RECOVERIES UNDER THE *QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION ACT 1994*

An Update on the Basics

In the last few years, there have been a number of authoritative decisions and much judicial comment on the right of recovery of Queensland Building and Construction Commission ("the Commission") pursuant to s 71 of the *Queensland Building and Construction Act 1994* ("the Act").

This paper discusses briefly those elements which must be proved in a claim under s 71 of the Act, and some related matters.

The Insurance Scheme

As a matter of logic, for there to be a claim under the insurance scheme, there must first be a policy of insurance in effect.

What is the scheme? The insurance scheme consists of the Insurance Policy which works in conjunction with the legislation.

Section 69A of the Act states that a policy of insurance comes into force in the terms stated in the policy on the earliest of the following to happen:

(a) when a licensed contractor pays the appropriate insurance premium for the work under section 68;
(b) on the date a contract between a building contractor and a consumer is entered into for the work;
(c) when a building contractor commences the work.

The insurance policy has been updated from time to time, and it is therefore important to use to correct edition of the policy, which will be the edition in force at the time of singing the contract for performance of the building work.

The Cause of Action

The Commission's right to recover money following an insurance payment is set out in s 71(1).

> ***"71 Recovery from building contractor etc.***
>
> *(1) If the commission makes any payment on a claim under the insurance scheme, the commission 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."*

The Commission may also recover that money from a person who was a director of the company who contracted to perform, or did perform, the work.

Section 111C relevantly states:

> ***"111C Liability of directors for amounts***
>
> *(1) …*

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(2) …
(3) This section also applies if a company owes the commission an amount because of a payment made by the commission 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 commission.
(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."

The cause of action created by s 71(1) simply requires that:

A. There was a claim on the insurance scheme; and

B. The Commission made a payment on that claim; and

C. The Defendant is the building contractor by whom the residential construction work was, or was to be, carried out, or any other person through whose fault the claim arose.

Jurisdiction

The Queensland Courts and the Queensland Civil and Administrative Tribunal (QCAT) share jurisdiction over these matters, however, in most cases proceedings are commenced in the Courts, primarily for the following reasons:

1. Costs are recoverable in the Courts, however the usual order as to costs in QCAT is that each party bears their own, except where the interests of justice require otherwise; [1]

2. In the Courts, parties can be legally represented as of right; conversely leave is required in QCAT. [2]

The Right of Subrogation

Subrogation enables substitution of one person or thing for another so that the same rights and duties which attach to the original person or thing attach to the substituted one.

The Commission has a right of subrogation pursuant to s 71(3):

> *"(3) The commission is subrogated, to the extent of any payment that the commission 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."*

This means that the Commission may commence proceedings in the name of the owners to enforce rights that the homeowners may have. It would require unusual circumstances to warrant the Commission's use of the right of subrogation in preference of a claim pursuant to s 71(1). Hence this is not examined any further in this paper.

The Antecedent Steps

On the face of s 71(1), the above three factors are the basis of the right to recovery. From a practical perspective, it is helpful to examine the antecedent steps which are in fact much broader than this.

The making of a payment on a claim in most cases necessitates the following steps:

1. The Commission receives the complaint giving notice of a homeowner's claim;

[1] See s 100 and 102 of the *Queensland Civil and Administrative Tribunal Act 2009* (QCATA).
[2] See s 43 QCATA.

2. The Commission decides whether the work is defective or incomplete and whether it requires rectification or completion;

3. Either:

   (a) The Commission issues a direction stating a period of at least 28 days (unless exceptions apply); or

   (b) The Commission decides not to give a direction, and that it is appropriate to proceed with an insurance claim;

Where a direction is issued, it is then relevant whether the Defendant in fact carried out the required work within the time allowed by the direction.

The Commission then determines whether it is appropriate to proceed with an insurance claim, and admit the claim under the policy. Inherent in this is the determination of the following:

1. The work was residential construction work;

2. The contract was for a fixed price; and

3. The insured properly terminated the contract with the contractor (where there is a claim for incomplete work).

The Commission then seeks tenders for carrying out the required work from appropriate licenced contractors. It accepts a tender it considers appropriate (it is not relevant whether the tender was the cheapest, merely that the Commission considered it was appropriate, as a basis for accepting it).

The Commission makes a payment of the reasonable cost of rectification or completion as determined by the Commission at that time, less any remaining liability of the homeowners under the contract (if applicable).

There is no requirement in the Act or the Policy that the payment must go directly to the rectifying contractor. In many cases, a homeowner will select their own contractor and payment will be made via the homeowner.

Recent Case Law

The current view appears to be that:

1. The "trigger for recovery" under s 71(1) is the making of a payment on a claim under the insurance scheme;

2. A claim under s 71(1) is not conditional upon compliance with or the quality of the anterior steps taken under Part 6 of the Act (for example a Direction to Rectify or a Scope of Work);

3. Challenges to the legal efficacy of anterior steps taken by the Commission in the assessment of the claim are not justiciable in s 71(1) proceedings. However, it is possible that circumstances may arise where certain steps are relevant to a claim;

4. The anterior steps which are reviewable in the Tribunal are set out in s 86. A decision to recover an amount under s 71(1) is not a reviewable decision listed in s 86. However, it is judicially reviewable in the Supreme Court pursuant to the *Judicial Review Act 1991*;

5. If the Commission is claiming against a "person through whose fault the claim arose", then "fault" will be a necessary element to allege and prove, as well as a causal nexus between the conduct and the circumstances of the making of the insurance payment.[3]

Informative extracts from the reasons and comments given in the "go-to" cases are below (most recent cases first).

Samimi & Anor v QBCC [2015] QCA 106

The successful Appellant argued that it *was* a valid defence a claim pursuant to s 71(1), that the payment made by the Commission was not in accordance with the Policy, and therefore, not a 'payment on a claim under the scheme'.

Boddice J (with whom McMurdo P and Morris JA agreed), stated, after setting out the current view:

> *"[31] However, it does not follow that no factual error can be the subject of a proper defence to a claim for recovery made pursuant to s 71(1) of the Act. The inclusion of the words "on a claim under the insurance scheme", in s 71(1) of the Act, indicate a legislative intention to require the right of recovery to pertain to payments made "on" claims under the insurance scheme. The use of those words connotes a requirement the payment made be within the policy. If that were not so, the legislature could simply have provided that the respondent could recover under s 71(1) of the Act any payment it had made pursuant to the insurance scheme."*
>
> And at [36]:
>
> *"[36] Whilst Fraser JA, in Namour, found the matters sought to be raised by way of defence were not justiciable under s 71(1) of the Act, that conclusion occurred in circumstances where there was "no reason to doubt that each claim was paid in accordance with the terms of the policy".10 A different conclusion may follow where there is reason to question whether the payment was made in accordance with the terms of the policy."*

QBCC v Lifetime Securities [2014] QCA 161

The Court of Appeal followed *Mahoney* and confirmed, in overturning a decision of the District Court that the validity of a claim under s 71 is not dependent upon the validity of the steps that the Commission had taken under Part 6 of the Act. In this case the 'step' in question was the giving of directions to rectify.

Gotterson JA's reasons included the following important points, which align with his reasoning in *Mahoney*:

> *"[33] Section 71(1) does not, by its express terms, condition the right of recovery thereby conferred by reference to regularity in compliance by QBCC with any of the provisions in Part 6. Neither s 72 nor 74 expressly refer to the right of recovery under s 71(1)…"*
>
> *"[34] Whilst the right to recover under s 71(1) is not conditioned as Lifetime Securities submits that it is, that is not to say that compliance by QBCC with the provisions of Part 6 might never have potential relevance to a recovery action under s 71(1). For example, such a circumstance might arise in the following way. Under the Insurance Policy Conditions, the amount that QBCC may pay under the insuring clause is limited to the reasonable cost, as determined by QBCC, of undertaking the rectification work: clause 4.2(a). A failure on the part of QBCC to call tenders when it was required to do so under s 74(1) or (2) might give scope for an argument that an amount paid by QBCC in respect of rectification work exceeded reasonable cost and, to that extent, was not a valid payment under the scheme."*

Mahony v QBSA [2013] QCA 323

[3] See *Queensland Building and Construction Commission v Coric* [2013] QDC 328; *Queensland Building Services Authority v PAL Geotechnical Services Pty Ltd* [2004] QCCTB 10 at [24]; and *Queensland Building Services Authority v Carey Randal Westropp & Bronwyn* [1999] QBT 132 at [58].

Gotterson JA decided that a challenge by the Defendant of the legal efficacy of any step taken by the Commission in the assessment of the claim is not justiciable in s 71(1) proceedings, his reasons being:

> *"[34] Section 71(1) confers a right to recover as a debt from any of the designated persons "any payment on a claim under the insurance scheme". It is sufficient for recovery under the section that the authority has made a payment on a claim under the insurance scheme. The statutory right to recover is not conditioned upon the legal quality of a determination by the authority to make the indemnity payment or of any anterior step taken by the authority that had led to the decision to pay.*
>
> *[35] That is not to say that a decision to make an indemnity payment or any anterior step is not reviewable. At the relevant time, Division 3 of Part 7 of the QBSA Act conferred a review jurisdiction on the Commercial and Consumer Tribunal ("the Tribunal") with respect to the following decisions by the authority: to direct or not direct rectification or completion work on a building; that work undertaken at the direction of the authority was not of a satisfactory standard; about the scope of works to be undertaken under the statutory insurance scheme in order to rectify; and to disallow a claim under the scheme wholly or in part. A decision by the authority to recover an amount under 71(1) was not reviewable by the Tribunal. However, it was a decision which was judicially reviewable in the Supreme Court of Queensland pursuant to the provisions of the Judicial Review Act 1991. So, too, for other anterior decisions of the authority. The availability of review of those kinds and at those stages provides a sound rationale for a legislative intention that the types of decisions to which I have referred not be justiciable in s 71(1) debt recovery proceedings. Another indicator of such an intention is that s 71 itself specifies certain defences which may be raised in proceedings under the section."*

Douglas J and McMurdo P agreed, with the same reservations as in *Lange*.

The majority recognised (as in *Lange* and *Orenshaw*) that it was possible for a decision to 'make a payment on a claim' to be made wrongly but the right to review the decision was a matter for judicial review, not debt recovery proceedings.

The decision also quashes previous misconceptions about the elements of a section 71 claim.

Lange v QBSA [2011] QCA 58

Wilson AJA observed that:

> *"[72] Sections 71 and 111C provide for recovery of the amount of "a payment on a claim under the insurance scheme" rather than the recovery of the amount of a "payment under the insurance scheme…"*
>
> *"[73] The administrative decision sought to be reviewed is one about entitlement to indemnity under the statutory policy. The appellant is a person aggrieved by that decision because, in consequence of it, a payment was made to the owners and he was exposed to recovery proceedings pursuant to s 111C. He is entitled to seek judicial review of that decision pursuant to s 20 of the Judicial Review Act 1991."*

The other members declined to express a concluded view on the *obiter* of Wilson AJA. However, President McMurdo noted that it would be unlikely that parliament would have intended for the statutory authority to be able to recover payments wrongly made to an insured (see para [3]). Justice Lyons agreed with these comments by the President.

Wilson AJA stated that even if the exclusion applied, ss 71 and 111C of the QBSA Act provided for recovery of the amount of "a payment on a claim under the insurance scheme" and as the statutory authority had paid on such a claim, even if not liable, recovery was permissible against the director (see paras [3], [72], [78]).

> *"[26] Because the policy is a statutory instrument, the interpretation of clause 1.9 which will best achieve the purpose of the QBSA Act is to be preferred to any other."*
>
> *…*
>
> *"[30] Thus, the purpose of Pt 5 is consumer protection, and the policy is to be construed in the way which will best achieve that purpose."*

QBCC v Orenshaw & Anor [2012] QSC 241

As to what constituted a 'payment on a claim under the insurance scheme' and when that position might be displaced, Henry J said:

> "*[36] It is undoubtedly correct that the relevant element, or trigger as Wilson AJA called it, is that there has been a payment on a claim under the insurance scheme. However, it is conceivable there may be incorrect facts or incorrect inferences of fact relied upon, in respect of a claim purportedly made under the insurance scheme and the nature of the error may be such that on the correct facts it cannot be said to have been a claim under the insurance scheme at all.*
>
> *[37] Carried to its logical extreme in such a case, the applicant's argument, which in fairness it did not advance, would have to be that ss 71 and 111C ought be read as referring to payment on a claim "purportedly" made under the insurance scheme, regardless of any degree of factual error bearing upon whether it actually is a claim under the scheme. That would involve erroneous reliance on a qualification not present in the relevant sections.*
>
> *[38] At the other extreme, it is unlikely that s 71 could be avoided by a building contractor disputing discretionary factual conclusions occurring as part of the professional judgment exercised by the QBSA in deciding whether and how much to pay in respect of a claim. It would not be enough to avoid the statutory liability imposed by s 71 for a defendant to point merely to any error of fact connected with the claim process. It must logically have been a factual error of such a nature that the claim was not, on the facts as correctly known, a claim under the insurance scheme or that the payment sought to be recovered was not a payment on such a claim."*

What must be established in a claim under s 71(1)?

Based on the above, the following is a workable guideline of the factual matters which should form part of a claim under s 71(1):

1. There was a claim on the insurance scheme; and

2. The Commission made a payment on that claim; and

3. The Defendant is the building contractor by whom the residential construction work was, or was to be, carried out, or another person through whose fault the claim arose.

4. The Commission determined that the work was defective or incomplete and required rectification or completion;

5. Either:

   (a) The QBCC issued a direction stating a period of at least 28 days (unless exceptions apply); or

   (b) [See para 7 below];

6. If a direction was issued, that the Defendant did not carry out the required work within the time allowed by the direction;

7. The Commission admitted the claim under the policy. Inherent in that is a determination that it was appropriate to proceed with an insurance claim, requiring that:

   (a) The work was residential construction work;

   (b) The contract was for a fixed price; and

   (c) [Where the work is incomplete], the insured properly terminated the contract with the contractor.

8. The Commission sought and obtained tenders for carrying out the required work;

9. The Commission accepted a tender it considered appropriate (it is not relevant whether the tender was appropriate, merely that the Commission considered it was, as a basis for accepting it).

10. The payment made was the reasonable cost of rectification or completion as determined by the Commission at that time.

Defences to a Claim

The Defences to a claim under s 71(1) are set out in the latter part of s 71 (from subsection (4)) and are summarised in the following table:

For a Building Contractor who is a licenced contractor whose…	**It is a defence to prove that their…**
licence card is imprinted on the contract for carrying out the work,	licence card was imprinted on the contract without their authority and they took all reasonable steps to ensure that the licence card was imprinted on contracts only with their authority.
name, licence number and address are stated on the contract,	name, licence number and address were stated on the contract without their authority and they took all reasonable steps to ensure that their name, licence number and address were stated in contracts only with their authority.
name is stated on the contract for carrying out the work,	name was stated on the contract without their authority.
name is stated on an insurance notification form for the work,	name was stated on the insurance notification form without their authority.
licence number is stated on the contract for carrying out the work,	licence number was stated on the contract without their authority.
licence number is stated on an insurance notification form for the work,	licence number was stated on an insurance notification form without their authority.
PIN was used for putting in place, for the work, insurance under the statutory insurance scheme,	PIN was used for putting in place, for the work, insurance under the statutory insurance scheme without their authority and they took all reasonable steps to ensure that their PIN was kept and used in accordance with the commission's requirements for the keeping and use of the PIN.

It is not a defence to a claim under s 71(1) to argue that:

1. The payment by the Commission was not reasonable; [4]

2. A Direction to Rectify or Scope of Work was not issued to the building contractor; [5]

3. The work was not defective (if a Direction to Rectify was issued and the building contractor did not review that decision within 28 days, or if the result of a review confirmed the decision);

4. The scope of the work for rectification or completion was incorrect (if a Scope of Work was issued and the building contractor did not review that decision within 28 days, or if the result of a review confirmed the decision);

5. In a non-completion claim - that the contract was not properly terminated by the homeowner (if the commission gave notice to the building contractor that it considered the contract was validly terminated and the building contractor did not review that decision within 28 days, or if the result of a review confirmed the decision).

Conclusion and Comment

The recent cases indicate that defences to a claim under s 71(1) are limited. To assess whether a payment has been made on a claim in accordance with the insurance scheme, a detailed understanding of the antecedent steps is required.

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[4] See *Carey Randal v Queensland Building Services Authority* [1998] QBT 85 per Dr Jensen.
[5] *Queensland Building and Construction Commission v Lifetime Securities* [2014] QCA 161.