

CITATION: *Neller v Queensland Building and Construction Commission* [2016] QCAT 353

PARTIES: Luke Edward Neller
(Applicant)
v
Queensland Building and Construction
Commission
(Respondent)

APPLICATION NUMBER: OCR156-15

MATTER TYPE: Occupational regulation matters

HEARING DATE: 19 July 2016

HEARD AT: Brisbane

DECISION OF: **Member Paratz**

DELIVERED ON: 4 October 2016

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. The decision of the Queensland Building and Construction Commission made on 29 July 2015 is set aside.**
- 2. A decision is substituted, pursuant to section 246CY(4)(h) of the *Building Act 1975 (Qld)*, that grounds for disciplinary action against Mr Neller are established, but no further action is to be taken.**

CATCHWORDS: PROFESSIONS AND TRADES – OTHER MATTERS – Where a licenced pool safety inspector issued a Queensland pool safety certificate – where disciplinary proceedings were brought for conduct contrary to a function under the *Building Act 1975 (Qld)* – whether the pool fencing inspector had wrongly issued a certificate – whether grounds for disciplinary proceedings were found - whether the sanction imposed by the *Queensland Building and Construction Commission* should be substituted

Building Act 1975 (Qld) s 246CY(2), 246CY(4)(h), Schedule 2

APPEARANCES:

APPLICANT: Luke Edward Neller in person

RESPONDENT: Malcolm Robinson of Robinson Locke Litigation Lawyers

REASONS FOR DECISION

[1] Mr Neller was a registered Pool Safety Inspector. Disciplinary proceedings were brought against him by the Queensland Building and Construction Commission (QBCC) under the *Building Act 1975 (Qld)*¹ (the Act) in relation to his inspection of a pool safety fence on 29 September 2011 at 302 Chapel Hill Road, Chapel Hill, in Brisbane.

[2] The QBCC made an initial decision on 12 January 2015 that:

- 1) Grounds for disciplinary action against Mr Neller had been established pursuant to section 246CY(1) of the Act; and
- 2) Mr Neller was required to pay \$1,821.60 to the QBCC within 5 months of the date of receiving the Information Notice for a breach of section 246AW(1) of the Act, and contravention of section 3 of the code of conduct for swimming pool safety inspectors (code of conduct).

[3] An internal review of the initial decision of the QBCC was sought by Mr Neller. The decision of the Internal Review by the Executive Director Executive Office, Kellie Lowe, was made on 29 July 2015. The initial decision was varied, and the following decision was substituted that:

- 1) I have decided that grounds exist for disciplinary action for non-conformities in relation to issues 1, 2, 3, 4, 5 and 6 and the review applicant is to be reprimanded and required to pay \$800 to the QBCC breaching section 246AW(1) of the Act and section 3 of the code of conduct.

[4] An application to review the decision made on 29 July 2015 was filed in the Tribunal on 28 August 2015.

[5] The application was heard on 19 July 2016. This is the decision on the Application.

History of the matter

[6] Margaret and Desmond Fanning engaged Mr Neller to inspect the pool fence at their property on 29 November 2011, as they were planning to sell the property.

¹ Section 246CY(2), s (6)(a).

- [7] A pool safety certificate was issued by Mr Neller dated 29 September 2011.
- [8] Mr and Mrs Fanning sold the property on 3 April 2012. Mrs Fanning said² that no changes were made to the pool fence between the time of the inspection and the time of the sale.
- [9] A complaint was made to the Pool Safety Council ('PSC') on 31 January 2014 by David Metrikas, the then owner of the house. The complaint was made following the issuing of a Non-Conformity Notice dated 3 October 2013 by Cameron Coward, a pool safety inspector.
- [10] Russell Bergman, a Principal Advisory Officer, employed by the QBCC, inspected the property with Michael Cummings who was also with the QBCC, on 28 February 2014. He advised Mr Neller of the complaint by letter dated 21 July 2014, and prepared a Pool Investigation Report of his investigation on 5 January 2015. The Information Notice was then issued on 12 January 2015.
- [11] The non-compliance matters alleged by the Pool Safety Council in its letter of 21 July 2014 were as follows:

(Issue 1) The pool gate latch release on the outside of the fence was less than 1500mm from the ground not in accordance with section 2.5.4.2 of AS1926.1-2007. It is alleged the latch was approximately 135mm lower than the 1500mm height.

(Issue 2) The pool gate latch release on the outside of the fence was less than 1400mm from the highest lower rail not in accordance with section 2.5.4.2 of AS1926.1-2007.

(Issue 3) A gap of over 100mm and about 100mm wide was present at the latch side of the gate (bottom of gate) not in accordance with section 2.5.2 of AS 1926.1-2007.

(Issue 4) Two gaps in the western pool (metal) fence greater than 100mm when reasonably subjected to the test for strength and rigidity not in accordance with section 2.3.7 of AS1926.1-2007.

(Issue 5) Three sections of timber paling fence have gaps greater than 10mm in the non-climbable zone (NCZ) where the rails were less than 900mm apart not in accordance with section 2.3.4 of AS1926.1-2007.

(Issue 6) The pool enclosure gate entry hinge and part of the front security door are climbable and within the NCZ.

(Issue 7) Further examples of gaps greater than 10mm in the NCZ in sections of the timber paling fence (similar to Issue 5).

(Issue 8) Climbable threaded bolts and nuts in the NCZ are protruding from the brick wall.

Evidence of witnesses

- [12] Evidence was given at the hearing by Ms Fanning, the initial relevant former owner; Mr Metrikas, the subsequent former owner; Mr Bergmann, the

² Statement of evidence of Margaret Fanning.

QBCC pool inspector; Mr Ferguson, a QBCC building inspector; and Mr Neller.

- [13] Ms Fanning said that she was a former owner of the property with her husband, and had owned it in 2011. She said she was advised by the Brisbane City Council that the pool fencing did not comply, and she then engaged Mr Neller to provide a certificate on 29 September 2011. She said that they sold the property on 3 April 2012, and that no changes had been made to the pool fence in the intervening period.
- [14] Ms Fanning said that the property was rented to a Christian Minister. She said that she was not notified of any damage to the pool fence. She said that they had the house painted, and had gardens installed.
- [15] Mr Metrikas stated³ that he bought the property on 3 April 2012, and received a copy of the Pool Safety Certificate issued by Mr Neller. He engaged Mr Coward on 3 October 2013 to inspect the pool. He said that there was no change in the condition of the pool fence between the two inspections.
- [16] In his evidence, Mr Metrikas said that he had done work on the property himself prior to the sale in 2013, but that this did not correlate to the work recommended to be done by Mr Coward. He said that he had bought a cone to go over the gate hinge for \$40.00 online, and had put it on himself.
- [17] Mr Metrikas said that the tenants of the house had not told him that they had changed any items.
- [18] Mr Bergmann said that he did not observe any of the defects listed in Issues 1 to 6, as the work had been repaired by that time. He said that the timber may have shrunk in the first year or two after installation, and the amount of shrinkage would depend on the species and the climate. He thought the fence was about 20 years old. He did not believe there would have been significant shrinking after the time of inspection by Mr Neller, or that any shrinkage after that would be miniscule.
- [19] Mr Bergmann said that the training for pool inspectors had been developed by the department. He said that had undertaken a Pool Safety Inspector's course, but had not inspected many pool fences. He described these as 'new rules to improve pool safety for children'.
- [20] Mr Coward, in a written statement, stated⁴ that there was no evidence that any part of the fence had been removed and replaced since installation, but that following his initial inspection, the owner did install new flat-top black pool fencing in place of the original loop-top green pool fencing.
- [21] Mr Ferguson said that he thought there had been changes to the pool fencing over time.

³ Statement of evidence of David Metrikas filed 24 November 2015.

⁴ Statement of evidence of Cameron Coward filed 29 October 2015.

Evidence of Mr Neller

- [22] Mr Neller stated⁵ that he inspected the pool fence, and was reasonably satisfied that the pool was a complying pool in accordance with section 246AW of the Act.
- [23] He noted that the pool fence was constructed from several materials including timber, masonry and metal, and that the site would have likely suffered ground movements and excessive swelling and shrinking of timber materials as a result of significant rainfalls.
- [24] He also noted that the property had been rented to tenants in the period between inspections, held vacant while offered for sale, and occupied at a later state by the owners. He suggested that during this period it is possible the condition of the pool fence could have changed due to damage by moving bulky items in and out of the property, aesthetic improvements for sale (including painting or replacing members), ground movements causing maintenance requirements, or other reasons.
- [25] In his evidence, Mr Neller said as to Issue 1 that he recalled a different latching mechanism to that shown in the photographs, and did not recall there being a magna-latch.
- [26] As to issue 2, Mr Neller said that he did not believe he would have 'walked past' it, as it would have been a key item of his inspection.
- [27] As to issue 3, he said that he couldn't recall the situation at the time of his inspection as to the gap at the latch side of the gate.
- [28] As to issue 4, Mr Neller said that he didn't recall there being gaps greater than 100mm, and suggested there may have been a shield there, but he could not recall one.
- [29] As to issue 5, Mr Neller said that remembered identifying the rails, and walking the perimeter of the fence. He said that he did not measure each gap, but used his 'pinky-finger' to measure the gap.
- [30] As to issue 6, Mr Neller said that when he inspected the hinge it was exposed, and that he noted it as non-compliant. He said that a cap was fitted, and it was passed on re-inspection, and he clearly remembered the hinge being rectified by the addition of a cone cap which would have been fixed with some sort of adhesive.
- [31] As to the screen door in issue 6, Mr Neller said that his recollection was that the screen door was removed at the time of his inspection.
- [32] Mr Neller said that he was newly licenced as a pool safety inspector, and was aged 21 at the time, and was studying Civil Engineering at the University of Queensland.

⁵ Statement of evidence of Luke Neller filed 6 November 2015.

- [33] Mr Neller said that he issued the certificate in the belief that there were no defects in the fence.
- [34] I note that Mr Neller had advised the PSC⁶ in his email response of 8 August 2014 that the property was one of his first inspections, and he had mostly worked as an assistant to a licensed building certifier on inspections, on no more than 25 inspections at that time.

Submissions of the QBCC

- [35] The QBCC submit that there is no reasonable basis to believe that the condition of the fence changed between the issue of the certificate by Mr Neller on 29 September 2011 and the date of the inspection by Mr Coward on 3 October 2013⁷, and on that basis there is no logical conclusion open other than that the original certificate was issued erroneously.
- [36] They further submit that the inspection by Mr Bergmann and Mr Cumming on 28 February 2014 confirmed the non-compliance existing at that date.
- [37] It was submitted for the QBCC that Mr Neller had not produced records of his inspection, including a check-list, which would have favoured him.
- [38] The QBCC submitted that as to all 6 items, an inspector should have objectively assessed the items as non-complying.

Discussion

- [39] The Internal Review Unit caused an inspection report to be prepared by Mr Ferguson, a QBCC Inspector. He conducted an inspection on 6 July 2015, and his report is dated 12 July 2015, and had regard to reports and submissions from Mr Bergmann, Mr Cumming and Mr Neller.
- [40] Curiously, the report of Mr Ferguson, which was requested for the Internal Review, was not referred to in the reasons for decision of the Internal Review.
- [41] Mr Ferguson was unable to substantiate any of the complaints in question, and concluded as follows⁸:

Issue 1 and 2: I am not able to provide any confirmation of the type and location of the gate at the time of the Neller inspection, however due to the changes that have occurred to the gate assembly and adjacent fixings, it would be difficult to verify the location and position of the gate at the time of the original Neller inspection.

Issue 3: It is relevant to note that the current gate complies with the requirements. It is difficult to verify the type and position of the gate at the time of the original Neller inspection in 2011 and whether it was this gate at the time of the Neller inspection or if the gate had been altered prior to the

⁶ Agenda PSC, p 160 of QBCC bundle.

⁷ Closing submissions on behalf of QBCC, [5], [6].

⁸ Internal Review Unit Inspection Report, p 2 to 7.

PSC inspection in 2013. I note that the original PSC inspection was carried out later again in February 2014. I have noted in the previous item the inconsistencies and changes that have been made to the pool fence components. I am not able to verify if there was a gap at the time of the Neller inspection.

Issue 4: The site inspection has identified that the fencing provided to the pool area is of many separate types and it is very difficult to verify which fencing was in place at the time of the Neller or if any had been altered before the PSC inspection.

Issues 5 and 7: It is difficult to verify the gaps were in the palings at the time of the original Neller inspection in 2011. My experience is timber palings can and often will shrink up to 4mm and if each paling shrinks and the gap is already almost 10mm a gap exceeding 10mm will appear after some time. An inspector is only able to provide an assessment at the time of inspection not provide an assessment for a likely outcome of a fence. It is relevant to note that the timber pool fence has been painted and appear different from my inspection to the PSC inspection.

Issue 6A: I was not able to identify the screen door at my inspection and it appears that the door had been removed. It is very difficult to verify if the screen door was in place at the time of the original Neller inspection.

Issue 6B: A review of the PSC report indicates that a cap with a 65% angle had been provided to the hinge which may have indicated that a different type of cap may have once been installed over the hinge and may have dislodged after the Neller inspection prior to the PSC inspection. I am not able to verify that the location of the hinge was not compliant at the time of the Neller inspection.

- [42] Mr Neller did not dispute that there were defects in the pool fence apparent some years after he conducted his inspection. He noted however that new defects were identified each time a subsequent inspector attended the property.
- [43] The situation as to this pool is not clear-cut. In order to establish that Mr Neller incorrectly issued his Certificate, it is necessary to be satisfied that no relevant changes were made to the pool fence between the various inspections. The matter becomes one of conjecture and probability.
- [44] There are lengthy periods of time between the various inspections, and a lengthy period between the initial certificate issued on 29 September 2011, and the making of the complaint on 31 January 2014. I note that the passage of time was the reason that the QBCC elected to pursue a disciplinary order, rather than an alternative course of issuing a penalty notice under section 246CY(4)(f) of the Act, as the Director of Compliance made the following notations on the Pools Investigation Report prepared by Mr Bergman⁹:

Russell, the issue here is that as the matter is soon to be 'statute-barred', a P.I.N. will be ineffective. Therefore a disciplinary order for the same amount is preferable. I am advised that the 'SPER Token' is some way off yet so P.I.N.s close to the 12 months are not advisable.

⁹ Pools Investigation Report, QBCC bundle p 40.

- [45] The expression “ground for disciplinary action” is defined in Schedule 2 of the Act. There are nine descriptions (a) to (i) of conduct that are included as follows:-

Ground for disciplinary action, against a pool safety inspector or former pool safety inspector, includes the following –

- (a) conduct that shows incompetence, or a lack of adequate knowledge, skill, judgment, integrity, diligence or care in performing pool safety inspection functions;
- (b) conduct that compromises the health or safety of a person;
- (c) conduct that is contrary to a function under this Act, including, for example –
 - (i) disregarding relevant and appropriate matters; and
 - (ii) acting outside the scope of the pool safety inspector’s powers; and
 - (iii) acting beyond the scope of the pool safety inspector’s competence; and
 - (iv) contravening the code of conduct for pool safety inspectors;
- (d) seeking, accepting or agreeing to accept a benefit, whether for the benefit of the pool safety inspector or another person, as a reward or inducement to act in contravention of this Act;
- (e) failing to comply with an order of the QBCC commissioner or the tribunal;
- (f) accumulating the number of demerit points prescribed under a regulation for this provision in the period prescribed under a regulation;
- (g) fraudulent or dishonest behaviour in performing pool safety inspection functions;
- (h) other improper or unethical conduct;
- (i) conduct that is of a lesser standard than the standard that might be reasonably be expected of the pool safety inspector by the public or the pool safety inspector’s professional peers.

- [46] Section 246AW (1) of the Act provides:

246AW Giving pool safety certificates and nonconformity notices

- (1) A pool safety inspector may give a pool safety certificate for a regulated pool only if the pool safety inspector –
 - (a) has inspected the pool; and
 - (b) is reasonably satisfied that the pool is a complying pool

- [47] The initial QBCC decision concluded that the grounds for disciplinary action were as follows¹⁰:

QBCC determined that under s 246AW of the Act, the review applicant issued a pool safety certificate on a non-complying pool. QBCC was of the opinion that as a licensed pool safety inspector he was responsible for ensuring a pool safety barrier for a regulated pool met the pool safety standard. QBCC

determined that the review applicant breached s 246AW(1) of the Act and section 3 of the code of conduct by not identifying eight (8) non-conformances during his inspection and therefore not complying with legislative requirements.

- [48] The Review decision concluded that the grounds for disciplinary action were:

I have decided that grounds exist for disciplinary action for non-conformities in relation to issues 1, 2, 3, 4, 5 and 6 and the review applicant is to be reprimanded and required to pay \$800 to the QBCC breaching section 246AW(1) of the Act and section 3 of the code of conduct.

- [49] The code of conduct for swimming pool safety inspectors is provided for by s 246AZ of the Act. The Chief Executive may make a Code of Conduct for pool safety inspectors for performing pool safety inspection functions and the Minister must table it in the Legislative Assembly. Section 3 of the Code of Conduct provides as follows:

An inspector must comply with the legislative requirements that regulate or govern inspectors in the performance of pool safety inspection functions.

- [50] This is a disciplinary proceeding. The requisite standard of evidence is on the *Briginshaw*¹¹ standard, which is often referred to as 'reasonable satisfaction'.
- [51] Mr Neller was a young man at the time and relatively inexperienced as a pool inspector. It is possible that he did not exercise the rigour that he may have displayed with maturity and further experience. However, he did issue a pool safety certificate which is a document on which the public relies. The consequence of the improper issue of a pool safety certificate is that a dangerous object, namely an unfenced pool, remains as a potential danger to the public.
- [52] The two owners of the house say that no changes were made to the pool fence between Mr Neller's inspection and Mr Coward's inspection. There is doubt as to whether a cone was placed over the hinge, as Mr Neller positively says one was placed, and that seems to be supported as a possibility by later inspections. However, the other defects as to gaps in the fence, and height of the latch, are not explained. Mr Neller suggests that the timber may have shrunk, but there is no evidence of that, and Mr Bergman put it as unlikely. Mr Neller does not appear to strongly deny that the gaps may have been there. The strongest implication is that issues 1 to 5 were apparent at the time Mr Neller issued his certificate.
- [53] Whilst the evidence is not explicit, the unrefuted implication is that there were defects in the pool when approved by Mr Neller which remained in an unchanged state until the inspection by Mr Coward.

¹¹ *Briginshaw v Briginshaw* (1938) 60 CLR 336.

- [54] I am reasonably satisfied that the pool certificate was wrongly issued as to items 1, 2, 3, 4 and 5. I am not satisfied that it is shown that Item 6 was a defect at the time of the issue of the Certificate by Mr Neller.
- [55] As a consequence of the wrongful issue of the Certificate, I am satisfied that grounds for disciplinary action, being conduct that is contrary to a function under the Act¹², are made out.

Sanction

- [56] The Act provides for several options as to sanction. The question becomes as to the most appropriate sanction in all the circumstances.
- [57] The sanction options pursuant to s 246CY(4) of the Act are:
- (4) If the Commissioner decides a ground for disciplinary action against the pool safety inspector is established, the Commissioner must decide to do 1 or more of the following –
 - (a) reprimand the pool safety inspector;
 - (b) impose the conditions it considers appropriate on the pool safety inspector's licence
 - (c) direct the pool safety inspector to complete to the satisfaction of the Commissioner the educational courses stated by the Commissioner;
 - (d) direct the pool safety inspector to report on his or her practice as a pool safety inspector at the times, in the way and to the persons stated by the Commissioner;
 - (e) require the pool safety inspector to refund some or all of a fee paid for an inspection of a regulated pool;
 - (f) require the pool safety inspector to pay to the Commissioner, within a reasonable stated period, a stated amount of not more than the equivalent of 60 penalty units;
 - (g) suspend the pool safety inspector's licence for a period of not more than 1 year;
 - (h) if the Commissioner is satisfied that the pool safety inspector is generally competent and diligent – advise the pool safety inspector it does not intend to take any further action.
- [58] The QBCC submit that the sanction imposed by the review should be maintained. Mr Neller seeks a dismissal of the claim with no further action.
- [59] Mr Neller is currently studying to become a building certifier. I asked if the outcome of these proceedings would have an effect on his opportunity of obtaining a licence as a Building Certifier. I was advised on behalf of the QBCC that a decision in this matter would not necessarily affect Mr Neller's application to become a building certifier, and that such a future decision would be made on a 'fit and proper' test at that time.

¹² Schedule 2, *Building Act* 1975 (Qld), 'ground for disciplinary action', para (c).

- [60] Whilst I am satisfied that Mr Neller wrongfully issued the pool certificate, I do not consider that he did so by any undue lack of diligence or through recklessness. I consider that his failure to note the defects was most probably due to a lack of experience on his part at the time.
- [61] I note that the PSC advised¹³ that when licenced, Mr Neller serviced seven local government areas in south-East Queensland, and that between April 2011 and 13 April 2014 he issued 141 pool safety certificates. There is no indication that complaints were made as to any other Certificate. The QBCC noted¹⁴ that he had no previous record of complaints or disciplinary actions. A number of referees were identified by him¹⁵. I am satisfied that he is generally diligent and competent.
- [62] It should also be noted that this inspection was conducted at a time when these pool regulations were still relatively new, as noted by Mr Bergmann, and the industry as a whole was still coming to learn the new rules and their nuances.
- [63] In all the circumstances, I do not view Mr Neller's actions as showing any high degree of culpability. I also take into account the element of uncertainty that has surrounded the issues, the length of time which the matter has taken, and the strain this has placed upon Mr Neller.
- [64] I consider that an appropriate sanction to reflect the situation should only; be minor. The two options that are best presented in that respect are a reprimand, or the taking of no further action.
- [65] A reprimand does not have a monetary effect, but it would be noted on Mr Neller's official records with the QBCC as being conduct requiring rebuke. I have concerns that the presence of such an adverse finding may detrimentally affect Mr Neller's future prospects of obtain a licence as a Building certifier, as the submission of the QBCC was that such a finding may "not necessarily" affect his obtaining a licence, but that leaves open the possibility that it may do.
- [66] In order to minimise the possible impact of an unintended further consequence upon Mr Neller, I consider that the correct and preferable decision¹⁶ is that grounds are established as to disciplinary proceedings, but that no further action be taken. This outcome would acknowledge that the action of issuing the certificate was improper, but indicate that such breach is seen as minor and not requiring rebuke, and acknowledge that Mr Neller is seen as generally competent and diligent.
- [67] I set aside the decision of the QBCC made on 29 July 2015, and substitute the decision that a ground for disciplinary action is established, but that no

¹³ Agenda Paper, PSC, p 162 of QBCC bundle.

¹⁴ QBCC Pools Investigation Report para 5, p 38 QBCC bundle.

¹⁵ Internal Review Submission, Luke Neller, p 66 QBCC bundle.

¹⁶ Ref s 20(1) *QCAT Act* as to purpose of a review of a reviewable decision.

further action is to be taken, pursuant to section 246CY(4)(h) of the *Building Act 1975* (Qld).