavation to remove all black clay soils from site to the extent indicated on Drawing No. 21369 Sheet 9 of the Reid Consulting Engineering drawings but on further consideration the amount of black clay soil which had to be removed was reduced.

10. This item was removed. It had originally read 'Install storm water drainage as specified' but on further consideration it was decided that it was not necessary to do this because water drained away from the swimming pool uniformly towards the stormwater drain, and not the gully.

13. The turfing area was limited to 20m^2 (originally it was much larger).

16. This item was removed. It had originally read 'Relocate the swimming pool backwash pit so as to connect to the appropriate storm water drainage system' but on further consideration it was accepted that the applicant 'would have had no input into the position of the back pit, accordingly this item should be removed from the SOW'.

The correct approach to the review

[22] This application started life as an application to review a scope of works decision made by Queensland Building and Construction Commission on 18 March 2019. As sometimes happens whilst review applications are in the tribunal, on 5 February

2020 the tribunal invited the QBCC to reconsider the decision.[14] This resulted in a decision dated 4 March 2020 called the 'reconsideration decision'. Since the applicant did not withdraw the application for review, the reconsideration decision is now the decision under review.

[23] The purpose of a review in the tribunal is to produce the correct and preferable decision, and this must be done by way of a fresh hearing on the merits.[15] The tribunal 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 directions that the tribunal considers appropriate.[16]

[24] Two experts gave evidence in the hearing, Mr Robert Hughes who was called by the QBCC and Mr Des Newport who was called by the applicant. Both experts had extensive experience with swimming pools.[17] I read the statement of the applicant's director Matthew Yourell who is also an engineer very experienced in swimming pools and I read a statement from Damien Rigby of Xypex Australia. I read the documents in the hearing book including the QBCC's statement of reasons and the documents attached to that. These included two reports from Reid Consulting Engineers who are also experts in swimming pools, a report from Australian Leak Detection, and several reports from the QBCC's own building inspectors.

[25] In accordance with the relevant practice direction[18] the tribunal convened an experts conclave so that a joint report from the 'independent' experts could be produced. But this did not happen. As it turned out, both independent experts would probably have needed to give evidence at the hearing anyway and so a joint report may not have been much assistance. I am entitled to take into account the relevant opinion evidence from the other experts mentioned above. The failure of the experts conclave, and the existence of the other expert opinions would cause difficulty if the practice direction applied. In the circumstances, I have directed that it does not apply to this matter.

Items in dispute in this review

[26] The applicant challenged three main aspects of the scope of works in the reconsideration decision. In its paperwork,[19] the applicant had 'agreed' many items in the scope of works, but it was explained at the hearing that these agreed items were consequential on the items in dispute. So if the challenge of the items in dispute were successful, some agreed linked items should fall away.

[27] The three main items in dispute in order of convenience for me to consider were:

Items 4, 5b, 7 — Whether the concourse slab had to be demolished, and whether the reactive soil underneath should be removed and replaced with other soil. The applicant said that it was much more cost effective to use screw piers founded below the earth affected by the ingress of water (roughly 3 metres below ground level) and to use void formers under

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14 Under section 23 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) (QCAT Act).
15 Section 20 of the QCAT Act.
16 Section 24 of the QCAT Act.
17 As Mr Newport explained at the hearing, he was independent of the applicant company.
18 QCAT Practice Direction No 4 of 2009.
19 Reply to statement of reasons of 30 September 2019 and statement of Mr Yourell of 30 June 2020.

the new slab to prevent upward expansion of soils pushing up the new slab,[20] or cardboard formers under the new slab to take up such expansion.[21] Any cracks in the tiles could be repaired. This would also mean that certain other items were not necessary or should be amended: removal of the swimming pool barrier and replacement after repair work not necessary (item 1), compaction testing and soil tests not necessary (item 8), tiles to be repaired rather than tiles replaced (item 11), repair to grass areas damaged by the demolition not necessary or reduced in area (item 13) and part of the required inspections during the works (item 14).

Item 9 Whether a new reinforced pool shell needed to be sprayed inside the existing shell. The applicant said that the existing shell was perfectly good and it was more reasonable and logical to repair it instead.

Item 6 Whether the underside of the pool shell needed to be exposed so that the soil there could be assessed.[22] The applicant said that the movement of the pool shell there was within tolerances and once the upward forces from the concourse slab were removed then the pool shell will no longer be pulled up by the slab movement.[23]

[28] The applicant also challenged item 15, saying that certification for the repair works would not be required.[24]

Approach where there is more than one correct way to rectify the defective work

[29] As can be seen below the evidence shows that there were two ways of dealing with the movement of the concourse slab which were argued before the tribunal, both of which would be 'correct'. There are probably several more correct ways too. There were three correct ways of dealing with the cracking in the pool shell which were discussed before the tribunal, and there was a fourth way mentioned in passing.

[30] Since the tribunal must reach the 'correct and preferable' decision the question arises how to do this when there are a number of decisions, all of which may be correct. I raised this with the parties and had some helpful submissions about it.

[31] In this respect it is to be noted that in some jurisdictions the tribunal should reach the 'correct *or* preferable' decision. It is then understood that the tribunal would find the correct decision in cases where there is only one decision which is correct, like for example whether building work was defective. But in cases where there were several decisions which are correct, then the tribunal would need to choose between them to reach the preferable decision.

[32] In a paper in the UQ Law Journal by Kerrie O'Callaghan and Michelle Howard, who are both former senior members of the tribunal,[25] this difference is explained:

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20 Statement of Mr Yourell 30 June 2020 paragraphs 22 and 34e.
21 Evidence of Des Newport who gave expert evidence for the applicant.
22 Reply to statement of reasons of 30 September 2019 paragraph 22.
23 Statement of Mr Yourell of 30 June 2020 paragraph 23.
24 Reply to statement of reasons of 30 September 2019 paragraph 30.
25 *Promoting Administrative Justice: The Correct and Preferable Decision and the Role of Government Policy in the Determination* [2013] UQLawJI 11.

> As is readily apparent from the cases discussed, if there is only one possible decision open on the facts as found and applying the law, the Tribunal must make the correct decision. However, if the statutory provision requires the exercise of discretion, the decision must not only be a correct one, based on the material before the tribunal and the law, but it must be the preferable decision of the possible decisions. Hence, the possibility of making the preferable decision only arises where there is discretion to be exercised.

[33] The paper then refers to the explanatory notes for the *Queensland Civil and Administrative Tribunal Bill* 2009 (Qld) which said:

> This provision recognises that there may be a number of ways of deciding a matter that that would be correct according to law and that the tribunal must, using its own judgement, make the decision that is not only correct, but is also the preferred decision based on the merits of the case.

[34] The paper then explained why in the QCAT Act the words 'correct and preferable' were preferred over 'correct or preferable'.

[35] It is clear from the paper that for my purposes there is no distinction between the two expressions, 'correct and preferable' and 'correct or preferable'. Given that there are a number of decisions each of which is correct I need to find the preferable one.

[36] This leads me to ask another question which arises in this review, as to whether the tribunal needs to reach the correct and preferable decision on all matters decided, when only some of them are in dispute.

Does the tribunal need to review the items not in dispute?

[37] This arises because the applicant makes three main challenges of items in the scope of works, and it is said that if those items are to remain in the scope of works then other items are 'agreed' and not in dispute.

[38] I raised with the parties whether in those circumstances I need to review all the items in the scope of works. In other words, do I need to ensure that each item in the scope of works is the correct and preferable decision? I had some helpful submissions about this.

[39] I am aware that I need to be cautious here because in *Queensland Building & Construction Commission v Whalley* [2018] QCATA 38 the Appeal Tribunal said that the tribunal has the task of reaching the correct and preferable decision after a fresh hearing on the merits,[26] and this meant it should 'do over again' what the original decision maker did,[27] which requires considering all the material afresh including any material that was before the decision maker.[28] *Whalley* was an application to review a decision by the QBCC that work had not been satisfactorily rectified. But the builder was not challenging that decision: the builder was only challenging the process the QBCC followed in making that decision. On that basis the builder submitted that the decision should not have been made – a submission which succeeded in the tribunal at first instance. The Appeal Tribunal decided that, notwithstanding that the builder was not challenging the QBCC's decision that the

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26 As required by section 20 of the QCAT Act.
27 [10].
28 [14].

work had not been satisfactorily rectified, the tribunal at first instance should still have enquired into that question and decided it.[29]

[40] On the other hand in *Wilkie v Councillor Conduct Tribunal* [2022] QCAT 79 there was an application to the tribunal to review a decision of the Councillor Conduct Tribunal which had made a decision about fourteen allegations against the applicant. The CCT had decided that about half the allegations did not amount to misconduct but the others did. Although the applicant applied for a review of the whole decision, he did not wish to challenge the findings in the decision which were in his favour. Judicial member D J McGill SC found that the statutory provisions contemplated that each finding of misconduct was a separate decision and, on that basis, directed that the application to review the decision was limited to the findings adverse to the applicant and it was not necessary for the tribunal to review those favourable to him. Judge McGill said:[30]

> There is no reason why a person entitled to (apply for a review) would want to review a decision which was favourable to that person, and when there were a number of separate allegations advanced in one application to the first respondent, it would not be satisfactory if a person with a right to apply for a review were to be exposed to having the findings on allegations which were favourable to that person also reviewed by the Tribunal, in effect as the price for a review of any decision.
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> .. (it) would mean that any review of the decision overall of whether or not there was misconduct would require the Tribunal to conduct a full review of all the allegations of misconduct. Given that the Tribunal is expected by the legislature to deal with matters in a way that is accessible, fair, just, economical, informal and quick,[14] that strikes me as an unlikely legislative intention, and one which is not supported by the purposes of the LG Act. Indeed, if a number of allegations of misconduct are found against a councillor and the councillor does not wish to pursue a review of the decision in respect of one or some of them, the review will be conducted even more efficiently. The fact that the Tribunal conducts a review by a hearing de novo does not mean that the parties cannot confine the issues in dispute between them.[15]
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> [14] The QCAT Act s 3(b). See also s 4(b), (c).
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> [15] That follows from the QCAT Act s 4(b), and the general thrust of Part 6 Divisions 1A, 2, 3 and 4 of the QCAT Act. Insofar as *Whalley (supra)* suggests that the parties cannot confine the issues in a review, I respectfully disagree.

[41] I respectfully agree with Judge McGill that having regard to need for the tribunal to be economical, informal and quick it seems justifiable to take a pragmatic view here, that where an applicant is sufficiently informed and able to identify which matters are in issue, then if the tribunal is satisfied it is right to do this, when reaching the correct and preferable decision it may limit the review to the matters in issue.

[42] This also seems to be confirmed by a series of cases in the tribunal which have followed the approach in *Laidlaw v Queensland Building Services Authority* [2010]

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29 [29].

30 [14] and [15].

QCAT 70 concerning onus of proof in review matters, and which were relied on by counsel in the hearing. In Laidlaw, Member Howard said (citations omitted):[31]

> Consideration has been given to the issue of onus in merits review proceedings in the federal arena before the Administrative Appeals Tribunal, where similarly the AAT Act does not deal with the issue of onus of proof. 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.

[43] By extension, if the review applicant is not challenging a decision which is one of a number of decisions, or a particular finding which is part of a single decision, then in the usual case there will be no evidence and no submissions about that decision or finding. Then the tribunal will be unable to change the decision on review, and will need to confirm it. To that extent the decision under review will be a starting point.

[44] This approach seems particularly valuable in a matter like this one before me, where I need to find the preferable way of rectification out of many possible correct ways of rectification. This because the evidence and submissions have concentrated only on some of those correct ways of rectification, and other ways of rectification which may also be correct, have only been mentioned in passing. I would suggest that I am not obliged to try to investigate all those other ways.

The insurance provisions which apply

[45] Since I need to reach the correct and preferable decision about the scope of works, and the scope of works is about the work that the homeowner is entitled to have done under the insurance scheme,[32] I need to understand exactly what that entitlement is. This requires looking closely at the insurance provisions which apply.

[46] In this matter the applicable insurance provisions depend on the date of the contract.[33] This is 5 February 2017. At that time the insurance provisions were those in Schedule 2C of the *Queensland Building and Construction Commission Regulation* 2003 (Qld). Schedule 2C was added to the 2003 regulation by the *Queensland Building and Construction Commission and Other Legislation Amendment Regulation (No. 2)* 2016 (Qld). In 2018, the 2003 regulation was replaced by the *Queensland Building and Construction Commission Regulation* 2018 (Qld) where the provisions which were in schedule 2C are now to be found in schedule 6. Although the section numbers of schedule 2C and schedule 6 are the same, a comparison of the text in the two schedules discloses some changes, so I shall work from the reprint of the 2003 regulation with an effective date starting 2 December 2016 and ending on 3 May 2017.

[47] Prior to the 2016 amending regulation mentioned just above, the insurance terms were in the Insurance Policy Conditions - a document published from time to time in a way similar to any other private insurance policy.

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31 [23].

32 As appears from section 71A of the QBBC Act considered below.

33 By section 26B of the 2003 regulation (section 30 of the 2018 regulation) the terms of cover are those in schedule 2C (or schedule 6 of the 2018 regulation) when 'the statutory insurance scheme comes into force for the work'. Section 68I of the QBBC Act defines when this happens, and here it is when the contract was entered into.

[48] Since the QBCC allowed the insurance claim in respect of defective design work for the swimming pool for the site conditions, I need to concentrate on the homeowner's entitlement where there is defective design work.

[49] Firstly we have section 3 of the QBCC Act which lists the objects of the Act, one of which is:

> (b) to provide remedies for defective building work

[50] How this object is achieved by the insurance scheme was explained when the terms of the scheme were moved from the Insurance Policy Conditions document into a regulation, in the explanatory notes to the 2016 amending regulation which said:

> The Amendment Regulation is consistent with the main objects of the QBCC Act and, in particular, with the objective of providing 'remedies for defective building work'. The Scheme will provide monetary assistance to consumers of residential construction work where the work is found to be defective.
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> .. The Scheme which is provided for under the Amendment Regulation creates a mechanism for rectifying residential construction work which does not comply with relevant codes and standards where the relevant builder is unable or unwilling to do so, for example, due to insolvency.

[51] Then we have section 67X of the QBCC Act which is headed 'Statutory insurance scheme'. It says (my emphasis):

> (2) The purpose of the statutory insurance scheme is to provide assistance to consumers of **residential construction work** for loss associated with work that is defective or incomplete.
>
> (3) Assistance can not be provided under the scheme to a consumer unless the consumer has suffered loss as a consequence of residential construction that is defective or incomplete.

[52] 'Residential construction work' is defined in section 67WA as:

> (a) primary insurable work; or
>
> (b) associated insurable work.

[53] Section 67WC(1)(d) of the QBCC Act provides that the erection, construction or installation of a swimming pool carried out by a licensed contractor is 'primary insurable work', and the effect of section 67WD(1)(a) combined with section 67WB(3) is that for primary insurable work relating to a residence (as here), design work carried out under a contract for primary insurable work (as here) would be 'associated insurable work'. In other words, design work arranged and provided by the contractor (as here) would be 'associated insurable work'.

[54] Strangely, 'associated insurable work' is not mentioned in the terms of cover in schedule 2C of the 2003 regulations. So the question arises how associated insurable work comes to be covered by the scheme as required by section 67X which says that the purpose of the scheme is that it is to be covered.

[55] This appears from section 67Y of the QBBC Act which says:

> **67Y Assistance available under statutory insurance scheme**
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> The terms of cover under which a person is entitled to assistance under the statutory insurance scheme are prescribed by regulation.

[56] Section 26B of the 2003 regulation says:

> **26B Terms of cover**
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> (1) For section 67Y of the Act, the terms of cover under which a consumer is entitled to assistance under the statutory insurance scheme are stated in schedule 2C.
>
> (2) The terms of cover apply to the following work—
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> (a) residential construction work;
>
> (b) work performed by either of the following if the work is associated with residential construction work—
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> (i) an architect in the architect's professional practice;
>
> (ii) an engineer in the engineer's professional practice.
>
> (3) The terms of cover applying to a claim under the statutory insurance scheme relating to residential construction work are the terms of cover stated in schedule 2C when—
>
> (a) if the consumer for the work obtains optional additional cover—the optional additional cover comes into force for the work; or
>
> (b) otherwise—cover under the statutory insurance scheme comes into force for the work.
>
> Note—
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> See section 68I of the Act for when cover under the statutory insurance scheme comes into force for residential construction work.

[57] So far, we can see the terms of cover apply to associated insurable work, here that is the design work, because it is 'residential construction work' within section 26B(2)(a). The design work would also be covered by section 26B(2)(b)(ii) where the design is done by an engineer in the engineer's professional practice. That seems to be the case here although there was no evidence about this and so I do not make a formal finding about it.

[58] I conclude that, as associated insurable work and therefore residential construction work, the design of this swimming pool was covered by the Queensland Home Warranty Scheme.

[59] Exactly what terms of cover apply, and the loss which the homeowner is indemnified against under the insurance scheme when there is defective design work is less clear.

[60] Delving into the terms of cover shows that the insurance provides cover not only for defective work, but for such events as loss of deposit when the work is not started, vandalism, forcible removal, fire storm or tempest during the work. There is cover where work has been started but not completed, in which case the consumer is entitled to claim 'the reasonable cost of completing' the work.[34]

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[34] Section 7(a) of schedule 2C of the 2003 regulation.

[61] The relevant provisions for my purposes are for work which has been started but is defective. For primary insurable work (which as we have seen does not include design work) there are these provisions in schedule 2C of the 2003 regulation:

> **Part 3 Defective work**
>
> **14 Application of part**
>
> This part applies to residential construction work that is primary insurable work if it is defective (defective work).
>
> **15 Assistance for defective work**
>
> (1) The consumer of the residential construction work is entitled to claim assistance for the reasonable cost of the following work (rectification work)—
>
> (a) rectifying the defective work;
>
> (b) any other building work reasonably required to be carried out to a relevant building as a consequence of the defective work.
>
> *Example for subsection (1)(b)—*
>
> work reasonably required to repair a wall in a residence that has cracked because defective work to the concrete slab supporting the wall has resulted in subsidence of the slab.

[62] Sub-section (2) deals with insignificant variations from the plans or specifications provided the work complies with the necessary codes. There is also section 19 which excludes cover for swimming pools in certain cases, for example for non-structural defects.

[63] All these provisions are in Part 3, and as can be seen from section 14, none of them apply to design work, because such work would not be primary insurable work.

[64] There are no corresponding provisions in the regulation which explain the loss which the homeowner is indemnified against under the insurance scheme when there is defective design work.[35]

[65] One thing to note is that the QBCC has various options how to deal with a claim under the scheme. One early decision which must be made is whether or not to issue a direction to rectify or remedy the work.[36] If that happens the QBCC cannot deal with the claim until the time for complying with the direction has ended.[37]

[66] The various options about how the QBCC may settle the claim appear from section 73 of schedule 2C of the 2003 regulation.

[67] One option is for the QBCC simply to pay the homeowner an amount in money terms. Presumably this would be the amount of the owner's 'loss' under section 67X of the QBCC Act.

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35 There are provisions tending to confirm that the design work done here was covered by the insurance, for example section 53 of schedule 2C which excludes cover for design work done under a contract directly with the consumer in the case of a multiple dwelling, and for designs prepared by someone other than an engineer, an architect, a building designer or the contractor.

36 Section 67 of schedule 2C of the 2003 regulation.

37 Section 68 of schedule 2C of the 2003 regulation.

[68] If the work is to be rectified then either the homeowner engages a contractor approved by the QBCC to do the work, and the QBCC pays the contractor directly. Alternatively the QBCC may engage the contractor to do the work and pay it directly. In these cases a scope of works is prepared so that tenders can be obtained under 71A of the QBCC Act.[38] Such scope of works would be limited as provided by section 71A(6):

> (6) The commission may only have work carried out under this section to the extent that the cost of the work is covered by the assistance under the statutory insurance scheme that the person may be entitled to.

[69] Some further guidance about what should be in the scope of works comes from a provision in the QBCC Act enabling the QBCC to recover its outlay under the scheme from the building contractor or from somebody like the applicant:

> **71 Recovery from licensed contractor etc.**
>
> (1) If the commission makes any payment on a claim under the statutory insurance scheme, the commission may recover the amount of the payment, as a debt, from the building contractor by whom the relevant residential construction work was, or was to be, carried out or any other person through whose fault the claim arose.

[70] Further insight as to what should be in a scope of works comes from section 86 of the QBCC Act which refers to what is a reviewable decision:

> (g) a decision about the scope of works to be undertaken under the statutory insurance scheme to rectify or complete tribunal work;

[71] Tribunal work is defined in sections 75 and 76, and includes the preparation of plans and specifications for the construction of a swimming pool, being site work related to the improvement of a building.

[72] If I limit myself to the statutory provisions, my conclusion about the indemnity provided by the insurance scheme when the work is completed but where there is defective design work, and therefore what should be in the scope of works in such a case, is:

(a) A scope of works is used by the QBCC to seek tenders from contractors to carry out rectification work the subject of the insurance claim.[39]

(b) The work to be done under the scope of works must be no more than the cover provided by the scheme.[40]

(c) The cover provided by the scheme is for loss to the homeowner both associated with, and a consequence of, the defective design work.[41]

[73] In the case of defective design therefore, there is no requirement of 'necessity' or of 'reasonableness' in the statutory provisions, at least for rectification works in the scope of works.

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38 This is stated in paragraph 8 of the statement of reasons, hearing book page 34. If the estimate for the work is less than $20,000 only one tender is required: section 71A(4) and section 26K of the 2003 regulation.

39 Sections 71A and 86(g).

40 Section 71A(6) of the QBCC Act.

41 Section 67X(2) and (3) of the QBCC Act.

[74] Schedule 2C of the 2003 regulation does have more general provisions about how to assess the 'reasonable cost of work'. These are in sections 49 to 52.[42] But these only apply 'to a consumer for residential construction work if the consumer is entitled to claim the reasonable cost of' (rectification work). Read literally, this would not apply to defective design work because there is nothing in the statutory provisions limiting the consumer's claim to a reasonable cost of rectification work.

[75] From the above analysis it can be seen that there is a difference between the provisions in schedule 2C of the 2003 regulation (now in schedule 6 of the 2018 regulation) and the old policy terms.

[76] The old policy terms were in the Insurance Policy Conditions and part 4.2(a) of those conditions said (my emphasis):[43]

> **4.2 Amount of Payment**
>
> (a) Subject to clause 4.2(c) and Parts 6, 7 and 8 of this policy, the amount of the payment under this Part will be limited to the **reasonable cost**, as determined by the QBCC, of undertaking those works **necessary to rectify** the defects, less, where the Insured contracted with the contractor for the undertaking of the residential construction work which is defective, the owner's remaining liability under the contract.

[77] It would appear that in the case of defective design work covered by the scheme both the requirement of 'reasonableness' and 'necessity' in the Insurance Policy Conditions have been omitted in the 2003 regulation, but in the case of primary insurable work the requirement of 'reasonableness' has been retained and only the requirement of 'necessity' has been omitted.[44]

[78] This means that the statutory provisions require the scope of works to be limited to the cover provided by the scheme, but in the case of defective design work the terms say little as to the extent of that cover except that it is for 'loss' both associated with, and a consequence of, the defective design work.[45]

[79] Had this insurance been entered into privately between the homeowner and an insurer then there would be no hesitation in looking to the common law about the rights of an insured when indemnified against such loss to understand the extent of the cover.

[80] I do not think it makes a difference that this is a statutory insurance scheme, with the terms of the policy defined legislatively. This is because of the presumption that legislation does not alter common law rights. As put by O'Connor J in *Potter v Minahan* (1908) 7 CLR 277 at 304, citing a passage in Maxwell on Statutes 4th Ed page 121:

> It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.

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42 That is, schedule 2C part 5 division 1.
43 Edition 8, effective 1 July 2009.
44 Section 15 of schedule 2C of the 2003 regulation.
45 Section 67X(2) and (3) of the QBCC Act.

[81] In looking to the common law, there is some assistance from insurance law cases, but also from cases considering the appropriate damages award for breach of contract, because as explained by the English Court of Appeal in *Sartex Quilts & Textiles Ltd v Endurance Corporate Capital Ltd* [2020] EWCA Civ 308,[46] an insurer's liability to indemnify an insured against loss or damage caused by an insured peril is the same as the liability of a party in breach of contract, that is to put the claimant in the same position so far as money can do it if the breach, or the insured peril, had not occurred.

[82] These cases show that where it comes to the choice between repair and reinstatement, or a choice as to the extent of work required to achieve such repair or reinstatement, the insurer's liability will be limited if the proposed work is unreasonable, although this is a 'heavy onus to establish'.[47]

[83] In the High Court case of *Bellgrove v Eldridge* (1954) 90 CLR 613,[48] the test was stated to be what was 'reasonable and necessary to provide a building in conformity with the contract'. This may include demolition and rebuilding even if the cost is greater than the contract price where, as in that case, a house was built which was gravely instable. But it must be reasonable to do the work, otherwise it would be regarded as 'economic waste',[49] which would mean that the plaintiff was only entitled to a difference between the value of the building as erected its value had it been properly constructed.

[84] It is clear from *Bellgrove* that at common law, what may be necessary rectification work must be assessed by considering the contractual obligations. This was important in *Chalet Homes Pty Ltd v Kelly* [1978] Qd R 389, where there had been a substantial departure from the contract plans and specifications. Connolly J said that it was wrong to say that the owner was not entitled to bring the work into conformity with the plans and specifications if he had been given something which could fairly be regarded as structurally sound. Instead, his Honour was of the view that the requirement in *Bellegrove* that the proposed work must be a reasonable course to adopt is of a 'strictly limited character' in the light of the contractual obligations which applied.[50] The contract provided that on the builder's default, the owner may engage some other person to complete the work and recover the outlay from the builder.[51]

[85] In *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 a commercial tenant badly damaged an office building in breach of covenant in the lease not to make any substantial alteration to the premises without consent. The High Court explained that the 'ruling principle' of putting the claimant in the same position so far as money can do it as if the contract had been performed did not mean 'as good a *financial position* as if the contract had been performed'.[52] This meant that the damages should be for the loss sustained by the landlord by the tenant's breach of covenant, being the cost of restoring the premises to the condition

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46 [35], [36].
47 *Kelly & Ball Principles of Insurance Law* [12.0120.25].
48 At 619.
49 At 618.
50 At 392E.
51 Set out at 391E.
52 [13].

in which they would have been if the obligation had not been breached.[53] The High Court expressed the view that such an assessment would only be 'unreasonable' in fairly exceptional circumstances such as where the innocent party is 'merely using a technical breach to secure an uncovenanted profit'.[54]

[86] Whether proposed work is unreasonable will be fact dependent, and could include considerations for example of a genuine desire of the owner to reinstate a building to its original state (given sufficient resources) which was not eccentric,[55] or of whether a prudent person uninfluenced by insurance considerations would choose repair or reinstatement,[56] or of whether the cost of achieving a result in conformity with the contract was out of all proportion to the benefit to be obtained.[57]

[87] When considering what preferably should be in the scope of works, I would suggest that the tribunal would also wish to consider all the circumstances, which might include the cost of the various options and therefore the proportionality and reasonableness of those options, certainty of success of the various options over the expected life of work, the owner's actual or likely satisfaction with the result, and in accordance with section 67X the nature and extent of the owner's loss, and as explained in the explanatory notes referred to above - the need to provide remedies for defective building work or work which does not comply with the relevant codes and standards.

[88] A number of these things were mentioned by Mr Hughes in his report as things he took into account in deciding what rectification work should be done, and I think he was right to take these into account.

The cause of the cracking

[89] It is common ground that before deciding on the appropriate rectification work for defects such as this in a swimming pool, the cause of the defects should be identified.

[90] One difficulty faced by all the experts was that as soon as the early cracking became so bad that it enabled water to escape from the pool into the surrounding soil, then further soil movement occurred causing further damage and obscuring the cause of the early cracking.

[91] The earliest report in the papers is dated 15 December 2017 by Australian Leak Detection.[58] This was a report commissioned by the building contractor and it described visible defects and provided theories as to their cause. One was a differing level of pool water at one end of the pool to the other end of one tile in height, indicating the pool may have dropped or sunk.[59] There were multiple cracks in the water line tiles which were leaking in one corner and cracks diagonally opposite which were also leaking, which could sometimes indicate that the pool was 'twisting'. Multiple cracks were found on the pool floor. There was a 5.5 metre

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53 [15].
54 [17].
55 As in *Reynolds v Phoenix Assurance Co Ltd* [1978] 2 Lloyd's Rep 440.
56 As in *Morlea Professional Services Pty Ltd v South British Insurance Co Ltd* (1987) 4 ANZ Ins Cas 60-777.
57 *Ruxley Electronics and Construction Ltd v Forsyth, Laddingford Enclosures Ltd v Forsyth* [1996] AC 344 (swimming pool should have been 7 feet 6 inches deep but was built only 6 feet deep).
58 Leak detection inspection report, hearing book page 370.
59 Or that the tiling was incorrect, which does not appear to be the case.

crack on the cove of the 10 metre wall, possibly formed from a cold join in concrete from the pool wall/cove to the floor. Another crack about 1.2 metres long was found in the floor under the bench with more hairline cracks visible. The recommendation was for these to be investigated further.

[92] The report of Reid Consulting Engineers dated 5 November 2018 contained a firm theory as to the cause of the cracking, which is also put in graphic form.[60] In a nutshell, Reid said that the concourse lifted because of the extremely reactive clay beneath. This was allowing rainwater to drain into the pool, which was a saltwater pool, and causing some coping tiles to crack.[61] And since the concourse slab was physically connected to the pool shell it caused the shell to crack at the top of the pool walls.[62] Once that happened there was leakage of water from the pool into the ground causing it to swell and to cause further cracking.[63] The cracks were then much longer than before and there was also both vertical and horizontal cracking.[64]

[93] The QBCC's expert Mr Hughes agreed that lifting of the concourse was the culprit, but the drawing at paragraph 31 of his report seems to blame such lifting for the cracking at the cove of the shell, rather than the cracking on the water line as shown on the Reid survey. Reid considered the cracking at the cove of the shell was due to water leakage from cracks at the water line.[65]

[94] The applicant's engineer Mr Newport when giving evidence, said he had no idea how the cracking on the water line could have happened.

[95] If it is right that the first event causing cracking was the lifting of the concourse slab, then it means that the bored piers down to below the base of the pool which were added at the time of construction were not sufficient to stop this movement.

[96] In their report, Reid Consulting Engineers explained that although the bored piers helped to prevent subsidence in the concourse slab, they were not effective to prevent upward movement due to swelling of the clay soil beneath.[66] As Mr Hughes put it in his evidence: the piers were 'nothing but passengers in a much bigger journey'.

[97] Mr Newport was also of the view that the bored piers were 'not doing a lot'. His solution was to use screw piers in the concourse slab rather than bored piers. He explained that the two types of piers operated very differently, with the soil able to cling to the bored piers, but not to the screw piers because it had been churned up.

[98] Mr Newport was strongly of the view that one likely contributor to the cracking was the position of a backwash pit uphill from the pool on its south eastern side and into which stormwater could drain. This was filled with gravel and was capable of discharging water into the surrounding soil. Mr Newport was of the view that water gathering in the pit could pass down through fissures in the soil causing the soil

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60 Sheet 5, hearing book page 581, although there is a better copy of this in the Statement of Reasons page 550.

61 This appears most clearly in the photographs attached to the report of Reid Consulting Engineers, hearing book page 561.

62 Paragraph 6.03(iv) hearing book page 544, and stage 2 shown on sheet 5 hearing book page 581.

63 Hearing book page 544.

64 Reid's survey hearing book page 582 (a better copy appearing in the Statement of Reasons page 551).

65 Stages 3 and 4 on sheet 5 hearing book page 581.

66 Hearing book page 549.

around and under the pool shell to expand. During dry weather there would be less water in the pit and the clay soil would naturally contract as it dried out.

[99] Mr Hughes agreed that such a pit would influence the moisture content of the soil on that side of the pool but was sceptical whether it could travel downhill to affect the soil under the pool, even taking into account that there was a layer of gravel under the pool shell. He pointed to the speed with which the pool shell had cracked after installation and it was unlikely that the water from the pit could have that effect so quickly.

[100] From Mr Newport's evidence given at the hearing it is possible to conclude that none of the cracks are likely to be shrinkage cracks despite this being an early theory put forward.

[101] Overall it is possible to conclude, at least for the purposes of deciding what should be in the scope of works, that the first cracking event, that is the cracking at the top of the pool walls, was caused by the lifting of the concourse slab and that over time pool water leaked from those first cracks into the surrounding soil which, possibly together with water seeping down from the backwash pit, caused further movement and further cracking, one crack being at a possible cold join in the cove of the pool shell.

Considering the main items in dispute

Work required to the concourse slab

[102] Since the bored piers were ineffective given the extremely reactive soil on the site in question and the conditions on site some better arrangement had to be found and provided for in the scope of works.

[103] The scope of works provided for the demolition of the existing concourse slab and the coping tiles and their disposal. The soil would then be excavated to 1 metre to remove all black clay soils from site and also to the extent of 1 metre outside the edge of the new concrete concourse surround. This soil would be replaced by medium plasticity clay soils as specified in the Reid report, placed in layers to achieve compaction of 95% Standard Compaction. This work would be inspected by Reid and the new soil tested. The new slab would then be built in accordance with the plans.

[104] The applicant relied on Mr Newport's preferred approach which was to reconstruct the concourse slab with screw piers at 1800mm centres around the outer edge of the new surround and taken down to 3000mm, with a 75mm thick degradable cardboard formwork below the slab. The outer edge of the slab would have a 600mm high x 150mm wide integral sealed baffle wall all round. This was to stop the soil under the slab drying out or too much water getting in.

[105] Although Mr Newport criticised Reid's proposed use of compacted soil he did not consider that the Reid proposal was incorrect or would fail. It seems to me that the two methods discussed in this review may well be only two of a number of different ways to reduce the effect of the soil on the concourse slab. There was no suggestion that one method was going to be better value than the other. In the circumstances it cannot be said that, for the purpose of this review, I should say that the applicant's proposal was preferable to the Reid proposal. They are both good proposals.

[106] The Reid proposal would necessarily involve demolition of the existing slab and therefore the coping and tiles, and the applicant argued that this could be avoided under his proposal. But Mr Newport was of the view there was no real advantage in using the existing slab instead of demolition and although it might be left to the contractor to decide, it was feasible to use the existing slab.[67] It seems to me however, that this view was expressed underestimating the movement in the existing slab. As can be seen from the Reid reports it had moved by more than 60mm and had been seriously distorted, and then further movement occurred after that. In those circumstances, as Mr Hughes said, the preference would be to demolish the slab and start again.

[107] There was a difference of opinion between the experts as whether the concourse slab should float as required by the scope of works or whether there should be an articulated joint at the top of the pool shell. On the evidence it seems to me that these are both acceptable methods and it cannot be said that one is preferable to the other, so it would be wrong to amend the existing scope of works on that basis.

[108] My conclusion therefore under this head is that in so far as the decision about the scope of works is about work required on the concourse slab, it should be confirmed.

Whether a crack repair would be sufficient

[109] One main difference between the scope of works and the applicant's approach to the pool shell is whether it would be better to make a new shell within the old, that is with reinforcing rods and sprayed concrete as required by the scope of works in the reconsideration decision, or whether it would be sufficient to cut out and fill the cracks. In both cases a new surface such as pebble concrete would be needed.

[110] There is a further option, which was originally recommended by Reid Consulting Engineers, which was to demolish and remove the pool shell and to build a new reinforced concrete shell. Reid seemingly preferred this option because they thought that the owner did not want a slightly smaller pool (which would be the result of the new shell within the old option).[68] A further option suggested by Mr Newport was to underpin the base of the pool shell.

[111] The argument in favour of the crack repair was that the cracking in the pool shell was caused by the lifting of the concourse slab, and after the potential of that happening was removed, then the cracks in the pool shell could be dealt with by crack repair being the most efficient solution.

[112] One difficulty with this approach is that, as Mr Hughes says, there will continue to be lateral pressure on the pool shell from the surrounding soil which could be very substantial, even after properly dealing with storm water drainage and relocating the backwash pit from uphill of the pool. Crack repair was not suitable where there was a prospect of further movement, which in his opinion could not be discounted.

[113] Mr Newport agreed with Mr Hughes that the new shell within the old would be more likely to withstand such pressures. He also was of the view that the cause of the problem had to be identified and removed to provide a long term solution, and

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67 Mr Newport said that the existing slab could be used by making holes in it to accept the screw piers although this would involve 'a bit of mucking around'.

68 Hearing book page 592.

that if that could not be done then he suggested that another solution was underpinning.

[114] Mr Hughes agreed that the cracks could be repaired instead, and acknowledged that the new shell within the old was a more 'cautious' approach, but he considered it was necessary to avoid experimentation with what may potentially be a 'Band-Aid' solution where the insurers were just hoping for the best.

[115] Although the new shell within the old solution results in a smaller pool than contracted for, the owner has not sought to review the reconsideration decision and no one in the hearing was aware that he had expressed discontent with the final result.[69]

[116] One important point made by the applicant was that crack repair would be much cheaper than the new shell within the old solution, and was therefore preferable. At the commencement of the hearing I raised concerns that the filed evidence about cost seemed very vague and would normally need to be supported by formal evidence which was absent. The applicant was reluctant to make a formal application for leave to adduce such evidence, and I decided to proceed on the available material.

[117] As it turned out, the applicant's belief that crack repair would be much cheaper than the new shell within the old solution, did not allow for the full extent of the cracks which would have to be cut out and filled. According to Mr Hughes, whose evidence I accept about this, the total length of cracks which would have to be cut out and filled was in excess of 30 metres.[70] On that basis Mr Hughes had expressed the view in his report that the cost of the crack repair option may well exceed the new shell within the old option.[71] Although when giving evidence about this Mr Hughes was reluctant to put any figures on it, it was clear that he was right about this.

[118] Reid Consulting Engineers were of the view that there were likely to be more cracks, or more extensive cracking, than was currently visible and that there would be more cutting away of the pool shell than appeared to be the case from the visible cracking.[72] If this is right then even more cracking would have to be cut out.

[119] In the circumstances it is clear that the new shell within the old shell option was the preferable solution to deal with the cracks in the pool shell.

[120] My conclusion therefore under this head is that in so far as the decision about the scope of works is about dealing with the cracking in the pool shell, it should be confirmed.

Whether the underside of the pool needed to be exposed etc.

[121] The inspections done by Reid Consulting Engineers revealed that the moisture levels of the soil in the vicinity of the pool exceeded soil saturation levels, and water was seeping back through the cracks into the empty pool from the outside ground. Reid advised it was necessary to remove such moisture affected soils, including those

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69 The rectification works having been done before the hearing of this review.

70 As appeared from the Reid Consultant Engineers survey, hearing book page 582 (a better copy of which appears in the Statement of Reasons page 551).

71 Report 6 October 2020, paragraph 42.

72 Hearing book page 552.

under the pool shell to an extent to be decided during earthworks.[73] Mr Newport considered that the soil under the pool shell could have been affected by water from the backwash pit uphill from the pool, and although Mr Hughes was doubtful that this could be the case, it seems to me that the possibility of this would mean that the soil under the pool shell should be examined for its moisture content as Reid recommended.

[122] There is a second reason I think, why examining the ground on the underside of the pool shell would be prudent. The first inspection was done by Australian Leak Detection and they considered that the pool shell may have sunk, rather than the concourse slab having lifted.[74] From this, it seems at least a possibility that the first movement of the pool structure was downwards because the ground under the pool shell and the surrounding soil allowed it to subside.

[123] Since any rectification work should minimise the chance of any further movement of the shell, it seems to me to be prudent to examine the ground on which it is resting and the surrounding soil to ensure that this is the case.

[124] My conclusion therefore under this head is that in so far as the decision about the scope of works is about exposing the underside of the pool and examining the soil and other material on which the pool is sitting, it should be confirmed.

Whether certification of the repair work will be required

[125] The rectification work is 'assessable development' if it is 'building work'.[75] Building work is defined in section 5 of the *Building Act* 1975 (Qld) and includes repairing and altering, underpinning, moving or demolishing a structure. A swimming pool is a structure.[76] It is clear that the work of repair and alteration of the pool in the reconsideration decision is building work.

[126] Assessable development needs development approval, but 'accepted development' does not.[77] Schedules 1 and 2 of the *Building Regulation* 2021 (Qld) list accepted developments and it is clear that the work of repair and alteration of the pool in the reconsideration decision is not an accepted development.

[127] Hence the 'allowance for building application' and 'certification fees' are properly in the scope of works with respect to the work of repair and alteration of the pool.

[128] As for the work on the pool safety barrier, under the scope of works it would be removed, stored, and then reinstated. By section 28 of the *Building Act* 1975 (Qld) a building development application for the construction of a regulated pool must also be for the construction of a pool safety barrier. This is a 'building assessment provision', and since 'work required under the building assessment provisions' is building work as defined in section 5 of the *Building Act* 1975 (Qld), this means that the pool safety barrier is itself building work.

[129] Schedule 5 of the *Building Regulation* 2021 (Qld) does not apply to this work. This means that the work to the pool safety barrier is not accepted development under schedule 1 section 1(2)(b) of that regulation. In turn this means that, as stated in the

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73 Hearing book page 541, 591, and 592.
74 Hearing book page 371.
75 Section 20 of *Building Act* 1975 (Qld).
76 Schedule 2 of the *Building Act* 1975 (Qld) definition *swimming pool*.
77 Sections 44(3) and (4) of the *Planning Act* 2016 (Qld).

scope of works, a certificate from a Building Certifier is required for the pool safety barrier as reinstated.

[130] My conclusion therefore under this head is that in so far as the decision about the scope of works is about allowing for a building application, certification fees and having the pool safety barrier certified by a Building Certifier, it should be confirmed.

The backwash pit

[131] Although Mr Newport was strongly of the view that the position of a backwash pit uphill from the pool and into which stormwater could drain was a likely cause of the movement of the pool shell, I have concluded that this was only a possibility and that it did not contribute to the first cracking at the top of the pool walls caused by the lifting of the concourse slab.

[132] I am satisfied that the scope of works adequately addresses the need for attention to storm water drainage and therefore even if the backwash pit is not relocated downhill, storm water will largely be diverted away from the pit by reason of the rectification works.

[133] This means that the rebuilding of the concourse slab and the strengthening of the pool shell should be sufficient to withstand any effect of the backwash pit even if it is not relocated.

[134] In the circumstances I am satisfied that no amendments are required to the scope of works about stormwater drainage or the location of the backwash pit.

Conclusion

[135] I am of the view that the decision about the scope of works should be confirmed in so far as it about the matters in dispute in this application, and there is no other reason to amend it. The reconsideration decision of 4 March 2020 is confirmed.