

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *The Body Corporate for 39 on Scenic CTS 41029 v Queensland Building and Construction Commission & Anor* [2021] QCAT 34

PARTIES: **THE BODY CORPORATE FOR 39 ON SCENIC CTS 41029**
(applicant)

v

QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION
(first respondent)

BRUCE KRENSKE
(second respondent)

APPLICATION NO: GAR413-18

MATTER TYPE: Building matters

DELIVERED ON: 29 January 2021

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member McVeigh

ORDER: **As the body corporate is a person affected by the decision of the QBCC within the meaning of section 87 of the *QBCC Act*, matter GAR413-18 is to be listed for a two day oral hearing at Brisbane.**

CATCHWORDS: ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – where the applicant body corporate complained about a private certifier – where the first respondent investigated the complaint – where the applicant sought external review of the decision of the first respondent – whether the applicant body corporate had standing to bring the application

Building Act 1975 (Qld), s 136, s 179, s 190, s 204
Queensland Building and Construction Commission Act 1991 (Qld), s 86, s 86A, s 86C, s 86D, s 86E, s 87

Fisher v Queensland Building and Construction Commission [2019] QCAT 323, distinguished
McCrystal v Queensland Building and Construction Commission [2018] QCAT 207, distinguished
West v Queensland Building and Construction Commission

[2019] QCAT 237, applied

**APPEARANCES &
REPRESENTATION:**

Applicant: HW Litigation
 First Respondent: Gadens Lawyers
 Second Respondent: M Wilkinson of counsel instructed by Swanwick Murray and Roche

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld)

REASONS FOR DECISION

Background

- [1] On 27 June 2017 the applicant (body corporate) complained to the first respondent (QBCC) about the conduct of the second respondent (certifier) in certifying the residential complex located at 39 Scenic Road, Cooee Bay.
- [2] The QBCC made a decision about the complaint on 25 July 2018. It gave the body corporate and the certifier notice of its decision as required by section 204 of the *Building Act 1975* (Qld) (*Building Act*).
- [3] The body corporate made an application for internal review of that decision pursuant to section 86A of the *Queensland Building and Construction Commission Act 1991* (Qld) (*QBCC Act*).
- [4] On 16 October 2018 the QBCC issued its Decision Notice pursuant to section 86D(1) of the *QBCC Act* to the body corporate and the certifier.
- [5] On 13 November 2018 the body corporate filed an application to review the internal review decision in this tribunal.
- [6] At a directions hearing on 5 November 2020 I raised concerns about the standing of the body corporate to make this application.

Relevant legislation

Building Act 1975 (Qld)

- [7] A private certifier must, in performing a private certifying function, always act in the public interest.¹
- [8] Part 4 of Chapter 6 of the *Building Act* establishes a regime for making and for investigating complaints about building certifiers. If a person believes that a building certifier has engaged in unsatisfactory conduct or professional misconduct, they may complain to the QBCC.² After investigating a complaint, the QBCC must decide whether or not the building certifier has engaged in unsatisfactory conduct or professional misconduct.³

¹ *Building Act*, s 136(1).

² *Ibid*, s 190(1).

³ *Ibid*, s 204(1).

[9] Unsatisfactory conduct is defined to include:

- (a) conduct that shows incompetence, or a lack of adequate knowledge, skill, judgment, integrity, diligence or care in performing building or private certifying functions;
- (b) conduct that is contrary to a function under this Act or another Act regulating building certifiers (including private certifiers for building work), including, for example—
 - (i) disregarding relevant and appropriate matters; and
 - (ii) acting outside the scope of the building certifier's powers; and
 - (iii) acting beyond the scope of the building certifier's competence; and
 - (iv) contravening the code of conduct;
- (c) conduct that is of a lesser standard than the standard that might reasonably be expected of the building certifier by the public or the building certifier's professional peers.⁴

[10] Professional misconduct is defined to include:

- (a) conduct that—
 - (i) shows incompetence, or a lack of adequate knowledge, skill, judgment, integrity, diligence or care in performing building certifying functions; and
 - (ii) compromises the health or safety of a person or the amenity of a person's property or significantly conflicts with a local planning scheme; and
 - ...
 - (iii) is contrary to a function under this Act or another Act regulating building certifiers (including private certifiers for building work), including, for example—
 - (A) disregarding relevant and appropriate matters; and
 - (B) acting outside the scope of the building certifier's powers; and
 - (C) acting beyond the scope of the building certifier's competence; and
 - (D) contravening the code of conduct; and
 - (E) falsely claiming the building certifier has the qualifications, necessary experience or licence to be engaged as a building certifier;
- (b) seeking, accepting or agreeing to accept a benefit, whether for the benefit of the building certifier or another person, as a reward or inducement to act in contravention of—
 - (i) this Act; or
 - (ii) another Act regulating building certifiers, including private certifiers for building work;

⁴ Ibid, schedule 2.

- (c) failing to comply with an order of the QBCC or the tribunal;
- (d) fraudulent or dishonest behaviour in performing building certifying functions;
- (e) other improper or unethical conduct;
- (f) repeated unsatisfactory conduct.⁵

[11] If the QBCC decides that the building certifier has engaged in unsatisfactory conduct, it must decide to do one or more of the following:

- (a) reprimand the building certifier;
- (b) impose the conditions it considers appropriate on the building certifier's licence;
- (c) direct the building certifier to complete to the satisfaction of QBCC the educational courses stated by QBCC;
- (d) direct the building certifier to report on his or her practice as a building certifier at the times, in the way and to the persons stated by QBCC;
- (e) require the building certifier to take all necessary steps to ensure the certification of building work—
 - (i) complies with this Act; or
 - (ii) for other assessable development related to the building work—is not inconsistent with all other necessary development approvals that apply to the work; or
 - (iii) for accepted development that may affect the position, height or form of building work—is not inconsistent with the requirements for the self-assessable development;
- (f) direct the building certifier to take necessary enforcement action under this or another Act, including, for example, by requiring the building certifier to issue an enforcement notice to the builder of the building work or owner of the building;
- (g) if QBCC is satisfied the building certifier is generally competent and diligent—advise the building certifier it does not intend to take any further action.⁶

[12] The QBCC must give the complainant a copy of its decision.⁷

[13] The QBCC keeps a public register of building certifiers.⁸ If the QBCC decides that a building certifier has engaged in unsatisfactory conduct, details of the decision are entered onto the register.⁹

[14] If the QBCC decides that the building certifier has engaged in professional misconduct it must apply to the tribunal to start a disciplinary proceeding against the building certifier.¹⁰ The QBCC need not wait until it receives a complaint about a building

⁵ Ibid, schedule 2.

⁶ Ibid, s 204(4).

⁷ Ibid, s 204(5)(b).

⁸ Ibid, s 179.

⁹ Ibid, s 179 (3)(d).

¹⁰ Ibid, s 204(6).

certifier. It can commence proceedings on its own initiative to prosecute the building certifier for an offence against the *Building Act*.¹¹

Queensland Building and Construction Commission Act 1991 (Qld)

- [15] Division 3 of Part 7 of the *QBCC Act* establishes a regime for reviewing certain decisions of the QBCC.
- [16] A person affected by a reviewable decision of the QBCC may apply to the tribunal for a review of that decision.¹²
- [17] However, before applying to the tribunal, a person who is given notice of a reviewable decision may apply to have the decision reviewed internally by the QBCC.¹³ A decision of the QBCC under section 204 of the *Building Act* as to whether or not a building certifier has engaged in unsatisfactory conduct or professional misconduct is a reviewable decision under the *QBCC Act*.¹⁴
- [18] As soon as practicable after an internal review decision is made, the internal reviewer must give the applicant and any other person affected by the decision written notice of the decision.¹⁵
- [19] An internal review decision made by an officer of the QBCC¹⁶ is a reviewable decision.¹⁷

Relevant cases

McCrystal v Queensland Building and Construction Commission

- [20] In *McCrystal v Queensland Building and Construction Commission*¹⁸ (*McCrystal*) Member Traves decided, in obiter, that the applicant did not have standing to seek external review of a decision by the QBCC that a building certifier had not engaged in unsatisfactory conduct or professional misconduct. The applicant, who had complained to the QBCC about the conduct of the building certifier, was the owner of a property next door to, and another property two doors down from, the property subject to certification by the certifier.
- [21] Member Traves said:
- [45] Sometimes it will be clear that a person is affected by a decision. That effect might be direct or indirect. If the nature of the decision is such that it could not have affected the applicant directly, it will be necessary for the applicant to establish by evidence that his or her interests are in truth affected.
- [46] The issue is whether the applicant was affected by the decision itself, not potentially by the outcome of any review. In other words, was the applicant affected by the decision to take no disciplinary action against the certifier.

¹¹ *Ibid*, s 204(7).

¹² *QBCC Act*, s 87.

¹³ *Ibid*, s 86A(1).

¹⁴ *Ibid*, s 86(2)(a).

¹⁵ *Ibid*, s 86D(1).

¹⁶ *Ibid*, s 86C.

¹⁷ *Ibid*, s 86E.

¹⁸ [2018] QCAT 207.

- [47] There is no requirement in s 87 that the applicant be affected in a particular way, for instance that his legal interests be affected. However, the applicant must be able to demonstrate that he is affected by the decision beyond that of a member of the public at large. (footnotes omitted).
- [22] She referred¹⁹ to principles developed relating to the expression ‘interests affected’ in the context of standing to review under s 27 of the *Administrative Appeals Tribunal Act 1975* (Cth), being
- (a) There must exist an interest other than as a member of the public;
 - (b) The interest cannot be a mere belief that particular conduct should be prevented, or a mere belief that particular laws should be observed;
 - (c) The relevant interest does not need to be of a pecuniary nature, however an applicant must be able to identify a definable relevant interest, or a genuine affection of an interest which attaches specifically to them; and
 - (d) The effect on their interests must not be hypothetical.
- [23] In her analysis the applicant’s interests were hypothetical and too remote because even had the decision been made to take disciplinary action, it was possible that an order personal to the certifier would have been made, not an order that may have led to remediation work being undertaken. She noted that there was no evidence as to how any such work would affect the applicant’s property, if at all.
- West v Queensland Building and Construction Commission*
- [24] In *West v Queensland Building and Construction Commission*²⁰ (*West*) Member Howe rejected the QBCC’s application to dismiss review proceedings on the basis of the applicant’s lack of standing. The applicant, who had complained to the QBCC about the conduct of the certifier, was the owner of land next door to the pool subject to certification by the certifiers. The QBCC had decided that the certifiers had not engaged in unsatisfactory conduct or professional misconduct.
- [25] Member Howe was referred to the decision of *McCrystal*. He noted:
- That decision involved an application for an extension of time to file an application for administrative review in the Tribunal and all that was required there of the learned Member was a preliminary examination of the merits of the applicant’s case. No detailed examination of the law associated with the BA complaint regime and its relationship to s 87 of the QBCC Act, I suggest, was undertaken or required.²¹ (footnotes omitted).
- [26] He concluded that the applicant was, as initial complainant under the provisions of the *Building Act* pursuant to the review regime intended by that Act, a person affected by the decision of the QBCC within the meaning of s 87 of the *QBCC Act* and entitled to bring the application in the Tribunal.
- [27] Member Howe reached that conclusion having considered the High Court’s decision in *Allen v Transurban City Link Limited*.²² He decided that the starting point for

¹⁹ Ibid, [50].

²⁰ [2019] QCAT 237.

²¹ Ibid, [39].

²² [2001] HCA 58.

deciding entitlement to administrative review is a consideration of the subject, scope and purpose of the legislation concerned, which means the *Building Act*.²³

[28] His consideration follows:

- [25] By s 136(1) of the BA a private certifier must, in performing a private certifying function, always act in the public interest. Acting outside the scope of the certifier's powers, or contravening the code of conduct of certifiers or being grossly negligent or grossly incompetent is not acting in the public interest.
- [26] By s 179(3)(d), if the QBCC decides the building certifier has engaged in unsatisfactory conduct, the QBCC must note in a register of building certifiers the details of the decision and if the decision was that the building certifier has engaged in unsatisfactory conduct, details of the further decision required under s 204(4).
- [27] By s 180(a) the QBCC must make the register available for inspection by anyone.
- [28] By s 190 (1) a person may make a complaint to QBCC about a building certifier if the person believes a building certifier has engaged in unsatisfactory conduct or professional misconduct.
- [29] By s 194 if, potentially after mediation between the complainant and certifier, QBCC must conduct an investigation into the complaint.
- [30] By s 204(1) after investigating a complaint QBCC must decide whether or not the building certifier has engaged in unsatisfactory conduct or professional misconduct. QBCC must give the building certifier and the complainant (if any) an information notice about the decision. The inclusion in s 204(2) of a note stating 'For reviews of the decision, see the QBCC Act, part 7, division 3' cannot be ignored. It is part of the legislation and must be given meaning and effect.
- [31] Section 14 of the *Acts Interpretation Act 1954* (Qld) provides:
- ... (4) A note in an Act to the Act or to a provision of the Act, as opposed to a footnote, an editor's note or an endnote mentioned in subsection (7), is part of the Act.
- Example of a note—*
- See the note to section 2
- Example of a footnote—*
- See the footnote to schedule 1, definition *Acting Governor*.
- [32] Part 7 division 3 of the QBCC Act covers both internal and external review procedures. Subdivision 1 of division 3 concerns internal review by QBCC and subdivision 2 external review in the Tribunal.
- [33] Had it been intended to restrict the right of a complainant to internal review only, the legislation could very simply have said as much. It does not. Instead by addition of the note the legislation specifically directs one to both rights of internal and external review of decisions by

²³ [2019] QCAT 237, [24].

QBCC which involve investigations and decisions about the conduct of private certifiers following complaints by members of the public.

[34] Given certifiers are specifically required to act in the public interest, making both avenues of review available to a complainant dissatisfied with an initial determination of the complaint seems a logical machinery to enhance the requirement that private certifiers act in the public interest by allowing vigilance of such by concerned members of the public.

[35] I note that s 87 of the QBCC Act contains no requirement that a person's interests be affected by a decision before a person is entitled to seek administrative review under that provision.

[29] Member Howe observed that the general rule was that whether a person is affected by a decision as provided for in s 87 will only be able to be determined in particular matters after considering the nature of the decision sought to be reviewed which in turn requires examination of the legislation concerned.²⁴

Fisher v Queensland Building and Construction Commission

[30] Two months after the decision in *West* was delivered, Member Dr Collier decided that the applicant in *Fisher v Queensland Building and Construction Commission*²⁵ (*Fisher*) did not have standing. He did so without having the benefit of legal submissions and without reference to the decision in *West*. He decided that the applicant did not have standing to seek reviews of two decisions of the QBCC. Mr Fisher had complained to the QBCC about the conduct of a building certifier on two sites. He owned property adjacent to one of the sites in respect of which complaint had been made. The QBCC had decided that the certifier had not engaged in unsatisfactory conduct or professional misconduct.

[31] Member Dr Collier decided that there was nothing in the evidence that suggested that Mr Fisher had any interest in the QBCC's decisions beyond that of a member of the public at large or that of a bystander.²⁶ He said that while Mr Fisher was entitled to make a complaint against the certifier and to seek an internal review of his complaint as a member of the public at large, his standing to have the decisions of the QBCC reviewed by this tribunal rested on him being a person affected, which he was not.²⁷

[32] Member Dr Collier observed that his conclusion was consistent with the decision in *McCrystal v Queensland Building and Construction Commission*.²⁸

Issue

[33] The question to be determined is whether the body corporate is 'a person affected' by the internal review decision of the QBCC.

Submissions

[34] I have had the benefit of comprehensive submissions prepared by the parties' legal representatives.

²⁴ Ibid, [38].

²⁵ [2019] QCAT 323.

²⁶ Ibid, [25].

²⁷ Ibid, [26].

²⁸ Ibid, [28].

[35] All three parties submit that the body corporate has standing.

Reasons

- [36] In order to decide whether the body corporate is a person affected by a decision as provided for in section 87 of the *QBCC Act* the first step is to examine the subject, scope and purpose of the legislation concerned, rather than concepts derived from decisions under the general law of standing. The second step is to consider the nature of the decision sought to be reviewed.
- [37] A purpose of the *Building Act* is to regulate the conduct of private building certifiers for the public benefit.²⁹ It provides an avenue for complaint to the QBCC about the conduct or alleged misconduct of a certifier. QBCC decisions regarding unsatisfactory conduct of a certifier are available for search on a public register.³⁰ Disciplinary proceedings regarding professional misconduct brought against a certifier by the QBCC are also matters of public record.
- [38] Each of the complainant, and the certifier the subject of the complaint, is given a right to have the QBCC's decision regarding the complaint reviewed internally by the QBCC.³¹ Each of the complainant, and the certifier the subject of the complaint, is given a right to external review of the internal decision.³²
- [39] The decision the subject of this review application is about certification of the building at 39 Scenic Road, Cooee Bay. I accept the submissions for the certifier that it is safe to conclude by reference to the Community Management Statement and the Survey Plan that at least some of the complaints relate to common property which is the responsibility of the body corporate. Accordingly, I find that the body corporate is directly affected by the decision the subject of this review application.
- [40] I note that the facts of this case are distinguishable from the facts in *McCrystal* and *Fisher*. In each of those cases the applicant, at best a neighbour of the property in respect of which certification had been made, had an indirect interest in the outcome. In this case, unlike those, the applicant body corporate has a direct interest in the outcome.
- [41] Having regard to the subject, scope and purpose of the *Building Act* and the *QBCC Act* and that the body corporate is directly affected by the decision sought to be reviewed, I find that as the original complainant under the *Building Act* the body corporate is a person affected by the decision of the QBCC within the meaning of section 87 of the *QBCC Act*.

²⁹ *Building Act*, Chapter 6.

³⁰ *Ibid*, s 179.

³¹ *QBCC Act*, s 86A.

³² *Ibid*, s 87.