

CITATION: *Tracey v Queensland Building and Construction Commission* [2016] QCAT 480

PARTIES: Martha-Lee Tracey
(Applicant)
v
Queensland Building and Construction
Commission
(Respondent)

APPLICATION NUMBER: GAR008-15

MATTER TYPE: General administrative review matters

HEARING DATE: 2 and 3 June 2016

HEARD AT: Bundaberg

DECISION OF: **Member Paratz**

DELIVERED ON: 14 December 2016

DELIVERED AT: Brisbane

ORDERS MADE: **1. The decision of the Queensland Building and Construction Commission made on 9 December 2014 that the certifier had not engaged in unsatisfactory conduct is confirmed.**

CATCHWORDS: DISCIPLINARY PROCEEDINGS –BUILDING CERTIFIERS – where a building certifier did not take into account a resolution of a Shire Council as to height levels– where the Shire Council did not enact or publicise the resolution - whether the certifier should reasonably have been aware of and taken account of the resolution – whether a building certifier should have regard to external plumbing matters – whether matters of complaint were significant – where no unsatisfactory conduct was shown

Building Act 1975 (Qld) s 212

Tracey and Anor v Olindaridge Pty Ltd and ors [2014] QCAT 617

APPEARANCES:

APPLICANT: Martha-Lee Tracey in person

RESPONDENT: Malcolm Robinson (Robinson Locke Litigation Lawyers)

REASONS FOR DECISION

- [1] Ms Tracey (the 'home owner') had a house built for her at 160 Acacia Street, Woodgate in Queensland in 2001. She subsequently experienced serious issues as to the construction.
- [2] Numerous legal proceedings have arisen since the building of the house, involving various applications in the Tribunal at first instance, and the Appeal Tribunal. These proceedings have variously involved the building company, the builder personally, the Queensland Building and Construction Commission (the 'QBCC'), and the certifier.
- [3] This application concerns a decision of the QBCC made on 9 December 2014 that the Certifier who was involved in certifying the construction had not engaged in unsatisfactory conduct.
- [4] I heard this application in Bundaberg over two days on 2 and 3 June 2016. Numerous witnesses gave oral evidence, and further material was admitted into evidence.
- [5] At the conclusion of the hearing I gave Directions for the filing of Closing Submissions and Submissions in Response and Reply. The home owner filed her submissions on 21 July 2016, and the QBCC filed its Submissions in Response on 26 July 2016. The home owner filed her Submission in Reply on 24 August 2016.
- [6] This is the decision in this application.

History of this Application

- [7] The builder submitted plans dated 13 November 2001 to the Isis Shire Council. The plans were approved by John Hartnett, a Building Inspector employed by the Isis Shire Council.
- [8] The home-owner lodged a complaint with the QBCC on 3 September 2014 regarding the certification of the house, that¹:
 - Final Certificate issued whole building work does not comply with approvals nor Town Planning Scheme
- [9] The QBCC conducted an investigation, and Mr Hough, a Senior Audit and Investigation Officer employed by the Commission, advised Mr Hartnett of a decision that Mr Hartnett had engaged in unsatisfactory conduct in

¹ Statement of reasons QBCC p 21.

relation to the complaint, and that the Commission reprimanded Mr Hartnett.

[10] Mr Hartnett requested an internal review of the decision on 13 October 2014. Following the review, Ms Alexander, the Manager of Internal Review employed by the QBCC, advised the home-owner on 9 December 2014 that the Commission had decided to overturn Mr Hough's decision as a result of there being insufficient evidence to support a finding that Mr Hartnett had engaged in unsatisfactory conduct.

[11] The home-owner filed an Application to Review the decision of the QBCC on 13 January 2015. She sought the following outcomes²:

- (1) I seek the QCAT Tribunal to review the Internal review QBCC Decision.
- (2) An order that the Respondent be held accountable for negligence caused by his actions being the Building Inspector/Certifier the employee of the Isis Shire council.
- (3) If the QCAT Tribunal allows it, a date to be set for a hearing for negligence and loss of value to our dwelling by the Building Inspector John Hartnett / Isis Shire Council / Bundaberg Regional Council.
- (4) An order that the Respondent pay the Applicant's costs of loss to the dwelling and incidental of this Application.

[12] The Tribunal has clear jurisdiction on an Application to Review as to Outcome (1) as to the decision in question; and as to Outcome (4) as to costs of the application.

[13] At the commencement of the hearing there was discussion as to the jurisdiction of the Tribunal as to the other desired outcomes. The QBCC submitted that the Tribunal did not have jurisdiction in those regards in this application.

[14] I asked the home-owner to identify the basis upon which she contended that the tribunal had jurisdiction as to the other desired outcomes. She referred to a Statutory Warranty which arises under the *QBCC Act* or under the *Home Owner Insurance Scheme*, but that relates to defects or unfinished work. She also referred to the *Integrated Planning Act* but was unable to identify a power in the QBCC to order damages for negligence against a Certifier under that Act. She said that she wanted someone held to account for the house having been built below a certain level.

[15] I ruled early in the hearing that the Tribunal does not have jurisdiction in this Application to make an order as to damages for negligence against Mr Hartnett, the Isis Shire Council or its successor the Bundaberg Regional Council, or the QBCC, and struck those parts of the Application out.

² Application to Review Part C, p 5.

Accordingly, outcomes (2) and (3), and that part of outcome (4) as to costs of loss to the dwelling, were not addressed in the hearing, and are not addressed in these Reasons.

- [16] Mr Hartnett had retired from the Bundaberg Regional Council some years before the hearing. The home-owner did not know where he lives, had been unable to serve a Notice to Attend on him, and said that he may have been unaware of the hearing.
- [17] I ruled that the Application could proceed in the absence of Mr Hartnett, as it was a review of a decision of the QBCC, but be strictly confined to the original complaint that was considered by the QBCC and which Mr Hartnett had the opportunity to respond to.³
- [18] The QBCC identified five items of complaint in its closing submissions⁴ as follows:

Complaint Item 5: the Platform height

11. The complaint paragraph 5 relates to the height of the slab and whether or not it complies with the Council planning requirements. This might conveniently be dealt with in 4 sub-issues:

- (a) Whether the Isis Shire Council adopted a minimum height for habitable rooms in Woodgate.
- (b) Whether the Council declaration about the minimum height for habitable rooms in Woodgate was invalid due to the Council's non-compliance with s 53 of the *Standard Building Regulations 1993*.
- (c) Whether the certification of the floor level (ie, habitable height) was incorrect.
- (d) Does the answer to the preceding item constitute unsatisfactory conduct or professional misconduct.

Complaint Items 6 and 7: the Overflow Relief Gully

Complaint Item 8: the spacing between the downpipes

Complaint Item 9: the correctness of the certificate of occupancy ie. Is the house completed?

- [19] It is convenient to include the letter of Mr Hartnett to the QBCC of 11 September 2014 in full:

In response to your email and correspondence received on Wednesday 10 September 2014 and to our telephone conversation on Monday 8 September 2014, I wish to advise that I commenced my employment with

³ Letter Mr Hartnett to Mr Hough, QBCC Statement of Reasons p 102.
⁴ QBCC Closing Submissions, filed 26 July 2016.

Isis Shire Council in November 1992 after serving approx. 3 years with Toowoomba City council.

Coming from Toowoomba I was unaware that there was a condition relating to A.H.D.

I was advised that all slabs had to be a minimum of 230mm above natural ground level.

When I started work at Isis Shire Council I was given a set of guidelines that council required for their building approvals to be carried out. I was never informed there were any A.H.D. conditions. At that time all council approvals were signed by the C.E.O. who I pointed out was not correct and all approvals should have been signed by a Building Inspector.

At that time there was no permanent town planner employed.

It was when a new full time town planner was appointed for the second time years later that the condition of the A.H.D. came up.

After that time all building approvals were required to meet the A.H.D.

As I stated previously I was not made aware of the requirement of an A.H.D. and the only condition I was aware of was that all slabs had to be a minimum of 230mm above ground line.

As there were several new homes constructed in Woodgate previous to my employment I followed these guidelines.

In our phone conversation I have stated that I retired 3 1/2 years ago. I am now on an aged pension.

[20] The issue revolves around a resolution of the Isis Shire Council passed on 23 April 1992 under the heading 'Correspondence'⁵:

10.1 Kinhill Cameron McNamara

Advising of recommended floor heights and residential land levels for Buxton & Woodgate.

Decision Moved by Cr Mattison, seconded by Cr Fitzsimmons, That the following Australian Height Datum for floor and land levels be adopted:-

Buxton – Land level for building to be 3.8m AHD

- minimum floor height (Habitable Room) be 4.2m AHD

Woodgate – land level for building be 3.0m AHD

- minimum floor height (Habitable Room) be 3.4m AHD

⁵ QBCC Statement of Reasons p 96.

Carried

- [21] Mr Fritz, the Strategic Manager for the Bundaberg Regional Council gave evidence that the 1992 resolution has now been rescinded. He said he had worked for the Isis Shire Council, but that he did not become aware of the Resolution until after the amalgamation of the Council when a thorough inspection was conducted and the resolution was found. He said that he was not aware of any ability for the resolution to be viewed, and that if he had been asked for the 1992 resolution he would not have known where to find it.
- [22] Mr Fritz was unable to identify a status for the Resolution, and said that if it was intended to be a planning requirement that ideally there should have been an amendment to the planning Scheme to that effect.
- [23] His view was that if the resolution was intended to operate for building certifying functions, and was intended to have effect under the Building Regulations, that the Council should have made it more widely known, but there was no process to inform the industry.
- [24] Mr Ellery, the Group Manager for the Bundaberg Regional Council, said that the Building Regulations were not in force at the time of the Resolution.
- [25] Mr Higgins, the Hinterland Co-Ordinator, gave evidence as to the plumbing issues. He had signed the Certificate of Occupancy as to the plumbing. He said that an issue did not arise as to the Overflow Relief Gully as that is a measure designed to relieve pressure on the sewage system, whereas this property had a septic system installed, and sewage was not connected until seven years later.
- [26] Mr Higgins described the back-flow preventer as a simple screw on fitting costing eighteen to nineteen dollars.
- [27] Mr Morgan was called to give evidence by the home owner. He is a retired builder who built his own house next door to the subject premises. He said that he was concerned the land was so low, and that there was a swamp across the road. He said that he built his house higher than the home owner, and changed his plan from a slab on ground to a bearer and joist construction, as he was concerned about possible water issues. He said that he did not recall any endorsements on his plans as to heights.
- [28] Mr Wayne Say is a Licensed Surveyor and Land Development Consultant. He said that he has been in business since 1987 and has done work at Woodgate from 'the early days'.
- [29] Mr Say said that the Development Control Plan was not written very well where it referred to ground level. He said that he was not sure when he became aware that the Council had passed the resolution in question. He described the wording on the planning policy which required a level at RL3.4 as unclear.

- [30] Mr Marshman is a civil engineer. He said that town planning maps at the time of the house being built were non-existent.
- [31] The Commission called Mr Stephen Ferguson who is a Senior Technical Review Officer with the QBCC, and a certifier.
- [32] Mr Ferguson was asked about the Overflow Relief Gully and said that it is a plumbing issue, and is not within the scope of certification of a certifier.
- [33] Mr Ferguson said that he approached the matter as if he were the certifier, and as to what he would have done. He said that he found it very difficult to get information, and that a lot of small shires did not have sophisticated processes. He described the field as a 'hodge-podge' until the Integrated Planning Act was introduced in 1998 which brought in private certification.

Submissions of the home-owner

- [34] The home-owner submitted that she discovered in 2011 that her dwelling was below the boundary requirements and standards for the Woodgate area, and that this was a breach of the building standards.
- [35] She referred to a Policy of the Isis Shire Council as to the height of buildings at Woodgate, adopted on 23 March 1993, as evidence of a height requirement for the Woodgate area.⁶ The relevant part of that policy was:-

Council requires habitable structures to be constructed at R.L. 3.0. Where a development is proposed on land below R.L. 3.0 Council will permit the filling of the site to this level. The height requirements of this policy (9.0 metres, 13.5 metres) will then apply from this level.

- [36] She also submitted that a second policy was evidence of a height level. That document was the Woodgate Development Control Plan adopted on 20 February 2001, which provided⁷:

(4) The height of buildings within the plan area shall be limited to either a maximum of 7m or 2 storeys, whichever is the lesser, or 11m or 4 storeys, whichever is the lesser, dependent on the location of the site as detailed on Map 3. Such dimension shall be measured vertically to the highest part of the building from either the natural ground level, or the minimum habitable allotment level of 3m AHD, whichever is the higher.

- [37] She noted the issues as⁸:

We are the homeowners who have local council building inspector John Hartnett, who has allowed our dwelling to be built, passed and approved non compliant and never completed.

⁶ Applicant's closing submission filed 24 August 2016, para 15.

⁷ Applicant's closing submission filed 24 August 2016, para 19.

⁸ Applicant's closing submission filed 24 August 2016, para 23.

- (1) The dwelling is 0.635m below the height requirement for Woodgate.
- (2) Downpipes non-compliant – Certifier did unsatisfactory conduct decision of Shaun Stuart – QBCC
- (3) The Overflow relief gully and Backflow on hose cock are non compliant and noted by John Hartnett the building inspector. I refer to Exhibit 11 – Council File Cover at completion 21-12-01 (OFRG too high) (Back flow on hose cock).
- (4) The dwelling has never been completed as by the council file Exhibit 11 at the bottom 14/02/02 Not Completed and initialled by John Hartnett the Building Certifier.

[38] She submitted in conclusion that⁹:

32. A Building Inspector John Hartnett working for the Isis Shire Council passed and approved the building applications and drawing plans which has a height that our dwelling was not constructed too. Mr Keith Morgan confirm this 3 June 2016 at the hearing.

33. The dwelling is 2 and a half foot below the building requirement and is non compliant and has never been completed.

34. All the above was inspected and approved by the Building Inspector John Hartnett.

35. I am a little confused that no one is responsible for this non compliant and never completed dwelling, which was passed and approved by the Building Inspector John Hartnett of the Isis Shire council now Bundaberg Council.

Submissions of the QBCC

[39] The Commission submitted that there was not good evidence that the council kept a register of the relevant resolution, nor that it had kept the resolution available for inspection at any relevant time.¹⁰

[40] It submitted that the resolution may have been invalid, as found in a related decision,¹¹ and that there could not then be any justification for a finding of unsatisfactory conduct or professional misconduct.

[41] It alternatively submitted that if the resolution was valid, the weight of evidence was that the certifier did not know of the existence of the resolution and no register was maintained by the council to enable it to be located with reasonable diligence, and that a finding could not be maintained of unsatisfactory conduct or professional misconduct.

⁹ Applicant's closing submission filed 24 August 2016, para 32.

¹⁰ QBCC Closing Submissions filed 26 July 2016, para 13.

¹¹ *Tracey v Olindaridge Pty Ltd* [2014] QCAT 617 at [37] to [48].

- [42] As to the Overflow Relief Gully, it submitted that sanitary drainage work is not a stage of assessable building work, and is not 'building work' under the *Building Act 1975* (Qld), and therefore was outside the scope of a certifier's duties. It also submitted that there was no evidence that the ORG was not working.
- [43] As to the spacing between the downpipes, it described this as merely a 'technical breach', and that as the system has been performing for 15 years, without evidence that it has failed, professional misconduct was not triggered.

Discussion

- [44] The homeowner has had a very upsetting, expensive and time-consuming experience as to the construction of her home. Practical completion was reached on 21 December 2001. In about April 2008 the home-owner started to notice problems with the house, and by September 2008 it became apparent there were significant difficulties with the house caused by termites.¹² She filed proceedings in the Tribunal in May 2011 seeking to have Olindaridge Pty Ltd and Rodney Wagner held responsible for the damage caused by the termite infestation.¹³
- [45] Matters have therefore been in issue for eight years, and the home-owner has been engaged in various legal proceedings for five years.
- [46] The homeowner is understandably seeking compensation for loss she has suffered in relation to construction of her home from relevant parties.
- [47] The decision that is being reviewed in this proceeding is a disciplinary one. The Tribunal does have power, under Section 212 of the *Building Act 1975* (Qld) to make a range of orders if the Tribunal decides that proper grounds exist for taking disciplinary action against a former building certifier.
- [48] The orders that the Tribunal may make include orders as to completion of certification, or completion of work:
212. Orders relating to former building certifier
- (3) The tribunal may make an order requiring the former building certifier to
- (a) have another person who is appropriately licensed take all necessary steps to ensure the certification of building work complies with – this or another Act; or any relevant development approval; or a local planning instrument; or
- (b) pay the complainant or another person an amount sufficient to complete the certification work

¹² *Tracey and Anor v Olindaridge Pty Ltd and ors* [2014] QCAT 617 at [4].

¹³ *Ibid* at [5].

(4) The tribunal may, in relation to building work carried out that is defective or incomplete as a result of the professional misconduct, make an order that the former building certifier –

(a) at the building certifier’s cost, have the work rectified or completed by a person who is appropriately licensed; or

(b) pay the complainant or another person an amount sufficient to rectify or complete the work

[49] If the former building certifier was employed by local government, then the Tribunal may make similar orders against the local government, if ‘local government did not take all reasonable steps to ensure the former building certifier did not engage in professional misconduct¹⁴’

[50] The Tribunal cannot make any order in these proceedings however, unless the threshold question of whether grounds exist for a disciplinary finding against the building certifier is answered affirmatively.

[51] There are two expressions that amount to a disciplinary finding. They are “unsatisfactory conduct” and “professional misconduct”, and are defined in Schedule 2 of the Act.

[52] The definition of ‘unsatisfactory conduct’ is:-

Unsatisfactory conduct for a building certifier or former building certifier, includes the following –

(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 be reasonably be expected of the building certifier by the public or the building certifier’s professional peers.

[53] The definition of ‘professional misconduct’ is:-

Professional misconduct for a building certifier or former building certifier, includes the following –

(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 builder 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;
- (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

[54] It is established that the Isis Shire Council did pass a resolution at its meeting on 23 April 1992, adopting floor heights and residential land levels recommended by Kinhill Cameron McNamara with respect to a minimum floor height of 3.4m AHD for habitable rooms for Woodgate.

[55] The other policies of the Shire Council, which the home owner has referred to, both relate to the height of buildings, and are designed to set guidelines for developers who may be seeking to maximise the number of storeys of buildings. Those policies set a base point for the measurement of height requirements. In concept they do not concern a minimum starting height for construction, and are therefore not directly relevant to the issues in question in this matter as to construction approval.

- [56] There is no evidence that any further steps were taken by the Isis Shire Council following the passing of the resolution of 23 April 1992. There is no evidence of the resolution being adopted in any plan or local law, or advised or distributed to any council employees or to the building or development industries, or being made available for public inspection.
- [57] Mr Hartnett could only have been expected to act in accordance with policies of the Council which were formally adopted, enacted and distributed. There is no evidence that he was, or should have been, aware of the resolution.
- [58] It could not be expected that Mr Hartnett as a Certifier, acting reasonably, should have had regard to the resolution of 23 April 1992, in the circumstances.
- [59] I therefore do not find a disciplinary ground is made out in relation to the height issue.
- [60] I accept the submission of the QBCC that the downpipe spacing is a technical breach, and that no apparent consequence has flowed from their spacing. This might indicate some inadvertence on the part of Mr Hartnett, but it is a minor matter without any ramifications, and no lack of adequate care sufficient to found a disciplinary ground is shown.
- [61] I therefore do not find a disciplinary ground is made out in relation to the downpipes.
- [62] The need for an Overflow Relief Gully at the time of construction, and of approval by the Certifier, has not been established, as the construction was a septic installation. The need for such a gully only arose some years later when the premises were connected to sewage. The Overflow Relief Gully has since been rectified.
- [63] I accept that the Overflow Relief Gully is an external plumbing matter in any event, and not a building certification issue. I do not find that a disciplinary ground is made out as to it.
- [64] The backflow valve installation is external plumbing work, is a very minor issue, and is not sufficient to found a disciplinary ground.
- [65] I therefore do not find a disciplinary ground is made out in relation to the Overflow Relief Gully or the backflow valve.
- [66] Mr Hartnett had noted that the building work was not completed. The builder would be expected to complete the work and then call for a final inspection. There is no evidence that the Certifier was required to follow up the parties as to progress of the construction.
- [67] I therefore do not find a disciplinary ground is made out in relation to the completion issue.

- [68] I therefore find that no disciplinary grounds are made out against the Certifier, and that he did not engage in unsatisfactory conduct or professional misconduct.
- [69] As no disciplinary grounds exist against the former Certifier, and he did not engage in professional misconduct, there is no basis to make any order against the Shire Council, or its successor, for failing to take all reasonable steps to ensure the former building Certifier did not engage in professional misconduct.
- [70] I confirm the decision of the QBCC made on 9 December 2014 that the Certifier had not engaged in unsatisfactory conduct.