DISTRICT COURT OF QUEENSLAND

CITATION:	*Queensland Building Corporation Commission v Kouzmenkov* [2022] QDC 81
PARTIES:	**QUEENSLAND BUILDING CORPORATION COMMISSION** (Plaintiff) **v** **KOUZMENKOV** (Defendant)
FILE NO:	589/22
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	Brisbane District Court
DELIVERED ON:	28 March 2022
DELIVERED AT:	Brisbane (ex tempore)
HEARING DATE:	28 March 2022
JUDGE:	Porter QC DCJ
ORDERS:	1. Judgement is entered against the Defendant in favour of the Plaintiff in the amount of $179,171.59 comprising $173,632.48 for the claim, $5,539.11 for interest to today; and 2. The Defendant pay the Plaintiff's costs of the proceeding, including the application for Summary Judgement, to be assessed on an indemnity basis.
CATCHWORDS:	PRACTICE AND PROCEDURE – SUMMARY JUDGEMENT – Where the defendant did not complete building works on a residential home – Where the plaintiff seeks to recover a debt arising from a claim by the homeowners under the *Queensland Building Corporation Commission Act 1991* statutory insurance scheme – Whether the plaintiff is entitled to recover the debt under s71 of the Act – Whether the plaintiff has demonstrated that there was a claim under the insurance scheme and whether the plaintiff made payments on that claim - Whether the defendant has any real prospects of successfully defending the plaintiff's

claim.

PRACTICE AND PROCEDURE – APPLICATION FOR ADJOURNMENT – APPLICATION REFUSED – Where the defendant applies for adjournment on the basis of lack of legal representation – Whether refusal of an adjournment would deprive the defendant of his legal rights – Where the defendant has no real prospects of defending his case.

CASES: *Mahony v QBSA* [2013] QCA 323
Lange v Queensland Building Services Authority [2012] 2 Qd R 457
Queensland Building Services Authority v Orenshaw & Anor [2012] QSC 241
Queensland Building Corporation Commission v Turcinovic [2017] QCA 77

LEGISATION: *Queensland Building and Construction Commission Act 1991* s 71

Queensland Building Services Authority Act 1991 s 71

Uniform Civil Procedure Rules 1999 r 292

COUNSEL: N Cooke for the Plaintiff/Applicant

No appearances for the Respondent/Defendant

SOLICITORS: Robinson Locke Litigation Lawyers for the Plaintiff/Applicant

Introduction

[1] This is an application by the Queensland Building and Construction Commission (**QBCC**) for summary judgment on its claim advanced under s. 71 of the *Queensland Building and Construction Commission Act 1991* (the **Act**). Section 71(1) provides:

> 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.

[2] It is a feature of claims under s. 71 of the Act that the scope of the defences available are less than one might think. The leading case explaining the limitation of the scope of matters that are open for dispute on a claim under s. 71 of the Act is the judgment of Justice Gotterson (with whom the others agreed) in *Mahony v QBSA* [2013] QCA 323 at [33] to [37], where his Honour said (footnotes omitted):

[33] Section 71(1) confers a right to recover as a debt from any of the designated persons "any payment on a claim under the insurance scheme". It is sufficient for recovery under the section that the authority has made a payment on a claim under the insurance scheme. The statutory right to recover is not conditioned upon the legal quality of a determination by the authority to make the indemnity payment or of any anterior step taken by the authority that had led to the decision to pay.

[34] That is not to say that a decision to make an indemnity payment or any anterior step is not reviewable. At the relevant time, Division 3 of Part 7 of the QBSA Act conferred a review jurisdiction on the Commercial and Consumer Tribunal ("the Tribunal") with respect to the following decisions by the authority: to direct or not direct rectification or completion work on a building; that work undertaken at the direction of the authority was not of a satisfactory standard; about the scope of works to be undertaken under the statutory insurance scheme in order to rectify; and to disallow a claim under the scheme wholly or in part. A decision by the authority to recover an amount under s 71(1) was not reviewable by the Tribunal. However, it was a decision which was judicially reviewable in the Supreme Court of Queensland pursuant to the provisions of the *Judicial Review Act 1991*. So, too, for other anterior decisions of the authority. The availability of review of those kinds and at those stages provides a sound rationale for a legislative intention that the types of decisions to which I have referred, not be justiciable in s 71(1) debt recovery proceedings. Another indicator of such an intention is that s 71 itself specifies certain defences which may be raised in proceedings under the section. None of these are relevant to the kind of defence that the appellant would wish to agitate in these proceedings.

[35] The view I take of this aspect of the construction and application of s 71(1) finds support in the following observations of Margaret Wilson AJA in *Lange v Queensland Building Services Authority*:

> "[72] Sections 71 and 111C provide for recovery of the amount of a 'payment on a claim under the insurance scheme' rather than the recovery of the amount of a 'payment under the insurance scheme'. For this reason, I do not accept counsel for the appellant's submission that the triggering circumstance on which the respondent relies does not apply.
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> [73] The administrative decision sought to be reviewed is one about entitlement to indemnity under the statutory policy. The appellant is a person aggrieved by that decision because, in consequence of it, a payment was made to the owners and he was exposed to recovery proceedings pursuant to s 111C. He is entitled to seek judicial review of that decision pursuant to s 20 of the Judicial Review Act 1991."

[36] The triggering circumstance to which her Honour was referring was the payment by the authority of the claim.

[37] I agree with these observations. I note that, in that case, McMurdo P and Ann Lyons J did not express a concluded view on the matter because it had not been fully argued before them. In so far as the learned President observed that it seems unlikely that Parliament would have intended for the authority to recover from building contractors payments wrongly made to those insured by the authority on policies entered into under Part 5 of the QBSA Act,[37] I understand her Honour to be referring to any payment that may have been made wrongly in the sense that it was not in fact made upon a claim made validly under the Act. The language of s 71(1) would leave open scope for a defence that the payment sought to be recovered was not made upon a claim and a defence that the claim was not validly made under the Act. To my mind, the position was accurately summarised by Henry J in Queensland Building Services *Authority v Orenshaw & Anor* as follows:

> "At the other extreme, it is unlikely that s 71 could be avoided by a building contractor disputing discretionary factual conclusions occurring as part of the professional judgment exercised by the QBSA in deciding whether and how much to pay in respect of a claim. It would not be enough to avoid the statutory liability imposed by s 71 for a defendant to point merely to any error of fact connected with the claim process. It must logically have been a factual error of such a nature that the claim was not, on the facts as correctly known, a claim under the insurance scheme or that the payment sought to be recovered was not a payment on such a claim."

[3] The gravamen of the Court of Appeal's approach to this section is that if the elements of the claim are established, then the QBCC is entitled to its judgment. Matters which go to the deliberative process or investigation process that lies behind the making of such a payment cannot be litigated by way of defence in proceedings on s. 71(1). Those matters are to be dealt with according to the scheme of the QBSA Act, which despite some changes to section numbers and so on, remains as articulated in the decision of *Mahony v QBSA*. Those matters are to be worked out at an anterior point by administrative-style reviews, either internal, or by appeal to QCAT.

[4] There is also some residual scope for review of the decision by the Authority to decide to recover an amount under s. 71(1) of the *Judicial Review Act 1991*, although one might think the grounds for that review might be rather narrow. The authorities referred to, including the case of *Queensland Building Corporation Commission v Turcinovic* [2017] QCA 77, consistently emphasise that approach. There will be a residual scope for a defence where it can be shown that a payment that was made was not incapable of being made as a payment under the insurance scheme, but that residual circumstance does not arise in this case.

The facts

[5] QBCC pleads the essential requirements to make out that it had made a payment on a claim under the statutory insurance scheme set up by the Act. The circumstances are summarised in this way, based on the evidence of the commission's solicitor.

[6] The defendant, Mr Kouzmenkov, held a builder low-rise licence. On or about 29 June 2020 he entered into a contract to build a residential dwelling for Mr John Caddle (the **Homeowner**) at Hollywell in Queensland for a specified sum. He obtained a Certificate of Insurance for statutory insurance under the Queensland Home Warranty Scheme (the **Scheme**), which, importantly, identifies him and his licence number in respect of that contract, the insurable value of which was $450,000.

[7] The builder commenced work in around August 2020 until January 2021. At that time the work was not complete. The evidence discloses that the likely explanation for that is that at the end of December 2020, Mr Kouzmenkov's builders' licence was cancelled. Thereafter, the Homeowner terminated the contract for, among other reasons, failing to progress the work diligently. The Homeowner submitted claims and complaints to the QBCC requesting completion of the work under the

Insurance Policy Conditions ('the **Policy')** and for rectification of defects in two separate claims.

[8] The QBCC obtained a defect assessment and completion assessment report. The defective work, it should be said in fairness to Mr Kouzmenkov, was of very limited scope. The real difficulty was that the building work had not been completed. The QBCC obtained a tender based on the scope of work for the completion of the contract works.

[9] That process identifies the context within which the QBCC ultimately paid an amount under the Policy in respect of completion and a small sum in addition for some minor defective work to the Homeowner, which amount is the subject of the claim today.

[10] The elements of the claim under s. 71 are made out either by admitted facts or facts that are proved on the material before me. That is, there are claims for incomplete and defective work. The commission has made a payment on those claims, and they were payments which fell within the scope of the statutory insurance scheme.[1]

Matters raised in the amended defence

[11] Mr Kouzmenkov's amended defence raises a number of issues. Mr Kouzmenkov has not led any evidence on this application. The reason for that is his decision, communicated to the Court, not to participate in the proceeding because of his lack of legal representation, lack of resources to obtain legal representation and concerns about his ability to confidently represent himself, given limitations he claims in respect of English. I put those considerations to one side for a moment.

[12] Presently, the issue I am dealing with is the fact that there is no evidence from the defendant to answer the strong *prima facie* case disclosed on the evidence. If, however, the defence raised an issue of law which gave rise to a matter which had to be dealt with by the plaintiff to make out their case, it would need to be considered on the summary judgment. Mr Cooke, who appeared on behalf of the QBCC, attempted to summarise, by list, the issues that were raised on the amended defence in paragraph 28 of his outline of argument. I am satisfied that none of those allegations give rise to any issue of law which impugns the right of the plaintiff to its judgment.

[13] An underlying theme of many of the issues outlined is that Mr Kouzmenkov's licence was suspended in the way I have described through the whole of the period of the complaint, the claim, the assessment and the rectification. Mr Cooke referred me to, in respect of the statutory right to recover, section 71(2)(a)(ii) and (iv), the gravamen of which is to make the person whose name and licence number appears on a contract, and a person whose name and licence number appears on an

[1] See, Insurance Policy Scheme (1 July 2009, Edition 8) pt 1 (Non-completion) & pt 4 (Defective Construction).

insurance notification for the work, the person liable to the QBCC in a recovery action for the amount of a claim paid under the statutory insurance scheme.

[14] That's the end of that argument in respect of the Act and, not surprisingly, the insurance policy conditions as well . These refer to, in respect of non-completion for example, a loss suffered by the insured in the event of the contractor failing to complete the contract for residential construction work, and defines "contractor", to mean the licenced contractor referred to in the certificate. Therefore, on the proper construction of the Act and the Policy, the liability attracting criterion is that the builder's name and licence number on the insurance notification and the contract, not that the builder still has a licence for the whole of the period of the work. It would be astounding if the situation under the Act and the Policy were any different. If it was, it would permit the avoidance of the effect of the Act simply by a builder surrendering the licence before a claim was finalised.

[15] The other points made have no merit on the facts. For example, it is said that the building work was not primary insurable work under section 67WC of the Act. It is plain that it was primary insurable work in the form of work for the construction of a residential dwelling. Other points raised fail to grapple with the fundamental point that the QBCC advanced, which is that the deliberative process leading to the making of a payment on a claim under the statutory insurance scheme cannot be challenged in a claim under s. 71(1) but must be challenged administratively in the way I have already described.

Mr Kouzmenkov's adjournment application

[16] In the last couple of days my Chambers received an email from Mr Kouzmenkov in response to my Associate's enquiry to the parties to this application as to whether the matter it was proceeding. Mr Kouzmenkov makes a particular point of his assertion that he could not possibly be liable if he did not have his licence but, of course he could have retained somebody else to do the work. I have already explained why the fact of the suspension is irrelevant to the claim, on any view.

[17] The balance of his submission could be characterised as either a submission there should be an adjournment of the proceeding until he can obtain legal representation, or perhaps adjournment of the application, or perhaps that it should be refused on the basis of rule 292(2)(b) of the *Uniform Civil Procedure Rules 1999*, being that there's a need for a trial of the claim, at least at this stage, because of the lack of legal representation.

[18] Courts must be astute to ensure that unrepresented parties have a reasonable opportunity to be heard in proceedings. That can require the granting of adjournments in circumstances where otherwise the court might be reluctant to do so. On the other hand, the authorities are replete with warnings that represented parties are not to be deprived of any part of their legal rights just because the other side is self-represented.

[19] Adjournments requested by litigants in person require a subtle balancing act in each case. But it is not the law that an adjournment is there for the asking for a litigant-in-person. Ordinarily, I would be reluctant to proceed with a summary judgment application without giving Mr Kouzmenkov at least one more chance to obtain some legal representation or to put on evidence or appear. However, the character of the claim in this case and the evidence to support it and, indeed, the matters that are raised in the amended defence lead me to conclude that it would be a futile waste of time and money to permit this matter to continue

[20] There is a public interest in the prompt and efficient disposition of proceedings at the minimum expense and with minimum delay. For the reasons I have given, delaying this proceeding seems futile. I do not consider there is a reasonable prospect of defending the case now, nor any basis for me to imagine that there are or are likely to be real prospects of defending the case in the future.

[21] For those reasons I order a summary judgment be entered in favour of the plaintiff in terms of the order which I initial and place with the papers.