QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Queensland Building and Construction Commission v Schneider* [2020] QCATA 124
PARTIES:	**QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION** (applicant\appellant) **v** **HEINZ (HENRY) GUNTHER SCHNEIDER** **MARIE LOUISE SCHNEIDER** (respondent)
APPLICATION NO/S:	APL006-19
ORIGINATING APPLICATION NO/S:	GAR046-17
MATTER TYPE:	Appeals
DELIVERED ON:	21 August 2020
HEARING DATE:	21 May 2019 31 July 2019 24 September 2019
HEARD AT:	Brisbane
DECISION OF:	Senior Member Aughterson Member Poteri

ORDERS:

1. **Order (1) of the orders made on 3 December 2018 by the Tribunal at first instance is confirmed; that is, the decision to deny indemnity under the statutory insurance scheme is set aside.**
2. **Orders (2), (3) and (4) of the orders made on 3 December 2018 by the Tribunal at first instance are set aside.**
3. **If there is no agreement between the parties in relation to costs, the following directions apply:**
   (a) **The appellant is to file in the Tribunal two (2) copies and give to the respondent one (1) copy of any submissions in relation to costs, by 4:00pm on 28 September 2020;**
   (b) **The respondent is to file in the Tribunal two**

(2) copies and give to the appellant one (1) copy of any submissions in response, by 4:00pm on 19 October 2020;

(c) The appellant is to file in the Tribunal two (2) copies and give to the respondent one (1) copy of any submissions in reply, by 4:00pm on 26 October 2020;

(d) Unless otherwise determined by the Appeal Tribunal, a decision in relation to costs will be made by the Appeal Tribunal on the papers and without an oral hearing, not before 27 October 2020.

CATCHWORDS: ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – Where a Statutory insurance scheme is in place pursuant to s 67X of the Queensland Building and Construction Commission Act 1991 – where a claim has been made in relation to non-completion of a dwelling house under the insurance policy conditions – whether there is a 'prepayment' under the insurance policy conditions where the payment was fraudulently induced – where costs have been ordered pursuant to ss 102 of the Queensland Civil and Administrative Act 1991.

Acts Interpretation Act 1954 (Qld), s 14A
Queensland Building and Construction Commission Act 1991 (Qld), s 67X
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 69, s 100, s 102
Statutory Instruments Act 1992 s 14(1), Sch 1;

Arthur v Queensland Building Services Authority [1997] QBT 165.
G Lazy J Pastoral Pty Ltd v QBSA [2000] QDC 220.
Insurance Commission (WA) v Container Handlers Pty Ltd [2012] 2 Qld R 457
Lange v Queensland Building Services Authority [2012] 2 Qld R 457
Schneider v Queensland Building and Construction Commission [2018] QCAT 412
Tashen Developments Pty Ltd v Queensland Building Services Authority [2006] CCT QR 140-06

APPEARANCES &
REPRESENTATION:

Applicant:	S Seefeld Counsel
Respondent:	C Garlick Counsel

REASONS FOR DECISION

Background

[1] This is an appeal from a decision of the Tribunal setting aside a decision of the appellant denying the respondents' claim for indemnity under the home warranty insurance scheme.[1] The grounds of appeal are set out below. A primary issue is the effect of clause 1.6(b) of the relevant policy of insurance ('the Insurance Policy'),[2] which required the Queensland Building and Construction Commission (the 'QBCC') to reduce the amount payable under the policy where, in the opinion of the QBCC, the home owner made payments for the contracted works before they 'become due' (referred to as a 'prepayment' under clause 1.6(b)). The amount payable under the policy will be reduced by the value of any prepayment. A question arises as to whether there is a 'prepayment' where, as here, the payment was induced by fraudulent representations by the builder that certain work had been completed when in fact it had not been completed.

[2] In the decision at first instance, it was held that the payments made consequent upon fraudulent representations as to completion of relevant work were not 'prepayments' and the decision to deny indemnity under the statutory insurance scheme was set aside.[3]

[3] The appellant does not seek to disturb the finding of the Tribunal at first instance to allow the claim under the statutory insurance scheme (Tribunal order 1). Rather, the appeal is directed only to the decisions in relation to the determination of the quantum to be paid (Tribunal orders 2 and 3) and in respect of costs (Tribunal order 4).[4] The measure of the amount payable is directly related to the question of whether there was a 'prepayment' under the terms of the policy.

[4] The respondents are the owners of land, Lot 450 Lomandra Avenue, Clearview Rise, Roma, Queensland ('the Land'). On 26 November 2013, they entered into a building contract with Contract Build Pty Ltd ('Contract Build') to erect a 4-bedroom steel frame and fibre cement cladding house ('the House') on the Land. The agreed price

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1 In relation to the statutory insurance scheme, see s 67X of the *Queensland Building and Construction Commission Act* 1991 (Qld) (*QBCC Act*).

2 Section 69(1) of the *QBCC Act* provides for the issue of a certificate of insurance in respect of residential construction work, which, by s 69(2), 'comes into force in the terms stated in the board's polices'. It is not in dispute that the applicable insurance policy conditions are the QBCC Insurance Policy Conditions Edition 8, effective 1 July 2009: see submissions of the respondent filed 29 July 2019, p 2.

3 [2018] QCAT 412, [103].

4 Submissions of appellant filed 29 March 2019, [4].

for the construction of the House was $284,900. It was to be paid in stages as follows:[5]

(a)	Deposit:	$ 14,245
(b)	Base stage:	$ 42,735
(c)	Frame stage:	$ 56,980
(d)	Enclosed stage:	$ 71,225
(e)	Fixing stage:	$ 56,980
(f)	Practical completion:	$ 42,735

[5] In accordance with the terms of the building contract, the respondents paid Contract Build progress payments as follows: $14,245 on 31 January 2014, $ 42,735 on 27 June 2014 and $56,980 on 3 July 2014), amounting to a total of $113,960.[6] This took the completed work to the frame stage.

[6] In October 2014, the contract with Contract Build was novated to Line Constructions Pty Ltd ('Line Constructions'). [7] In the decision at first instance it is stated:[8]

> Grant Donald Page, who was the sole director and secretary of Contract Build, promoted these assignments to the Schneiders, while Yvonne Leigh Page, the wife of Grant Donald Page, is listed as a director of Line Constructions Pty Ltd ("Line Constructions").
>
> It also appears that the nominee licence holder of both Line Constructions and Master Homes was Elliott John Coulson, a long-standing friend of Grant Donald Page.
>
> The Schneiders were persuaded to enter into these assignments without having had disclosed to them that there were evident personal relationships between Grant Donald Page and the other officers and directors of Line Constructions and Master Homes.
>
> It also appears that, notwithstanding the failure of the First Contract, the Schneiders either did not check the bona fides of either Line Constructions or Master Homes, or were prepared to continue to deal with Mr Page.

[7] A Certificate of Insurance under the Queensland Home Warranty Scheme in favour of the respondents in respect of the House was issued on 5 June 2014.[9] Following a novation of the building contract to Line Constructions, a second Certificate of Insurance was issued on 21 May 2015.[10]

[8] In May 2015, Line Constructions sent the respondents photographs showing apparent progress on the construction of the House.[11] In fact, the photographs were of a different property. Line Constructions had done no work whatsoever on the

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5 [2018] QCAT 412, [4].
6 [2018] QCAT 412, [9].
7 In relation to the circumstances surrounding the novation of the contract, see [2018] QCAT 412, [10]-[25]. It is not now in dispute that there was a novation of the contract.
8 [2018] QCAT 412, [19]-[22].
9 [2018] QCAT 412, [8].
10 Ibid, [26].
11 Ibid, [27]-[28].

respondent's property and fraudulently claimed progress payments. The respondents lived some 1,300 km from the land and did not visit the property. They arranged for payment of the claims in the following amounts:[12]

(a) $71,225 on 17 June 2015 (based on the purported completion to Enclosed Stage); and
(b) $56,980 on 11 September 2015 (based on the purported completion to Fixing Stage).

[9] On 15 August 2016 the respondents made a complaint to QBCC and this commenced a claim under the Insurance Policy. On 16 August 2016 the respondents terminated the building contract with Line Constructions.

[10] The QBCC denied the claim under the Insurance Policy on two grounds:

(a) That the Respondents had not terminated the contract within the two year period in which a notice of default had to be lodged by a claimant (as required by clause 1.7 of the Insurance Policy); and

(b) That the Respondents had made prepayments; that is, payments for contracted works before they were undertaken.

[11] On 27 February 2017 the Schneiders filed an application for review of the decision of QBCC to reject their insurance claim (GAR 046-17).

The decision at first instance

[12] In the decision at first instance, it was held that the contract had been terminated within the required two year period, thus satisfying clause 1.7 of the Insurance Policy, and that the Schneiders were entitled to indemnity under the Policy.[13] This finding is not challenged on the appeal.

[13] In relation to the issue of 'prepayment', as is noted above, at [2], the Tribunal at first instance held that the payments made following the fraudulent representations were not 'prepayments'.[14] It was there stated:[15]

> They were payments made in reliance on false information and fraudulent invoices created and sent to the Schneiders by Line Constructions. The two payments made by the Schneiders to Line Constructions were 'due' at the time they were made, albeit that they were based on false information that was created by Line Constructions.
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> The Schneiders lived 1,300km away from the construction site and could not reasonably perform a personal inspection. They were sent photographs by Line Constructions supposedly showing progress to the extent claimed, and received invoices in accordance with the terms of the Second Contract. They were entitled to, and did, rely on the information supplied and representations made by Line Constructions.

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12 Ibid, [27].
13 [2018] QCAT 412, [97]-[98].
14 ibid, [103].
15 Ibid, [103]-[105].

> It is not open to the QBCC to deny the Schneiders' insurance claim on the basis of prepayment.

[14] The Tribunal found that the respondents were entitled to compensation under the Insurance Policy in respect of money paid by them to Line Constructions for the enclosed and fixing stage of the house, in the sum of $128,205,[16] and for the cost of deterioration of the flooring and frame arising from the effluxion of time.[17] As there was no evidence as to the detail of the required work, the parties were ordered to make submissions as to the cost of remediation (Tribunal order 3). An order was also made that the appellant pay the respondent's costs in the sum of $35,907.85.

[15] In a letter from QBCC dated 31 January 2019 to the Tribunal, QBCC stated that it had complied with the orders requiring the payments of $128,205 and $35,907. On the other hand, by an order of the Tribunal made on 21 May 2019, the operation of order (3) of the Tribunal at first instance has been stayed.

The grounds of appeal

[16] On appeal it is not argued that the respondent had not terminated the building contract within the required time frame and was not entitled to indemnity under the Insurance Policy.[18] Accordingly, it is the quantum of the claim rather than the validity of the claim itself that is in issue.

[17] In summary, the grounds of appeal are:

(1) The Tribunal did not have jurisdiction to determine the amount payable under the statutory insurance scheme.

(2) The Tribunal erred by failing to determine the amount payable in accordance with clause 1.5 of the Insurance Policy.

(3) The Tribunal erred in finding that the payments made by the respondents based on the fraudulent representations of Line Constructions were payments that had become 'due' under clause 1.6(b) of the Insurance Policy.

(4) The Tribunal erred by misdirecting itself as to the correct test to be applied in relation to the award of costs.

(5) The Tribunal erred in determining the question of costs without providing the parties with an opportunity to be hear in relation to costs.

[18] In relation to ground (1), the jurisdiction of the Tribunal to determine the amount payable under the statutory insurance scheme, the application to review was brought pursuant to s 86(1)(h) of the *Queensland Building and Construction Commission Act* 1991 (Qld) ('the QBCC Act'), which allows review of 'a decision to disallow a claim under the statutory insurance scheme wholly or in part'. It is submitted by the appellant that the decision as to the quantum to be paid is a distinct and subsequent decision, which is made following the conduct of a technical assessment and which is separately subject to review under s 86(1)(g) of the QCAT Act.[19] Because of the

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16 [2018] QCAT 412, [122].
17 Ibid, [106]-[113].
18 Letter to the Tribunal from QBCC dated 31 January 2019.
19 Submissions of appellant filed 29 March 2019, [8]-[27]

findings of the Appeal Tribunal in relation to grounds (2) and (3), setting aside orders 2 and 3 of the Tribunal at first instance, it is not necessary to determine this ground of appeal. In any event, there is no evidence before the Tribunal of the work required and related costs, such that would allow any decision to be made by the Tribunal in that regard.

[19] Ground (2), relates to how payments made under the Insurance Policy should be calculated. Clause 1.5(a) provides that the amount of payment is limited to 'the QBCC's assessment of the reasonable cost of completing the contract less the Insured's remaining liability under the contract … at the date of termination of the contract'. It is submitted that the Tribunal simply adopted the sum provided under the contract for the enclosed stage and fixing stage, without any reference to whether this constituted the reasonable cost of completing the contract.[20] It was further submitted that there was no evidence before the Tribunal as to the reasonable cost of completion.[21] This ground is addressed below.

[20] In relation to ground (3), it is submitted that the payments made by the respondents to Line Constructions were 'prepayments' and, accordingly, were not payments that were 'due' to be paid. On that basis, it is submitted that the amount payable under the Insurance Policy should be reduced by the value of the prepayments.

[21] In relation to grounds (4) and (5), the issue of costs is addressed below.

[22] The question of whether the payments made by the respondents were 'prepayments' is central to this appeal and is discussed first.

Ground 3 - prepayment

The Insurance Policy

[23] Clause 1.6 of the Insurance Policy is headed 'Limit on right to payment' and at 1.6(b) provides:

> Where in the opinion of the QBCC the Insured pays to or on behalf of the contractor any moneys for the contracted works before they become due ("prepayment"), the QBCC will reduce the amount payable under this policy by the value of that prepayment. (The value of the prepayment is the QBCC's assessment of the value of the incomplete work in the stage of the contract for which the prepayment was made).

[24] In the 'Insurance policy conditions', it is provided:

> Subject to the terms of this policy the Queensland Building and Construction Commission (QBCC) will pay for loss for:
> - Non-completion;
> - Vandalism and forcible removal;
> - Fire, storm and tempest; and
> - Subsidence or settlement
>
> of the Insured work referred to in the certificate of insurance.

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20 Submissions of appellant filed 29 March 2019, [28]-[42]; [2018] QCAT 412, [117]-[125].
21 Submissions of appellant filed 29 March 2019, [33].

There is no reference either there or elsewhere in the Insurance Policy to loss occasioned by fraud.

Submissions and Discussion

[25] It is the submission of the QBCC that the two payments made by the owners to Line Constructions were prepayments: the payments of $71,225 for the enclosed stage and $56,980 for the fixing stage. Accordingly, it is QBCC's submission that the amount payable under the policy should be reduced by $128,205. It is not in dispute that these payments were made because of a false representation made by the builder as to completion of those stages in circumstances where, in fact, no work had been commenced or completed in relation to either of the stages.

[26] The QBCC submits that whether payments had 'become due' for the purposes of clause 6(1)(b) of the Insurance Policy depends on the proper construction of the contract. It is noted that clause 17.4 of the General Conditions provides that 'the Contractor is entitled to claim a Progress Payment when the Contractor has achieved completion of each stage' of the contract and it is submitted that compensation for defrauded consumers is not part of the statutory insurance scheme.[22] It is further submitted that either the payment of $128,205 was a payment under the contract, in which event it was a 'prepayment' as the work had not been completed, or it was a fraudulently induced payment made outside of and not pursuant to the contract.[23] In the latter event, clause 1.5(a) of the Insurance Policy would come into play, with the amount payable under the policy being reduced by the respondent's remaining liability under the contract, including the $128,205.

[27] On the other hand, it is the submission of the respondents that the payments made to Line Constructions were not prepayments. The submissions of the respondents filed on 1 April 2019 do not directly address the question of why that is so, but rather rely on the finding of the learned Member at first instance.[24] However, the observations of the learned Member on this issue are relatively brief: see paragraph [13], above.

[28] The respondents filed further submissions on 24 June 2019, 22 July 2019 and 28 August 2019. It is there submitted that it is implicit in the Insurance Policy that if the builder causes loss the policy is in place to assist the consumer.[25] Reference is made to 2016 'reforms' to the insurance scheme, which refer to 'theft' and 'fraud'.[26] However, they have no relevance to the policy presently under consideration and, in any event, it is evident that the given reference to fraud is in the context of representations as to the status as a licensed contractor.

[29] Reference is also made to ss 28, 75B and 74C of the QBCC Act.[27] Section 28 requires the QBCC to report certain suspected offences, while s 74B and 74C deal with the taking of disciplinary action where, among other things fraud is committed by a licensee or a person undertaking building work. It is said that fraud is 'acknowledged' in the QBCC Act,[28] but it is not explained how this bears on the

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22 Submission of the appellant filed 29 March 2019, [50]-[51], [56].
23 Ibid, [53]-[54].
24 Submissions of the respondents filed 26 April 2019, [7].
25 Submissions of the respondent filed 24 June 2019, [12]. See also submission filed 29 July 2019, p 3.
26 Submissions of the respondent filed 24 June 2019, [13].
27 Ibid, [14]-[20]. Compare submissions of the respondent filed 29 July 2019, p 3.
28 Submissions of the respondent filed 24 June 2019, [20].

proper interpretation of the terms of the Insurance Policy. Reference is also made to s 77 of the QBCC Act,[29] in Part 7 of that Act, which empowers the Tribunal to exercise certain powers, including ordering the making or payments or restitution, in deciding building disputes. Again, it is not explained how this relates to the statutory insurance scheme under Part 5 of the QBCC Act or how it impacts the proper interpretation of the Insurance Policy.

[30] The respondent also referred to the good faith provisions in the *Insurance Contracts Act* 1984 (Cth).[30] However, it is not said how this is relevant to the present matter. Reference is also made to the now repealed *Domestic Building Contracts Act* 2000 (Qld) and to the *Building Regulations* (Qld) 2006,[31] dealing with certifications of inspection and completion. It is submitted that a progress claim should be accepted as a certification that the work has been done and be treated as conclusive evidence that the builder has satisfactorily completed the work and is due for payment. On that basis, it is submitted, there is no pre-payment. However, as submitted by the appellants,[32] the *Building Regulations* concern the provision of a certificate under the *Building Act* 1975 (Qld) and a progress claim is not a certificate given under that Act.

[31] It is further submitted by the respondents that the *contra proferentem rule* applies, as clause 1.6(b) is ambiguous and should be interpreted against the interests of QBCC.[33] It is not said where the ambiguity lies. In any event, the rule has limited if any utility in relation to a statutory insurance scheme. As noted by Kirby J in *Insurance Commission (WA) v Container Handlers Pty Ltd*:[34]

> The maxim was applied by this Court from its earlies years. It may occasionally still be useful where dictionaries and logic alone do not resolve an ambiguity. However, the limitations and defects of the maxim were also recognised long ago. It did not afford an alternative to proper legal analysis. This appeal, which concerns a statutory policy of insurance, illustrates another limitation in the usefulness of the maxim. (citations omitted)

[32] Also, in *Lange v Queensland Building Services Authority*,[35] after referring to the observations made by Kirby J, Wilson AJA stated: 'The contra proferentem maxim is of doubtful assistance in construing a statutory policy of insurance'.

[33] As noted by Margaret Wilson AJA in *Lange*,[36] because the QBCC Insurance Policy is a statutory instrument, the interpretation of policy clauses which will best achieve the purpose of the Act is to be preferred to any other. By s 3(a)(ii), an object of the QBCC Act is 'to achieve a reasonable balance between the interests of building contractors and consumers' and, by s 3(b) 'to provide remedies for defective building work'.

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29 Ibid, [10].

30 Submissions of the respondent filed 27 August 2019, [10]. At [10] reference is also made to later QBCC regulations of 2018, without indication as to their relevance

31 Submissions of the respondent filed 27 August 2019, [17]-[22].

32 Submissions of the appellants filed on 11 September 2019, [25].

33 Submissions of respondent of 28 August 2019, at [12]-[13].

34 (2004) 218 CLR 89, [98].

35 (2012) 2 Qd R 457, [53].

36 [2012] 2 Qld R 457, [26]. See *Statutory Instruments Act* 1992 s 14(1), Sch 1; *Acts Interpretation Act* 1954, s 14A.

[34] The statutory insurance scheme is provided for in Part 5 of the Act. Section 69(1) of the Act provides for the issue of a certificate of insurance in respect of residential construction work, which, by s 69(2), 'comes into force in the terms stated in the board's polices'. As noted above,[37] it is not in dispute that the relevant policy terms are Edition 8, effective 1 July 2009. The policy terms place some limitations on any payments to be made under the policy, including the limitation at clause 1.6(b). Clear obligations are placed on the insured, including that the insured has properly terminated the contract within 2 years from the date of payment of the insurance premium or the date of entering into the contract (whichever is the earlier) and that any claim be made within 3 months of termination or such further time as QBCC may allow.[38]

[35] Clause 1.6(b) provides that where 'in the opinion of the QBCC' a prepayment is made, the amount payable under the policy will be reduced accordingly. The opinion of the QBCC provides a reference point for determining when monies are due and payable under the contract. While it is to be imagined that it was not intended that the opinion of the QBCC be subjectively formed, but rather that it should be based on discernible and objective standards, including the terms of the contract, the clause appears to leave little or no room to avoid the requisite opinion being formed where no relevant work has been undertaken. In the absence of a provision qualifying the operation of clause 1.6, it places a strain on the language of the clause to interpret it to mean that in forming an opinion the QBCC must take into account extraneous factors such as the reason for the prepayment or any misunderstanding on the part of the owner, whether induced by fraud or otherwise, in the face of inescapable evidence that the work for which payment has been made has not been completed. That difficulty is compounded by use of the term 'will'; that is, that the QBCC 'will' reduce the amount payable under the policy where there has been a prepayment.

[36] There does not appear to be anything in the QBCC Act or the Insurance Policy terms that would support the suggested broad ambit of clause 1.6(b). It is one thing for a successful claim to be made for defective construction and non-completion, which is clearly envisaged under the Insurance Policy,[39] and quite another for a claim to be allowed where payment is made in circumstances where it is transparent that no payment is due. If that did not constitute a 'prepayment' it would mean that an insured could simply avoid inspection and fall back onto the insurance scheme if it transpired that the payment was not in fact due, whether because of fraud or otherwise. In other words, clause 1.6(b) could be avoided simply by relying on the say so of the builder and neglecting to undertake any inspections. To the extent that it is argued that the respondents could not readily inspect because of the great distances involved, that begs the question of the criteria to be adopted in determining when an insured has a responsibility to check and when they are absolved from doing so.

[37] The same view has been reached in cases dealing with analogous statutory insurance provisions. In *G Lazy J Pastoral Pty Ltd v QBSA*,[40] the insurance policy terms provided that the QBSA was entitled to reduce the amount of compensation payable under the insurance policy where monies were paid before they were due under the

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37 See footnote 2, above.
38 Policy Terms, Edition 8, clauses 1.7 and 1.8, respectively.
39 See 'Insurance Policy Conditions', noted at [24], above.
40 [2000] QDC 220.

contract. In circumstances where the builder wrongly claimed payment, Forde DCJ stated:[41]

> In the circumstances of this case, I find that the Respondent was justified in refusing to indemnify the Appellant in respect of the payment of the sum of $55,000.00. The builder was not entitled to make a claim within the meaning of clause 14, as the dwelling had not reached the pre-paint stage. Notwithstanding the certificate, the Appellant was entitled to challenge the right of the builder to the payment. Although this results in a harsh decision for the Appellant, the construction which I have placed on the contract accords with the authorities and will allow other proprietors to challenge such certificates when appropriate. It may mean that proprietors should seek professional advice before making such progress payments to ensure that the work has been carried out to the stage so certified.

[38] In *Arthur v Queensland Building Services Authority*,[42] the Queensland Building Tribunal considered a statutory insurance policy term in similar terms to clause 1.6(b) of the present policy. Clause 2.3 provided:

> Where in the opinion of the Authority:
> (a) the insured pays to or on behalf of the contractor any moneys before they become due under the contract
> the Authority may reduce the amount of compensation payable under this policy by the amount of that excess pre-payment

[39] It was held that in making the claim the builder 'has clearly failed to act in good faith' and 'cannot have honestly claimed that the work had been completed to the stages claimed, least of all have held a reasonable view that he had done so'.[43] There was also reference to the builder 'falsifying progress claims'.[44] Nevertheless, it was held that though the result was 'clearly an unhappy one for the homeowners',[45] there had been an pre-payment within the meaning of clause 2.3 of the policy.

[40] In *Tashen Developments Pty Ltd v Queensland Building Services Authority*,[46] the Commercial and Consumer Tribunal considered a clause identical to clause 1.6(b) in the present case, except for reference to the QBSA rather than the QBCC. It was held the amount of compensation should be reduced by the prepayment and it was stated:

> In my view, the relevant clause is both clear and unambiguous, and cannot be dealt with otherwise than upon its literal interpretation. The situation is the same, in my view, whether or not the payment made was either unauthorised by the financier, or due to the builder's misrepresentation. The fact remains that the policy appears to place a very significant and real onus upon homeowners to ensure that payments are properly made under the contract, and that any payments improperly made, for whatever reason, are at the risk of the homeowner.

[41] In our view, in the present case the payments made by the respondents of $71,225 and $56,980 (total of $128,205) were 'prepayments' within the meaning of clause

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41 Ibid, [16].
42 [1997] QBT 165.
43 [1997] QBT 165, p 11.
44 Ibid.
45 Ibid.
46 [2006] CCT QR 140-06.

1.6(b) of the Insurance Policy and, to that extent, the amount payable under the policy should be reduced.

Ground 2 – payment calculation

[42] When the issue of prepayment is left to one side, there does not appear to be any doubt that the calculation of the amount payable under the insurance policy should be calculated by the QBCC.[47] Clause 1.5(a) of the policy provides that, subject to parts 6, 7 and 8, which deal with limits of liability, general exclusions and matters relating to claims, respectively, where the contracted works have commenced the amount of payment is limited to the total of:

> The QBCC's assessment of the reasonable cost of completing the contract less the Insured's remaining liability under the contract (exclusive of any amount by way of liquidated damages or damages for delay) at the date of termination of the contract.

[43] As submitted by the appellant, there was no evidence before the Tribunal as to the reasonable cost of completion at the date of termination of the contract.[48] That is also evident from the terms of Order 3 made by the Tribunal at first instance.

[44] In our view, the appropriate course of action is to set aside orders 2 and 3 made by the Tribunal at first instance. It is then a matter for the QBCC to undertake an assessment of the work to be carried out and the costs involved, in accordance with the finding of the Tribunal, and the now accepted position of the QBCC, that the applicants are entitled to indemnity under the statutory insurance scheme, though also taking into account the finding of the Appeal Tribunal in relation to the issue of prepayment.

Grounds 4 and 5 - costs

[45] As noted at [17], above, in relation to costs there are two grounds of appeal. First, the Tribunal misdirected itself as to the correct test to be applied in relation to costs and, second, the Tribunal erred in determining costs without providing the parties with an opportunity to be heard in relation to that issue. In relation to the former, in the decision at first instance it is stated that the applicants having succeeded in their application 'costs will normally follow the event'.[49] It is submitted that this ignores s 100 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) (the *QCAT Act*'), which provides that subject to that Act or an enabling Act, 'each party to a proceeding must bear the party's own costs for the proceeding'. On the other hand, s 102(1) of the *QCAT Act* provides that the Tribunal may make an order for costs where 'the interests of justice require it to make the order'. Both s 100 and s 102 of the *QCAT Act* were referred to in the decision at first instance.

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47 The respondent refers to 2018 regulations which are said to permit the Tribunal to make a decision to pay to the insured an amount it considers appropriate: submissions of the respondent, 28 August 2019 at p 1. However, as submitted by the appellant (submissions of 11 September 2019 at [3]-[5]), the earlier Act and Regulations as in force prior to 28 October 2016 continue to apply to a contract entered into prior to that date.

48 Submissions of appellant filed 29 March 2019, [33].

49 [2018] QCAT 412, [132].

[46] In any event, given the findings of the Appeal Tribunal, it is appropriate that the order as to costs be set aside and, and in the absence of any agreement, the parties be invited to make further submissions in relation to costs.

Orders made

[47] The following orders are made:

(1) Order (1) of the orders made on 3 December 2018 by the Tribunal at first instance is confirmed; that is, the decision to deny indemnity under the statutory insurance scheme is set aside.

(2) Orders (2), (3) and (4) of the orders made on 3 December 2018 by the Tribunal at first instance are set aside.

(3) If there is no agreement between the parties in relation to costs, the following directions apply:

(a) The appellant is to file in the Tribunal two (2) copies and give to the respondent one (1) copy of any submissions in relation to costs, by 4:00pm on 28 September 2020;

(b) The respondent is to file in the Tribunal two (2) copies and give to the appellant one (1) copy of any submissions in response, by 4:00pm on 19 October 2020;

(c) The appellant is to file in the Tribunal two (2) copies and give to the respondent one (1) copy of any submissions in reply, by 4:00pm on 26 October 2020;

(d) Unless otherwise determined by the Appeal Tribunal, a decision in relation to costs will be made by the Appeal Tribunal on the papers and without an oral hearing, not before 27 October 2020.