

# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Tutkaluk trading as Prestige Patios and Decks v Queensland Building and Construction Commission* [2019] QCAT 92

PARTIES: **BENJAMIN PAUL TUTKALUK TRADING AS PRESTIGE PATIOS AND DECKS**  
(applicant)  
v  
**QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION**  
(respondent)

APPLICATION NO/S: GAR085-17

MATTER TYPE: Building matters

DELIVERED ON: 3 April 2019

HEARING DATE: 16 April 2018

HEARD AT: Brisbane

DECISION OF: Member Ann Fitzpatrick

ORDERS: **The decision of the Queensland Building And Construction Commission made 24 February 2017 is confirmed.**

CATCHWORDS: ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – where the Respondent made a reviewable decision – defective work not rectified – where the Applicant sought review of reviewable decision – where no review sought of direction to rectify – scope of Tribunal’s jurisdiction

*Queensland Building and Construction Commission Act 1991 (Qld), s 71J, s 86(1)(f), s 87*  
*Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 19, s 20, s 24.*

*Queensland Building & Construction Commission v Whalley* [2018] QCATA 38

APPEARANCES & REPRESENTATION:

Applicant: Self-represented

Respondent: Self-represented by D McNulty, in-house Solicitor

## REASONS FOR DECISION

- [1] On 27 March 2017 the Applicant filed an Application to Review a Decision of the Queensland Building and Construction Commission ('QBCC') set out in a letter from the QBCC to the Applicant dated 24 February 2017.

### The Decision under review

- [2] The decision was to the following effect:
- (a) On 28 October 2016, Mr Tutkaluk was directed by the QBCC to undertake rectification work at 8 Aroona Street, Durack, Queensland. That work was to be completed by 30 January 2017.
- (b) That direction was not complied with in that the following direction items were not satisfactorily rectified:
- (i) 'The front south gutter near the chimney holds water and has insufficient fall to the existing downpipes. The house gutters are partially unsupported with insufficient brackets and some of the gutter brackets being rusted. The gutter fixing and falls are insufficient with regards to recommendations of HB39, Section 5 (Pertain to Item 1 on the QBCC Complaint Form).
  - (ii) The Envirolead flashing is not compatible with the Colorbond product and is not to manufacturer's specifications. The flashing does not provide enough cover to the roofing iron at the end of the box gutter and not in accordance with standard HB38, Section 8 (Pertains to Item 5 on the QBCC Complaint Form).
  - (iii) Touch-up paint has been used on the roof sheets in various areas where metal roofing sheets overlap. Overspray of touch-up paint to metal roofing is a visual defect and against the manufacturer's guidelines (Technical Bulletin 2, Bluescope, September 2013) (Pertains to Item 7 on the QBCC Complaint Form).
  - (iv) As above with respect to painting (Pertains to Item 8 on the QBCC Complaint Form).
  - (v) The hips and ridge flashings to all areas are not trimmed; sheets not turned up and not correctly fastened to the hip batten. The hips and ridge flashings are not fixed according to Australian Standard HB39, Section 8 (Pertains to Item 10 on the QBCC Complaint Form).
  - (vi) The valley gutters had less than the required cover and required trimming to most areas was not in accordance with HB39 (Figure 5.4.1). The iron to either sides of the valley were not fixed to the valley batten and was not in accordance with HB39 (Figure 5.4.1) (Pertains to Item 11 on the QBCC Complaint Form).
  - (vii) The valley gutters had less than the required cover and required trimming to most areas was not in accordance with HB39 (Figure 5.4.1). The iron to either sides of the valley, were not fixed to the valley batten and was not in accordance with HB39 (Figure 5.4.1) (Pertains to Item 12 on the QBCC Complaint Form).
  - (viii) The valley gutters have less than the required cover and required trimming to most areas and is not in accordance with HB39 (Figure 5.4.1). The sheet roof to either side of the valleys is not fixed to the valley batten and is not in accordance with HB39 (Figure 5.4.1). Ingress of water has occurred above the living room ceiling, caused faulty and unsatisfactory building work which is non-compliant

with BCAP 2.2.2 Weatherproofing in that - the roof and external wall (including around windows and doors) must prevent the penetration of water that could cause -

- A. Unhealthy or dangerous conditions, or loss of amenity for occupants; and
  - B. Undue dampness or deterioration of the building elements (Pertains to Item 13 on the QBCC Complaint Form).
- (ix) Various areas of the roof had approximately 50% of screws not installed square to the roof profile and pitch of the roof or were over-tightened. Fastener screws were not installed in a tradesman-like manner or to manufacturer's specifications (Pertains to Item 14 on the QBCC Complaint Form).
  - (x) The hips and ridge flashings to all areas are not trimmed at the lapped joints, sheets not turned up and fastened to the hip batten, and in accordance with Australian Standard HB39, Section 8, has not been met (Pertains to Item 16 on the QBCC Complaint Form).
  - (xi) Insufficient roof sheet laps are located to the front of rear roof pitch change point. Compliance with specifications and HB39 (Sections 5 and 8) and has not been achieved as a minimum of 200 millimetres lap is required or the installation of transitional flashing (Pertains to Item 17 on the QBCC Complaint Form).
  - (xii) Roof sheeting length into eaves gutter that is excessive and has not complied with Australian Standards HB39, Sections 5.3.2 and 7.8.2 in that consistence with standard of 50 millimetres to 65 millimetres (Pertains to Item 19 on the QBCC Complaint Form).
  - (xiii) The install roof sheeting of the left-hand side of the front eastern gable was not of the appropriate length resulting in insufficient sheet cover (Pertains to Item 21 on the QBCC Complaint Form).'
- (c) The failure to satisfactorily rectify the Direction Items may result in a claim for the Owner under the Queensland Home Warranty Scheme and may give rise to a range of consequences including in relation to Mr Tutkaluk's licence.

### **Statutory framework**

- [3] The Respondent submits and I accept that the relevant legislation is the legislation in force at the date of the decision, that is the *Queensland Building and Construction Commission Act 1991* (Qld) ('QBCC Act') as at 28 October 2016.
- [4] The Applicant has applied for a review of the decision pursuant to Section 86(1)(f) and 87 of the QBCC Act.
- [5] By section 86(1)(f) of the QBCC Act a reviewable decision includes: 'a decision that building work undertaken at the direction of the commission is or is not of a satisfactory standard.'
- [6] By section 19 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act') the Tribunal must decide the review in accordance with the QCAT Act and the QBCC Act. The Tribunal has all the functions of the decision maker.
- [7] By section 20 of the QCAT Act the review is a fresh hearing on the merits.

- [8] By section 24 of the QCAT Act, the Orders that can be made by the Tribunal upon review are:
- (a) the decision is confirmed; or
  - (b) the decision is set aside and substituted with the Tribunal's own decision; or
  - (c) the decision is set aside and the matter returned to the Commission to reconsider the decision with directions the Tribunal considers appropriate.
- [9] Section 71J of the QBCC Act provides that a consumer may request that the Commission give a direction to rectify building work the consumer considers is defective or incomplete. 'Consumer' is defined to mean a person for whom building work is carried out.
- [10] By Section 72 of the QBCC Act, the QBCC may require rectification of building work and remediation of consequential damage if it is of the opinion that building work is defective or incomplete or consequential damage has been caused as a consequence of carrying out building work.
- [11] Schedule 2 of the QBCC Act defines 'building work' to include improvement or repair of a building.
- [12] Schedule 2 of the QBCC Act defines 'defective' as:
- In relation to building work, includes faulty or unsatisfactory...
- [13] Schedule 2 of the QBCC Act defines 'rectify' as:
- "Rectify building work" means to remedy defective building work or to complete incomplete building work.

### **Evidence at the hearing**

- [14] Mr Tutkaluk gave evidence and relied upon his Statement of Evidence filed 13 June 2017, comprising a Statement of reasons to review the decision, dated 9 June 2017, together with attachments (Exhibit 1 in the proceedings).
- [15] Mr Tutkaluk relies upon the evidence of Mr Edward Knox who gave evidence in person in accordance with his statement set out in a letter from Mr Tutkaluk to the Tribunal dated 4 September 2017 (Exhibit 2 in the proceedings).
- [16] Mrs Alison Tutkaluk gave telephone evidence consistent with a statement provided by Mr Tutkaluk to the Tribunal dated 4 September 2017 (Exhibit 3 in the proceedings).
- [17] The Tribunal also had reference to the QBCC's Statement of Reasons for the Decision and attached documents filed in the Tribunal.

### **Chronology**

- [18] I find on the evidence before me that the following facts occurred.
- [19] 22 July 2015: the Applicant entered into a Master Builders Minor Works Contract (MWC 1 February 2014) with Mr Pat Loudon, the Owner of 8 Aroona Road, Durack.

The work was to fit a new Colorbond corrugated iron roof with metal top hat battens, to remove broken tiles from site and to remove and reinstall solar panels.

- [20] The contract provided for a total contract price of \$48,850.00 payable in stages. The construction days were said to be 20 days with an allowance of a further 50 days for inclement weather, weekends and public holidays.
- [21] 14 September 2015 - 29 October 2015: the Applicant carried out work for the Owner.
- [22] 22 October 2015: defects document signed by the Applicant and the Owner.
- [23] 15 December 2015: letter from solicitors for the Owner to the Applicant giving notice of intention to terminate the contract if defects are not remedied by 31 December 2015.
- [24] 7 January 2016: letter from solicitors for the Owner terminating the contract for failure to remedy breach.
- [25] 26 February 2016: the QBCC received a complaint from the Owner.
- [26] 7 April 2016: Ambrose Nicolson, a QBCC Building Inspector, carried out an initial inspection in the presence of the Owner, the Applicant and Dieter Isenhardt of Tenant Roofing Services Pty Ltd, following complaint by the Owner.
- [27] 1 April 2017: Mr Isenhardt prepared a report (the QBCC notes the date of the report is likely to be an error).
- [28] 16 April 2016: Mr Nicolson prepared an Initial Inspection Report.
- [29] 20 April 2016: the Commission issued a direction to rectify and/or complete - number 0100365 (the First Direction) - in respect of 14 items of defective or incomplete work at the property, to be completed within 28 days.
- [30] 9 May 2016: the Applicant requested access to the Owner's property to comply with the First Direction.
- [31] 17 May 2016: the Applicant again requested access to the Owner's property to comply with the First Direction.
- [32] 18 May 2016: the Owner confirmed he would provide access to the property on 20 May 2016 to comply with the First Direction.
- [33] 18 May 2016: email from Mr Nicolson confirming access on 20 May 2016 and stating: 'Please notify us with any intension (sic) or extension of time. It is noted that it has taken till today 18-05-2016 for you to receive approval or notice from Pat Loudon though (sic) for your site access.'
- [34] 20 May 2016: the Applicant undertook some rectification work at the property.
- [35] 23 May 2016: the Applicant emailed Mr Nicolson confirming attendance at the site on the previous Friday, 20 May 2016, to perform works. The Applicant set out what work was done and noted there was no time to measure and order extra materials. The Applicant said that more time was required to trim sheets into the gutter. He indicated that he would return to complete the list of defects if given an extension of time. The

Applicant said that he first emailed Pat Loudon on 9 April 2016 with no response, again on 9 May 2016 and then 17 May 2016 with no response. He said additional text messages and phone calls were made. This has made it impossible to complete the work within the QBCC timeframe 'given the customer will not communicate with me'.

- [36] 25 May 2016: the QBCC acknowledged an internal review application by the Applicant in relation to the First Direction and allocated a reference number. It is not clear on the material how the internal review was requested or how the matters sought to be reviewed were articulated. It is possible to detect some of the Applicant's concerns from the exchange of emails between him and the QBCC referred to later in this decision.
- [37] 26 May 2016: the Owner applied to internally review the scope of works in the Commission's First Direction.
- [38] 26 October 2016: the QBCC notified the Applicant that it had made a decision regarding the Internal Review Application. The letter appears to be directed to the internal review requested by the Owner. The decision upheld the original decision and recorded an intention to issue a direction for items 1, 5, 7, 8, 10-14, 16-19 and 21 of the original complaint.
- [39] 28 October 2016: Direction to rectify and/or complete No 0101179 was issued (the Second Direction). It was in the same terms as the First Direction, except that item 3 was not included. The time period for completion was 45 days from the date of service of the Direction. That is by 16 December 2016.
- [40] 3 November 2016: the Applicant emailed Mr Nicolson asking for a date for a site meeting. He was referred to the Second Direction.
- [41] 10 November 2016: email from the Applicant to the Owner copied to Mr Nicolson addressing times for work on site, making an offer of settlement to the Owner and observing: 'I realise this situation has been caused by miscommunication, experience and understanding by both parties and wish it had been resolved a long time ago. I wish my dad Glen had not sold you the job for me without considering the size and difficulty of the job and the size and experience of my team...'
- [42] 17 November 2016: email from Mr Nicolson to the Applicant confirming previous advice recommending he seek expert professional advice to comply with the Direction.
- [43] 21 November 2016: the Applicant emailed the Owner and Mr Nicolson a work schedule.
- [44] 24 November 2016: email from Craig Anderson, Senior Building Inspector to the Applicant advising: 'There is some confusion on the IRU letter and the Direction for 8 Aroona Street. Please see the attached amended Direction. This is the original direction that was upheld, with the 45 days...The Building Inspector has approved a further extension to the 31th (sic) January due to schedules and Christmas closedown.' The amended Direction is not in evidence. Because it upholds the original decision, I have proceeded on the basis that it is the same as the Second Direction except for the compliance date.

- [45] 16 December 2016: email advice from the Applicant to Mr Nicolson in relation to delays and supplier shut downs.
- [46] 18 January 2016: email from the Applicant to Mr Nicolson confirming the schedule remains the same.
- [47] 31 January 2016: email from the Applicant to Mr Nicolson advising:
- Our lead time is usually 12 weeks. Due to previously contracted jobs which I can't postpone I am next able to work on the direction for 6 – 10 March. I have contracted jobs before and after this time. I cannot say if all the items will be completed during that time due to the difficulty of the job, my lack of staff with lack of experience in roof restoration, both theirs and mine. I would hope to have a roofer or roofing company contracted to complete this work before then so I don't have to return...
- [48] 6 February 2017: email from the Applicant to Mr Nicolson and the Owner advising two roofing companies will quote 'this week'.
- [49] 6 February 2017: Mr Nicolson advised by email:
- ...that is good that you are moving on your committed (sic) to repair all by the Friday the 10<sup>th</sup> of February. However QBBC is still going to have our inspection on Monday the 13<sup>th</sup> at 7.00 am to determine all that is not finished against the direction. Please inform me if you are coming to this completed works of the direction inspection.
- [50] 8 February 2017: quote from Roofs Plus Gutters to the Applicant to undertake rectification work.
- [51] 8 February 2017: email from the Applicant to the Owner advising 2 roofing companies can complete the roof.
- [52] 8 February 2017: the Owner sought a detailed scope of works from the preferred roofer. Quote sent by the Applicant to the Owner.
- [53] 13 February 2017: email from the Applicant to Craig Anderson at the QBCC advising:
- I have tried to come to an arrangement with Pat Loudon but he is not wanting me to engage the roofer to complete the job. If I cannot get an extension of time to engage the roofer to rectify the work then I guess there is nothing else I can do... I still strongly believe the direction should have been withdrawn as the Owner had terminated the construction contract and was not granting site access.
- [54] 13 February 2017: Mr Anderson responded by email: '...On this occasion, it would be not fair and reasonable for the Owners to wait any further, as it has been over 6 months from the time the dispute reached the QBCC...'
- [55] 13 February 2017: the Applicant responded:
- ... My issue which seems to fall on deaf ears is that back in May 2016 the Owner was denying me access until two days before the direction was due... The work of course wasn't completed and Ambrose refused an extension which led me to the IRU... Nothing was going to happen in December & January, nobody is taking on jobs and suppliers have 3- week closures... I was ready to fix the issues

when I had staff to do so in May and this was stopped by the Owner & QBCC.  
Again now when I have outside contractors ready to do the job I am unable to,  
stopped by the Owner & QBCC.

- [56] 14 February 2017: Mr Isenhardt of Tenant Roofing Services provided a re-inspection report concluding no work had been satisfactorily completed except for notice item 12.
- [57] 16 February 2017: Mr Nicolson prepared a re-inspection report to the same effect.
- [58] 24 February 2017: letter from the QBCC to the Applicant setting out a decision that Direction items have not been satisfactorily rectified, other than Item 11 of the Second Direction.

### **The Applicant's submissions and evidence**

- [59] Mr Knox and Mrs Tutkaluk gave evidence corroborative of the Applicant's advice to Mr Nicolson about difficulties accessing the site to attend to the First Direction. Mrs Tutkaluk gave evidence that on 6 February 2017 she heard the Applicant ask Mr Nicolson for an extension of time to enable a roofing company to complete the work, however that extension of time was denied. I accept the evidence of these witnesses, however the matters they address are of limited relevance to the review I am required to undertake.
- [60] The Applicant does not disagree with the contents of the re-inspection reports but says that work was incomplete under the contract with the Owner rather than defective. I note that even if the work is categorised as incomplete, the QBCC may still direct rectification of incomplete work under s 72 of the QBCC Act. Whether the work is incomplete or defective may arise on a consideration of whether the contract between the Applicant and the Owner was lawfully terminated. That may be an issue which arises in the event the Owner makes a claim on the Statutory Home Warranty Scheme. The issue of failure to grant access may go to the fairness of directing the Applicant to rectify the work. Those issues are however beyond the scope of this review for reasons set out in more detail later in this decision.
- [61] It was put to the Applicant in cross examination that the reason the work in question was not completed was because the Applicant did not have the skills for the job. The Applicant said that when the work was first undertaken, he was working with an experienced roofer but later that roofer was no longer working with him.
- [62] It was also put to the Applicant that he did not prioritise compliance with the Second Direction. The Applicant agreed stating that he had work for other clients who he did not want to upset. He said that was a mistake, in hindsight. However, he was led to believe that an extension of time was possible and was never told that an extension was not possible.
- [63] The Applicant's evidence is that the expert roofer from whom he obtained a quote expected that there would be 2 to 3 days work involved in completing the work. He said that it took many weeks to obtain quotes and that in the end he could not engage a roofing contractor until he had received confirmation the contractor was acceptable. The Owner was not satisfied with the quote.

[64] When it was put to the Applicant that the Owner had waited a long time to get completion of a 20-day job, the Applicant responded that as at 20 April 2016 he could have used a roofer if he had been given an extension and access to the site and the job would have been complete.

[65] The Applicant submits that:

- (a) the Second Direction should not have been issued because there was insufficient time to finish the First Direction;
- (b) he was not allowed on site between the dates of the First Direction and the Second Direction because the contract had been terminated;
- (c) the QBCC's file was not closed when the Owner failed to give access sufficient to complete the work under the First Direction;
- (d) he sought an internal review of the First Direction in light of the Owner's failure to give access to the site. He also sought the internal review because he considered many of the items in the Direction to be incomplete work rather than defective work so that the effect of the Direction would be to require 100% completion of the job with no payment. In this regard I note that the Applicant observed in final submissions that he has not raised the question of whether the contract with the Owner was lawfully terminated;
- (e) the letter from QBCC to the Applicant dated 26 October 2016 is a response to a request for an internal review by the Owner and is not responsive to his request. The reference in that letter to the Applicant merely seeking "clarification of items" does not reflect what the Applicant sought by way of internal review;
- (f) the Applicant's emails to Mr Nicolson in November and December 2016 and January 2017 made it clear that it was not possible to complete the work in time due to Christmas, end of year closures, previously booked contracts, the struggle to get extra staff or even quotations from other companies at that time of year. Mr Nicolson did not respond to these emails;
- (g) the work could have been completed by a specialist roofer in March 2017 if a short extension of time had been granted in February 2017;
- (h) the balance owing on the job was \$13,000.00 but the quote to complete the work was for a lesser sum of \$9,000.00; and
- (i) it was unreasonable for an extension not to be granted in these circumstances, given the time which has since passed after the decision.

### **QBCC submissions**

[66] The QBCC submits that:

- (a) on the basis of the re-inspection conducted by Mr Nicolson no rectification work has been undertaken in respect of items 1 to 10 and 12 of the Second Direction and the rectification work undertaken in respect of item 13 is insufficient;
- (b) accordingly, the decision is the correct and preferable decision;

- (c) the scope of the review by the Tribunal is limited by section 86(1)(f) of the QBCC Act. That is the Tribunal can only review the decision that ‘building work undertaken at the direction of the commission is or is not of a satisfactory standard’. I was referred to *Queensland Building and Construction Commission v Whalley*;<sup>1</sup>
- (d) it is beyond the power of the Tribunal to consider the circumstances in which the Second Direction was issued;
- (e) the QBCC has a discrete power under s 72 of the QBCC Act to issue a Direction to rectify;
- (f) the decision to issue the First Direction was a reviewable decision. No review was sought;
- (g) the Tribunal is to undertake a merits review, not a judicial review;
- (h) suitably qualified experts have inspected the work and concluded it was defective, not incomplete as alleged by the Applicant;
- (i) the First Direction was not attended to. An argument is raised as to whether it was reasonable for the QBCC to make that Direction, but it is a question of how much weight should be given to that submission given the limits of the scope of the merits review the Tribunal is to undertake;
- (j) the work was not done by the Applicant because of a lack of skills, a lack of staff and no priority given to the Direction. Failure to comply with a Direction to rectify has serious consequences under section 73 of the QBCC Act;
- (k) in relation to the nomination of a third-party roofer to undertake the work, the QBCC has to balance the interests of the building contractor and the consumer. The consumer is not a party to the proceeding, but it is relevant to consider the consumer;
- (l) the First and Second Directions were not satisfactorily complied with. That has consequences for the consumer who is obliged to wait for completion of the process in order to lodge an insurance claim. The clear intention of Parliament is that there be a defined time period to do what is required by a Direction to rectify.
- (m) the Second Direction was the second time a Direction to rectify was given and it was given with an increased time for performance, of 45 days, with extra time given beyond that until inspection. That was more than adequate time to complete the work;
- (n) the consumer has been waiting since 2015 for a conclusion to the matter. There is no obligation on a consumer to accept a third-party quote. The consumer can choose to claim on the Statutory Home Warranty Insurance Scheme;

---

<sup>1</sup> [2018] QCATA 38.

- (o) the Tribunal should dismiss the submissions in relation to the third party roofer as too little too late. There was a delay in obtaining quotes from other roofers. The time to do that was at the time the Second Direction issued.
- (p) alternatively, an appropriate response may have been for the Applicant to seek a review of the Second Direction.

### **The Applicant's Reply**

- [67] The Applicant submits in reply that it is incorrect to say the items the subject of the Directions were defective work. He re-asserts that because the owner terminated the contract the job was incomplete and the items of work were incomplete.
- [68] The Applicant restated that the QBCC have not acknowledged that if the home owner was unwilling to give access, the QBCC should not have assisted the home owner by issuing the First Direction. That forced the Applicant's hand to ask for an internal review.
- [69] The Applicant says that there have been many opportunities to conclude this matter, in particular if he had been given an extension of time on the First Direction when he had qualified staff or on the Second Direction when he had a qualified third party to do the work.

### **Conclusion**

- [70] I find on the basis of the re-inspection report of Mr Nicolson and the re-inspection report of Mr Isenhardt<sup>2</sup> that Direction 0101179 has not been complied with and that the Direction items other than item 18, have not been satisfactorily rectified.
- [71] I am supported in the finding by the failure of the Applicant to lead any evidence which calls into question the decision made 24 February 2017.
- [72] I note the grievances of the Applicant in relation to the way in which this matter developed, particularly denial of access to the site, the uncertainty surrounding the internal review process and the way in which the passage of time and his altered circumstances made it very difficult to comply with the Directions.
- [73] The Applicant has not clearly stated what decision he would prefer to be made in substitution for the decision under review. However, his submissions assert that neither the First nor Second Direction to rectify should have been issued; and that an extension of time to complete the Second Direction by engagement of a third-party roofer should have been given.
- [74] The Applicant did not seek a review of the decision made 26 October 2016 upholding the original decision nor did he seek a review of the decision to issue the Second Direction. That course was open to the Applicant. Defined time frames existed for such a review to be sought. Such a review would have addressed whether it was unfair to the Applicant to give the Direction.<sup>3</sup> The questions of fairness are what concern the Applicant now. Unfortunately, they are not matters which fall within the jurisdiction of the Tribunal to address on a review of the 24 February 2017 decision, however they

---

<sup>2</sup> Attachments SOR21 and SOR22 to the QBCC's Statement of Reasons.

<sup>3</sup> Section 72(5), *Queensland Building and Construction Commission Act 1991* (Qld).

may well have been relevant considerations upon a review of the decision to uphold the original direction and to issue the Second Direction.

- [75] I accept the submission of the QBCC that the scope of this review is limited to the decision in question.<sup>4</sup> That is, whether the work in the Direction was satisfactorily rectified. The decision in question for this review is not whether the Direction should have been issued. The time for a review of that decision has passed.
- [76] The other matter to consider is whether the decision in question was prematurely made. That is, on the facts is the correct and preferable decision that time be extended to allow the third-party roofer to complete the work?
- [77] Again, I think that this Tribunal is limited in the scope of its review. Just because Mr Nicolson could have used his discretion to grant the Applicant an extension of time to engage a third-party roofer, but did not, does not mean that this Tribunal has the power to do so. In the context of the Administrative Appeals Tribunal which has similar powers in its review functions to this Tribunal. Professor Pearce in his text 'Administrative Appeals Tribunal' says that despite a broad power to stand in the shoes of the decision-maker, that power is exercisable only in relation to the decision under review. Exercising all the powers of the decision maker does not substitute the AAT (or this Tribunal) for the decision maker generally. The AAT (or this Tribunal) has no general decision-making powers. Accordingly, if an issue before the AAT (or this Tribunal) has not been the subject of a decision by the primary decision-maker, the Tribunal itself cannot assume to make a decision on the matter on the basis that the decision-maker could have made such a decision.<sup>5</sup>
- [78] Even if that were not the correct position in terms of the scope of this Tribunal's functions, I accept the submission of the QBCC that the Applicant did not prioritise the required work either by undertaking the work or engaging a specialist to do the work. The Applicant admits that he did not prioritise the work. He elected to perform work for other clients in preference to the Owner. The Applicant admitted that he did not have the skills for the job. I accept that it may take some time to locate a roofer prepared to take on the work, but I do not think the Applicant has given sufficient evidence that he embarked on that course as early as he could have done. In considering the interests of the Applicant and the home owner I agree it is the case that the Applicant has done too little too late as submitted by the QBCC. In all, even if I had the power I would not on the basis of this evidence substitute a decision that an extension of time be granted for a third-party roofer to do the work.
- [79] I confirm the decision made 24 February 2017.

---

<sup>4</sup> *Queensland Building & Construction Commission v Whalley* [2018] QCATA 38.

<sup>5</sup> D. Pearce, *Administrative Appeals Tribunal* (Lexis Nexis Australia, 4<sup>th</sup> ed., 2015) 16.10.