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E-alert: Shutting the gate after the horse has bolted: “Backdoor” review of QBCC insurance payment not permitted

The recent Queensland Court of Appeal decision of *Queensland Building and Construction Commission v Turcinovic* [1] confirms the difficulties that will be faced by a builder in defending debt recovery proceedings instituted by the Queensland Building and Construction Commission (**QBCC**) if that builder has not diligently challenged the decisions of QBCC leading up to a payment under the Queensland Home Warranty Scheme (**Scheme**).

Facts

Mr Turcinovic built a number of homes.

The work at each property was covered by a by a policy of insurance pursuant to the Scheme in accordance with *Queensland Building and Construction Commission Act 1991*(Qld) (**QBCC Act**).

Mr Turcinovic’s work was substandard and the owner of each premises made a claim upon the Scheme. Each claim was accepted and payments (totalling over $200,000.00) were made to the various owners.

QBCC then sought to recover the amounts which it had paid out pursuant to the Scheme from Mr Turcinovic, pursuant to section 71 of the QBCC Act.

District Court Proceedings

At first instance, QBCC sought summary judgment.

The builder successfully resisted QBCC’s application by submitting that the payments made to the homeowners were “so unreasonable so as to make the monies paid out not a payment on a claim under the insurance scheme”.[2] In support of that submission, the builder provided evidence from a quantity surveyor who provided quotes for the rectification works, which, when compared with the payments, was found to be by the learned District Court judge of “such a magnitude to suggest enquiry is warranted”.[3]

QBCC appealed the decision to the Queensland Court of Appeal.

Decision

On appeal, North J (with whom Morrison and Philippides JJA agreed) determined that the application for summary judgment ought to have been granted.

The Court emphasised that a builder can only defend a debt recovery proceeding if the builder asserts grounds which would mean (if proven) that a payment was not made “on a claim” made under the Scheme.[4]

The Court held that reasonableness of the quantum of the payments was not such a ground.[5]

Consistent with previous authority[6] the Court emphasised the need for a builder to take advantage of the internal and external review processes available in relation to the decisions[7] of QBCC which necessarily predate the making of a payment under the Scheme.

Take Home Points

In a long line of authority, the Court has unequivocally held that a decision of QBCC can only be challenged in debt recovery proceedings if it will mean that a resulting payment is not one made “on a claim” made under the Scheme.

Once debt recovery proceedings have been commenced, a builder is likely to find itself in a very difficult position.

Trying to take steps at that point in time, is akin to shutting the gate after the proverbial horse has bolted.

It is critical that builders engage with the process in the event that they receive documents from QBCC and that they take appropriate action to challenge decisions of QBCC where appropriate.

We recommend that you promptly seek legal advice if you receive any unexpected correspondence from QBCC.

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[1] [2017] QCA 77.

[2] [2017] QCA 77 [21].

[3] [2017] QCA 77 [22].

[4] [2017] QCA 77 [33].

[5] [2017] QCA 77 [32].

[6] *Mahony v Queensland Building Services Authority*[2013] QCA 323 [34]; *Lange v Queensland Building Services Authority* [2011] QCA 58 [72]; *Queensland Building Services Authority v Orenshaw & Anor* [2012] QSC 241 [38]; *Samimi & Anor v Queensland Building and Construction Commission* [2015] QCA 106 [31].

[7] For example, a number of decisions are internally reviewable by QBCC and externally reviewable either in the Queensland Civil and Administrative Tribunal, such as, a decision to issue a Direction to Rectify (s 86 (1)(e) of the QBCC Act), a decision that a builder has failed to rectify work (s 86 (1)(f) of the QBCC Act), a decision about the scope of works to be undertaken under the statutory scheme (s 86(1)(e) of the QBCC Act) or by the Supreme Court of Queensland pursuant to the *Judicial Review Act 1991* (Qld).

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