QBCC DEBT COLLECTION

Litigation Lawyers

The QBCC has the right to recover debts in circumstances where:

1. There is an insurance pay out; and

2. Unpaid fines.

This paper proposes to deal only with the law in relation to recovery of insurance payouts.

RELEVANT LAWS

The QBCC right to recover money following an insurance payment is:

> S. 71 QBCC Act - Recovery from building contractor etc.
> (1) If the authority makes any payment on a claim under the insurance scheme, the authority may recover the amount of the payment, as a debt, from the building contractor by whom the relevant residential construction work was, or was to be, carried out or any other person through whose fault the claim arose.
>
> S. 111C - Liability of directors for amounts
> (1) …
> (2) …
> (3) This section also applies if a company owes the authority an amount because of a payment made by the authority on a claim under the insurance scheme.
> (4) …
> (5) …
> (6) If this section applies because of subsection (3), the liability to pay the amount attaches to--
> (a) each individual who was a director of the company when building work the subject of the claim was, or was to have been, carried out; and
> (b) each individual who was a director of the company when the payment was made by the authority.
> (7) A liability under subsection (4), (5) or (6) to pay a penalty or an amount applies regardless of the status of the company, including for example, that the company is being or has been wound up.
> (8) If a liability under subsection (4), (5) or (6) attaches to 2 or more persons, the persons are jointly and severally liable.

JURISDICTION – QCAT OR COURT?

The courts and the Queensland Civil and Administrative Tribunal share jurisdiction over this type of matter.

Whilst that is a plain interpretation of the sections, also see *QBSA v Turner* Unreported District Court 16 June 1999, before Trafford-Walker SDCJ. Note that case cites with approval an earlier case of *QBSA v Beatty* [1999] QDC 45, even though *Beatty* appears to suggest that proceedings need to be brought in the first instance in the Tribunal – see paragraph 17.

The QCAT has jurisdiction in accordance with section 93 of the QBCC Act.

S. 93 QBCC Act - Decisions about debts arising from statutory insurance scheme

(1) The authority may recover a debt under section 71 by application to the tribunal under this section.

(2) The tribunal may exercise 1 or more of the following powers--

(a) order the payment of an amount the tribunal has found to be owing to the authority;

(b) order the payment of interest on the amount mentioned in paragraph (a);

(c) order the payment of costs;

(d) order that amounts mentioned in paragraphs (a), (b) and (c) be paid by instalments or another way directed by the tribunal.

You will see that this section is not mandatory, that is, it does not state that any such proceedings must be bought in the QCAT. As the Court's jurisdiction is not ousted, courts clearly continue to have jurisdiction. Note again the case of *Beatty* (referred to above), which appears to suggest otherwise.

Factors in determining the venue in which proceedings should be commenced include:

- The Tribunal filing fee will be less than the Supreme or District Court filing fee.

- The claim is for a liquidated sum. Therefore, in the courts, 28 days after service, you should be able to obtain default judgment in the registry.

- The Tribunal has the power to give a decision by default (S. 115 CCT Act). That power appears to be exercised by a member in a hearing. If such decision would be given merely based upon default in responding to the claim (hence on the documents without evidence proving the claim), then this would be an adequate procedure. If however, evidence is required, then clearly this is not a true default decision.

- S.93 allows that the Tribunal may exercise certain powers. This appears dangerously to require that the CCT consider what power should be exercised – hence to do so would require a hearing and consideration of issues.

- As to costs, in a court, you would expect to recover costs when you are successful. In the CCT however, Mr McMeekin stated in *QBSA v Adamec* [2007] QCCTB 121 at 31:

> Whilst I have the power to award costs under section 93(2)(c) of the QBSA Act I consider that the power should be exercised in accordance with the principles usually applicable to the Tribunal. Section 70 of the *Commercial and Consumer Tribunal Act 2003* ("the Act") provides:
>
> > *"The main purpose of this division is to have parties pay their own costs unless the interests of justice require otherwise"*

It is submitted that it is more appropriate from a procedural perspective merely to commence proceedings in a Court. Procedurally, if you are entitled to judgment on the face of the pleading, then you will be granted judgment, and you will recover costs.

There is the ability to transfer from the Court to the Tribunal as provided in the S. 40 of the Commercial and Consumer Tribunal Act 2003.

S. 40 Transfer of proceedings between tribunal and the courts

(3) If a proceeding is started in a court and the proceeding could be heard by the tribunal under this Act, the court may order the entity who started the proceeding to start the proceeding again before the tribunal under section 31.

(4) If the tribunal considers it does not have jurisdiction to hear all matters in a proceeding before the tribunal, the tribunal may order the entity who started the proceeding to start the proceeding again before the court.

You will see that it is not mandatory that the matter must be transferred; rather the court may order transfer.

Finally in relation to jurisdiction, the CCT does not have jurisdiction to review a decision by the Authority to pursue recovery – see S. 86(2).

S. 86(2) QBCC Act - Reviewable decisions
(2) The tribunal must not review the following decisions of the authority--
(a) a decision to recover an amount under section 71;

In view of S. 86(2), the decision of *QBSA v Stohr* [2004] QCCTB 6 must have been based on wrong principles (whether or not the correct result was achieved, the reasoning must have been wrong). In this regard see paragraph 63 where the matter is reviewed as if it is a discretion, due to the appearance of the word "may" in section 71(1).

THE RIGHT OF ACTION PURSUANT TO SECTION 71(1)

Elements of the right of action

S. 71(1) provides:

> If the Authority makes any payment on a claim under the insurance scheme, the Authority may recover the amount of the payment, as a debt, from the building contractor by whom the relevant residential construction work was, or was to be, carried out or any other person through whose fault the claim arose.

For the right of action to exist under Section 71, clearly there must be:

1. An actual payment pursuant to the insurance provisions

2. The Defendant/s must be either:

   a) The building contractor by whom the relevant residential construction work was, or was to be, carried out, bearing in mind the extended definition in section 71(2)(a); or

   b) A person through whose fault the claim arose – bearing in mind the extended meaning in S. 71(2)(b);

3. A valid basis to make an insurance payout; and

Having said that, in *QBSA v Burton* [2005] QCCTB 61 is stated by Mr Morzone at para 14:

> "It seems to me that the following conditions must be fulfilled before the applicant may properly expend and recover money in relation to undertaking rectification work pursuant to its statutory insurance scheme:
>
> 1. whether the building work undertaken by the respondent was defective or incomplete;
> 2. having formed the opinion that building work become the subject of an application by a consumer under section 71A of the QBSA Act is defective or incomplete, a direction must have been given by the Authority to a person requiring the carrying out of rectification work in respect of residential construction within a specified period in accordance with section 72(1) of the QBSA Act, with the recipient of that direction having failed to rectify that work within the period specified (see section 74(1));
> 3. alternatively, the Authority has formed the opinion that the building work concerned is defective or incomplete, but has decided not to give the direction under section 72 for the rectification of the building work (see section 74(2));
> 4. the Authority (whether by itself or through an authorised intermediary (see section 76(6)) has sought tenderers that are carrying out of the rectification work by an appropriate licensed contractor (see section 74(1)-74(5));
> 5. the Authority has given notice of the decision about the scope of works to be undertaken under the statutory insurance scheme to the respondent (see section 86(2)(c));
> 6. the costs of the work to be carried out by the Authority is covered by payment to be made under the statutory insurance scheme in relation to that work (see section 74(7)), and those costs are reasonable."

The Element of Payment

This raises two points. Firstly, the right does not exist until payment and therefore the cause of action arises only upon payment. Therefore there would be a different cause of action, arising at different times in relation to different payments under different scopes of work. This is confirmed at paragraph 33 in the decision *QBSA v Musca* (unreported as at the date of this paper – CCT [2008] QM007-07).

Secondly, the payment needs to be in a reasonable amount. In this regard, refer to *Carey Randal v QBSA* [1998] QBT 85 where Dr Jensen comprehensively stated:

> "But that is not the end of the matter. Section 71(1) of the Act provides for the recovery as a debt of "any payment on a claim under the insurance scheme". Can the whole amount expended by the Authority be recovered even though I have found that it paid much more than a reasonable sum for rectification? If Section 71(1) is read literally, the Authority can recover any amount which it has actually been paid, even though this Tribunal has found as a fact that more than a reasonable amount was expended. It is necessary now to consider the decision of his Honour Judge Brabazon QC in *QBSA v Carey* (not this Mr Carey). That was a non-completion claim and the Authority had paid the owner on its understanding that the owner had lawfully terminated the contract. In the Tribunal it was established that the owner had not lawfully terminated. It was held on appeal that the Authority had no right to recover the payment. It seems to be inherent in the decision of Judge Brabazon QC that one cannot read Section 71(1) strictly literally, at least in a case where there was simply no basis to make the payment. However, the present case is not one where there was no basis at all to make a payment. The dispute is about the correct amount. In *QBSA v Carey* Judge Brabazon QC does not deal explicitly with Section 71(1) because he held that the insurance claim should not have been approved. However, I think I should take it that his Honour's view on Section 71, consistent with the decision given, would be that one cannot interpret Section 71(1) literally at least where there is no basis at all for the payment.
>
> As I have indicated, this case is distinguishable because there was some basis for making an insurance payment. I am inclined to think that as long as the Authority acts honestly, the full amount can be recovered. In some cases when all the facts are explored in this Tribunal, an insurance payment may be seen to have been objectively erroneous. For example, the builder and owner may disagree on which issue of the plans they contracted on. The Authority might proceed on the owner's version of events. But on a full hearing in this Tribunal, it may be found that the builder's version is preferable and that the owner has been over paid on his insurance claim. This highlights the timing problem which occurs when the builder fails to seek a review of a decision to pay an insurance claim before the money is actually expended.
> In *Builders' Licensing Board v Inglis* (1985) 1 NSWLR 592 the NSW Court of Appeal touched upon this question. The issue was whether the Board in that case was obliged to give particulars of the debt it was seeking to recover. It argued that as it had a right to recover the insurance expenditure "as a debt" from the builder, it need do no more than itemise how the debt was comprised without giving particulars of the facts and circumstances behind it. That contention was rejected by the Court of Appeal because of the necessity to give the builder fair notice of the case which he had to meet. As to the rights of the Board under the equivalent to our Section 71(1), Kirby P said at 596:
>
> "It cannot be said that *any* amount paid by the Board is recoverable. For example, an amount paid as a result of an administrative error, or for a reason wholly extraneous to the purposes of the Act, would clearly not be recoverable."
>
> I can fully accept that there should be glosses on Section 71(1) to preclude recovery of amounts paid as a result of an administrative error or for reasons wholly extraneous to the purposes of the Act and I would add as a further gloss where the payment has not been made in good faith. But none of those considerations apply here. Section 71(1) should be interpreted literally to allow recovery of a payment actually made even though the Tribunal has come to a different decision about the reasonableness of the amount of the payment.
>
> My view of Section 71(1) may be thought to be inconsistent with the decision of Roden J at first instance in *Builders' Licensing Board v Inglis* (1984) 1 BCL 275. His Honour said that any amount paid by the Board to the purchaser in excess of what is reasonable, is not a payment required by the indemnity and was thus not a payment made under the purchaser's agreement so as to give rise to a right of action against the builder. The decision of Roden J has been applied by Mr Cotterell in *Toorabay Pty Ltd v QBSA* R097-97 but Mr Cotterell did not have to deal with the meaning of Section 71(1) firstly because the case was a review application only and secondly, because he found as a fact that the amount expended had been reasonable.
>
> The decision of Roden J in *Inglis* is distinguishable because the amount which the Board was permitted to pay the owner was the sum required to indemnify the owner against any loss or

> expenses "reasonably incurred by him in rectifying" defects. The distinction from the present case is that s. 3.3.2 of the policy refers to the reasonable cost *as determined by the Authority* of undertaking the rectification works. This element of discretion was absent in the New South Wales Act."

Accordingly, so long as the payment is sincerely made and not in error, it will be recoverable.

As payment will be made in some cases be many years after the act of negligence, the right of action will have accrued much more recently than a claim in negligence, which would likely be statute barred. Consider this in relation to the subrogation right referred to below.

The Identification of a proper Defendant

The building contractor who can be pursued is taken to include the people involved in S. 71(2)(a) as follows:

> S. 71(2) For subsection (1) –
>
> (a) a building contractor by whom the relevant residential construction work was, or was to be, carried out is taken to include—
>
> (i) a licensed contractor whose licence card is imprinted on the contract for carrying out the work; and
>
> (ii) a licensed contractor whose name, licence number and address are stated on the contract; and
>
> (iii) a licensed contractor whose name is stated on the contract for carrying out the work; and
>
> (iv) a licensed contractor whose name is stated on an insurance notification form for the work; and
>
> (v) a licensed contractor whose licence number is stated on the contract for carrying out the work; and
>
> (vi) a licensed contractor whose licence number is stated on an insurance notification form for the work; and
>
> (vii) a licensed contractor whose PIN was used for putting in place, for the work, insurance under the statutory insurance scheme; and
>
> (viii) a building contractor by whom the work was, or was to be, carried out; and
>
> (ix) a person who, for profit or reward, carried out the work;

A person who can be pursued due to fault is taken to include the people mentioned in S. 71(2)(b) as follows:

> S. 71(2) For subsection (1)--
>
> (b) a person through whose fault the claim arose is taken to include a person who performed services for the work if the services were performed without proper care and skill.

On a clear reading of S.71(1), as re-stated above, the builder is liable irrespective of fault. On this interpretation, which is supported by a plain reading of the section, the decision of *QBSA v Stohr* [2004] QCCTB 6 (mentioned above) at para 63 is wrong.

As to the fault required to sue a person who is not the building Contractor, in *QBSA v Carey Randal Westropp & Bronwyn* [1999] QBT 132 at para 58 Ms Bradford-Morgan stated:

> "I adopt the findings of his Honour Judge Morley in the *Wright & Francey* decision that "fault" should be construed to mean a breach of statutory duty or other act or omission which gave rise to a liability. In my view however the concept of strict liability pursuant to section 76 of the repealed Act is confined to the Contractor and does not extend to alleviating the necessity to adduce evidence of fault in recovery proceedings against the Respondents pursuant to section 71 (2) (b) of the Act."

This was adopted by Ms McVeigh in *QBSA v PAL Geotechnical Services P/L* [2004] QCCTB 10, at para 24 where she stated that:

> "In my view the word *"fault"* in section 71(1) of the QBSA Act requires the authority to allege and prove a causal nexus between the conduct of the person against whom it makes its claim, and the circumstances of the making of the payment on a claim under the Statutory Insurance Scheme.

> I see no reason to disagree with the carefully reasoned decision of the former Deputy Chairperson Ms Bradford-Morgan in *QBSA v Carey* (above). I note she adopted the definition of *"fault"* found to apply to section 71(2)(b) of the QBSA Act by Judge Morley QC in *Patterson v Saeedi and Wright & Francey* (unreported District Court, 20 August 1999, 1143/1997). "

Validity of Payment pursuant to the Insurance Scheme

In *QBSA v Adamec* [2007] QCCTB 121 Mr McMeekin SC stated as para 14;

> "It has been accepted in previous decisions of this Tribunal that in order to recover under Section 71 it is necessary for the Authority to establish that all proper steps and procedures (both statutory and in accordance with the insurance policy) have been followed leading to the payment: See for example *Queensland Building Services Authority v. Chesmar* [2006] CCT QM002-06 at [38]. As Member Lohrisch pointed out in *Chesmar* the only payment on a claim under the insurance scheme which can be made pursuant to Section 71(1) of the QBSA Act is one which is properly made under the scheme."

The statutory requirements are:

> s. 70 Insurance claims
> (1) A person claiming to be entitled to indemnity under the insurance scheme must give notice of the claim to the authority in accordance with the regulations.
> (2) If the regulations do not state the way the notice of claim is to be given, a person who has applied to the authority under section 71A is taken to have given notice under this section.
>
> s. 72 Power to require rectification of building work
> (1) If the authority is of the opinion that building work is defective or incomplete, the authority may direct the person who carried out the building work to rectify the building work within the period stated in the direction.
> (2) In deciding whether to give a direction under subsection (1), the authority may take into consideration all the circumstances it considers are reasonably relevant, and in particular, is not limited to a consideration of the terms of, including the terms of any warranties included in, the contract for carrying out the building work.
>
> s. 74 Tenders for rectification work
> (1) If rectification work in respect of residential construction work is required under this Act and the person required to carry out the work does not carry it out, or have it carried out, within the time allowed by the direction, the authority must seek tenders for carrying out the work.
> (2) The authority must also seek tenders for carrying out building work if the authority—
> (a) is of the opinion that the building work is defective or incomplete; but
> (b) has decided not to give a direction under section 72 for the rectification of the building work.
> (3) The authority may accept any tender that it considers appropriate, irrespective whether the tender was for the lowest cost.
> (4) Tenders for carrying out the building work must be sought from the number of licensed contractors considered by the authority to be reasonable in the circumstances.
> (5) A licensed contractor from whom a tender may be sought must be--
> (a) a licensed contractor whose name is included on an appropriate panel; or
> (b) a licensed contractor whose name is not included on an appropriate panel, if the authority is satisfied it would be in the best interests of the efficient rectification of the building work if the licensed contractor were to provide a tender.
> (6) The authority may authorise the person for whom the building work requiring rectification was, or was to be, carried out to act for the authority in seeking the necessary tenders.
>
> (7) The authority may only have work carried out under this section to the extent that the cost of the work is covered by a payment to be made under the statutory insurance scheme in relation to the defective or incomplete work.

It is important to note that the sections of the statute do not include mandatory requirement that:

- A direction to rectify must have issued;
- There must be any specific number of tenders;
- The lowest tender be accepted; not that
- Any Scope of Work be issued.

Relevance of the Administrative Decisions and processes

Commonly, though not an essential event that must occur, following complaint by an owner about defective building work, the Authority will issue a direction to rectify to the builder. He may or may not seek review of that decision.

At a later stage, the Authority may issue a Scope of Works being the works required to rectify the defect. That decision is also a Reviewable Decision.

Where an administrative decision has been made in the course of the progress of complaint by the owner and has not been the subject to review by the Tribunal, the Defendant is precluded from arguing that decision was wrongly made.

That is, the correctness of such decision is not open for debate in the debt recovery litigation. The following are authority for this point:

- *Manwin v QBSA* [2007] QDC 298;
- *QBSA v Hollingworth* [1998] QBT 182;
- *QBSA v Chesmar* [2006} QCCTB 096 at [38];
- *QBSA v Potter* [2007] QCCTB 012 at [20]; and
- *QBSA v Simpson* [2008] QCCTB 15 at [64].

It is not open for the Defendant to challenge the reasonableness of the amount paid. In this regard the Authority cites *QBSA v Carey* unreported District Court No. 1209/07 20 June 1997 before His Honour Judge Brabazon. That case cites *King v Victorian Insurance Co Limited* [1896] AC 250.

It is correct however that the Defendant does have the right to challenge that the payment was made in accordance with a statutory scheme in the *QBCC Act*. However that does not give a right to open matters which are precluded from reviewing.

Therefore, the real dispute between the parties relates to technical compliance with statutory requirements – hence statutory interpretation.

Pleading

Of course, all the elements referred to in paragraph 3.1 above need to be covered in a pleading for it to be complete and valid.

I consider that interest should be claimed pursuant to the Supreme Court Act. In this regard, I consider that S.77(2)(c) of the Act is not triggered, and therefore Reg 34B does not apply – contrary to the suggestion at para 42 in *QBSA v Musca*.

SECTION 71(3) – THE RIGHT OF SUBROGATION

S. 71(3) provides:

> S. 71(3) The authority is subrogated, to the extent of any payment that the authority has made, or has undertaken to make, to the rights of a person to whom, or for whose benefit, the payment has been, or is to be, made in respect of the matter out of which the insurance claim arose.

Subrogation is defined in Osborn's legal Dictionary as:

> "The right of subrogation of one person or thing to another, so that the same rights and duties which attach to the original person or thing attach to the substituted one."

This means that upon payment, the Authority may commence proceedings in the name of the owners to enforce any rights the owners may have.

Considerations in this are:

1. The claim will be unliquidated, and therefore to obtain default judgment, there would need to be an assessment of damages.

2. Proceedings are commenced in the name of the owners, and not in the name of the Authority;

3. The right of action, usually being negligence, will have arisen when the right arose – hence when the damage was first suffered, unless you can establish a latent defect;

4. Loss would be assessed on normal principles of negligence. That means that the loss will be the lesser of:

   a) Cost to repair; or
   b) Reduction in value.

   Therefore the evidence to prove the claim might include a valuation of the property.

5. The amount of the claim would be the full amount of the loss. Note that the amount recoverable by the Authority is limited "the extent of any payment". It could be expected that this would include interest and costs on an indemnity basis. (Note – this is stated without locating any authority for that point). However, the excess would be passed to the owner.

6. As a result of points 1 and 4 above, it can be seen that a duty of care would be owed to the owner – to the extent of any excess. This clearly means that, by virtue of such duty, the owners need to be advised and be a party to any settlement.

7. There is a duty to mitigate loss;

For these reasons, normally you would expect to exercise the right under S. 71(1) rather than the right of subrogation right under S. 71(3).

However, it might be preferable to proceed by way of subrogation where:

- There has been a defect in the insurance process, such that the insurance payout does not qualify technically as a payment pursuant to the scheme. As a result a S.71(1) claim may not be available. A good example of this is discussed in *QBSA v Carey* 1997 QDC (unrep 1209/97) at page 17.

- The owner has a judgment against the builder, enforcement of that judgment could be subrogated.

DEFENCES

S. 71 provides the following defences:

> (4) In a proceeding brought by the authority under subsection (1) against a licensed contractor mentioned in subsection (2)(a)(i), it is a defence for the licensed contractor to prove that—
>
> a) the licensed contractor's licence card was imprinted on the contract for carrying out the work without the licensed contractor's authority; and
> b) the licensed contractor took all reasonable steps to ensure that the licence card was imprinted on contracts only with the licensed contractor's authority.
>
> (5) In a proceeding brought by the authority under subsection (1) against a licensed contractor mentioned in subsection (2)(a)(ii), it is a defence for the licensed contractor to prove that—

a) the licensed contractor's name, licence number and address were stated on the contract for carrying out the work without the licensed contractor's authority; and

b) the licensed contractor took all reasonable steps to ensure that the licensed contractor's name, licence number and address were stated in contracts only with the licensed contractor's authority.

(6) In a proceeding brought by the authority under subsection (1) against a licensed contractor mentioned in subsection (2)(a)(iii), (iv), (v), (vi) or (vii), it is a defence for the licensed contractor to prove—

a) for a licensed contractor mentioned in subsection (2)(a)(iii)--that the licensed contractor's name was stated on the contract for carrying out the work without the licensed contractor's authority; and

b) for a licensed contractor mentioned in subsection (2)(a)(iv)--that the licensed contractor's name was stated on the insurance notification form for the work without the licensed contractor's authority; and

c) for a licensed contractor mentioned in subsection (2)(a)(v)--that the licensed contractor's licence number was stated on the contract for carrying out the work without the licensed contractor's authority; and

d) for a licensed contractor mentioned in subsection (2)(a)(vi)--that the licensed contractor's licence number was stated on the insurance notification form for the work without the licensed contractor's authority; and

e) for a licensed contractor mentioned in subsection (2)(a)(vii):

(i) that the licensed contractor's PIN was used for putting in place, for the work, insurance under the statutory insurance scheme without the licensed contractor's authority; and

(ii) that the licensed contractor took all reasonable steps to ensure the licensed contractor's PIN was kept and used in accordance with the authority's requirements for the keeping and use of the PIN

These are self-explanatory and are likely to be defences very infrequently raised.

Malcolm Robinson