SUPREME COURT OF QUEENSLAND

CITATION:	*Schneider v Queensland Building and Construction Commission* [2021] QCA 155
PARTIES:	**HEINZ (HENRY) GUNTHER SCHNEIDER** **MARIE LOUISE SCHNEIDER** (applicants) **v** **QUEENSLAND BUILDING AND CONSTRUCTION COMMISSION** (respondent)
FILE NO/S:	Appeal No 3411 of 2021 QCATA No 6 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time Application for Leave *Queensland Civil and Administrative Tribunal Act*
ORIGINATING COURT:	Queensland Civil and Administrative Appeal Tribunal at Brisbane – [2020] QCATA 124
DELIVERED ON:	30 July 2021
DELIVERED AT:	Brisbane
HEARING DATE:	15 July 2021
JUDGES:	Morrison and Mullins JJA and Brown J
ORDERS:	**1. The application for leave to appeal is refused.** **2. The applicants pay the respondent's costs of the application for leave to appeal.**
CATCHWORDS:	ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – STATUTORY APPEALS FROM ADMINISTRATIVE AUTHORITIES TO COURTS – where the applicants entered into a standard form BSA New Home Construction Contract for a dwelling to be built on land – where a certificate of insurance under the statutory insurance scheme instituted under s 67X of the *Queensland Building and Construction Commission Act 1991* (Qld) was issued – where the applicants received invoices and fraudulent photographs purporting that certain work had been done but had not in fact been completed – where the applicants made payment believing that the work had been completed – whether the payments were prepayments *Domestic Building Contracts Act 2000* (Qld), s 39 *Queensland Building and Construction Commission Act 1991* (Qld), s 67X

COUNSEL:	D W Marks QC, with C J Garlick, for the applicants S E Seefeld for the respondent
SOLICITORS:	Derek Legal for the applicants Queensland Building and Construction Commission for the respondent

[1] **MORRISON JA:** The applicants (**the Schneiders**) bought a block of land in Roma. They entered into a building contract with Contract Build Pty Ltd (**Contract Build**) to erect a house on the land. The agreed price for the construction was $284,900, to be paid in six stages:

(a) Deposit: $14,245;

(b) Base Stage: $42,735;

(c) Frame Stage: $56,980;

(d) Enclosed Stage: $71,225;

(e) Fixing Stage: $56,980; and

(f) Practical Completion: $42,735.

[2] The first three payments were made between January and July 2014. By that time the house had been completed to the Frame Stage.

[3] In October 2014 there was a novation of the construction contract and Line Constructions Pty Ltd (**Line Constructions**) became the contractor.

[4] A certificate of insurance under the statutory insurance scheme instituted under the *Queensland Building and Construction Commission Act 1991* (Qld) (**the QBCC Act**) was issued in respect of the contract with Contract Build. Following the novation of the contract to Line Constructions, a second certificate of insurance was issued in May 2015.

[5] In May and September 2015 Line Constructions sent the Schneiders invoices accompanied by photographs purporting to show the progress of construction on the house. The May photographs purported to show completion to the Enclosed Stage; the September photographs purported to show completion to the Fixing Stage. They lied to the Schneiders as the photographs were of a different property. In fact, Line Constructions had done no work whatsoever on the Schneiders' property.

[6] In that way two fraudulent claims were made by Line Constructions for the next two progress payments, namely:

(a) $71,225 on 17 June 2015 (based on purported completion to the Enclosed Stage); and

(b) $56,980 on 11 September 2015 (based on purported completion to the Fixing Stage).

[7] By 15 August 2016 the Schneiders had become aware of the true situation and made a complaint to the Queensland Building and Construction Commission (**the QBCC**). That initiated a claim under the statutory insurance policy. The next day the Schneiders terminated the building contract with Line Constructions.

[8] The QBCC denied the claim under the insurance policy, one of the grounds being that the Schneiders had made "prepayments", that is payments for contracted works before the work had actually been undertaken and the monies had become due.

[9] Proceedings were instituted in the Queensland Civil and Administrative Tribunal, to review the decision of the QBCC, rejecting the claim. The decision by the Tribunal[1] was to permit the claim, including the amount of the prepayments.

[10] The QBCC appealed to the Appeal Tribunal of the QCAT. A number of grounds were argued, including whether the payments for the Enclosed Stage and the Fixing Stage constituted "prepayments" and therefor the amount payable under the insurance policy was to be reduced by that amount.

[11] The Appeal Tribunal held that the two payments were prepayments under the insurance policy.[2] The effect of the Appeal Tribunal's orders was that the QBCC was entitled to reduce the amount payable to the Schneiders under the statutory insurance policy by an amount equal to the prepayments, $128,205.

[12] The Schneiders seek leave to appeal against the Appeal Tribunal's decision.

Leave to appeal

[13] An appeal to this Court from a final decision of the Appeal Tribunal of QCAT may only be made on a question of law and with the leave of this Court.[3] Leave to appeal will usually only be granted where it is necessary to correct a substantial injustice and where there are reasonable prospects of an error being demonstrated.[4]

[14] The Schneiders also require an extension of time within which to bring this application. Their original application for leave to appeal was filed within time but was struck out at a review because it did not reveal any basis for the grant of leave. The second application was filed promptly thereafter. Although the QBCC opposes a grant of an extension of time, it does not seem to me that that is the appropriate basis upon which this application should be resolved.

[15] As to the application for leave under s 150 of the *Queensland Civil and Administrative Tribunal Act*, the QBCC accepts that, if the Schneiders can show that the amounts were not prepayments, the ultimate shortfall in payment to the Schneiders under the statutory insurance scheme[5] would amount to an injustice. The consequence is that the central point on the application for leave, and any resultant appeal, is confined to whether there are reasonable prospects of demonstrating an error of law on the part of the Appeal Tribunal.

The statutory insurance scheme

[16] The statutory insurance scheme was established under the QBCC Act. It was a continuation of the form of statutory insurance in building construction first

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1 *Schneider v Queensland Building and Construction Commission* [2018] QCAT 412.

2 *Queensland Building and Construction Commission v Schneider* [2020] QCATA 124.

3 *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 150(3).

4 *Underwood v Queensland Department of Communities (State of Queensland)* [2013] 1 Qd R 252, at [18] and [68].

5 Assuming the Schneiders were successful, after taking into account the limit of payment under the insurance scheme, the shortfall would still be $71,208.25.

introduced by the *House-builders' Registration and Home-owners' Protection Act 1977* (Qld) and continued in the *Builders' Registration and Home-owners' Protection Act 1979* (Qld).

[17] One of the objects of that Act is to provide remedies for "defective building work": s 3(b). The term "defective", in relation to building work, is defined to include "faulty or unsatisfactory": schedule 2.

[18] The statutory insurance scheme is created under Part 5 of the QBCC Act and specifically s 67X which provides:

> "**67X Statutory insurance scheme**
>
> (1) The statutory insurance scheme previously established under this Act is continued.
>
> (2) The purpose of the statutory insurance scheme is to provide assistance to consumers of residential construction work for loss associated with work that is defective or incomplete.
>
> (3) Assistance can not be provided under the scheme to a consumer unless the consumer has suffered loss as a consequence of residential construction that is defective or incomplete."

[19] For the purpose of Part 5 the term "incomplete" is defined to mean, in relation to residential construction work, "work that has not reached practical completion", but not work that is defective: s 67WA.

[20] In my view, it is evident from the face of s 67X that assistance under the scheme is provided, or withheld, by reference to the work that is done or not done, or defectively done, rather than the reason why that work is done, or not done, or defectively done. In other words, it does not look to the motivation of the contractor to see why work was defective or incomplete, but rather the mere fact that it is defective or incomplete.

The contract provisions

[21] The contract between the Schneiders and Line Constructions was in the standard form of the BSA New Home Construction Contract.[6] In its standard general conditions a number of provisions are made in respect of the contractor's obligation to carry out the work and its ability to claim payment for work. Thus, under clause 12.3 the contractor must "diligently carry out the work under this Contract and must not, except as permitted by this Contract, … fail to maintain reasonable progress in the performance of that work".[7]

[22] Clause 17 governs payment by the owner of the building to the contractor carrying out the works. It relevantly provides:

> "17.1 The Owner must pay the Contractor the Total Price for the Works in accordance with this Condition.
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> …

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6 Appeal Book (**AB**) 197. In these reasons I have omitted the bold text used in the contract to denote a defined term.

7 AB 204.

17.4 The Contractor is entitled to claim a Progress Payment when the Contractor has achieved completion of each of the stages set out in Schedule Item 10 or in any separate document setting out payment stages.

17.5 A progress claim must:

(a) be in writing using a BSA Form 3 - *Progress Claim* or other similar written notice;

…

(c) certify that the work under this Contract has been completed to the relevant stage;

…

17.8 In respect to any progress claim other than the Progress Claim for the Practical Completion Stage:

(a) the Owner must pay the Contractor the Progress Payment, or so much of the relevant claim as is not disputed by the Owner, within 5 business days of receipt of the relevant claim;

(b) if the Owner disputes the relevant claim for Progress Payment or any part of it, the Owner must within 5 business days of receipt of the relevant claim give to the Contractor a BSA Form 4 - *Notice of Dispute of Progress Claim* with the particulars completed or other appropriate written notice, stating the reasons for so disputing the claim or any part of it.…"

[23] The two stages relevant to these proceedings are the subject of definitions in the standard form contract:[8]

> "'Enclosed Stage' means that stage when the external wall cladding and roof covering is fixed, the structural flooring laid and the external doors and windows fixed (excluding the fixing of soffit linings, the pointing of a tile roof or the scribbing and final screwing of a metal roof).
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> 'Fixing Stage' means that stage when all internal linings, architraves, cornices, skirting, doors to rooms, baths, shower trays, wet area tiling, built-in cabinets and built-in cupboards are fitted and fixed in position."

The insurance policy

[24] The Insurance Policy Conditions are approved by the *Queensland Building and Construction Commission Regulation 2003*.[9] The focus of the insurance policy is revealed in the "Insurance Policy Conditions" which provide:[10]

> "Subject to the terms of this policy, the Queensland Building and Construction Commission ('QBCC') will pay for loss for:

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8 AB 212.

9 Edition 8, effective 1 July 2009: AB 236. In the policy conditions some words are italicised to denote a defined term. In these reasons I have not repeated the italicised format as it is unnecessary.

10 AB 239.

- Non-completion;
- Vandalism and forcible removal;
- Fire, storm and tempest;
- Defective construction; and
- Subsidence or settlement

of the insured work referred to in the certificate of insurance."

[25] Part 1 deals with "Non-completion". Clause 1.1 stipulates that the QBCC "agrees to pay for loss suffered by the *Insured* in the event of the *contractor* failing to complete the *contract* for the *residential construction work*".[11]

[26] Clause 1.4 of the insurance policy deals with payment where work is not commenced. Then clause 1.5 deals with the amount of the payment where works have commenced. It provides that the amount of payment under the policy is limited to the total of the QBCC's assessment of the reasonable cost of completing the contract, less the insured's remaining liability under the contract.[12]

[27] Clause 1.6(a) imposes a limit on the right to payment where, in the opinion of the QBCC, the value of the contracted works to be undertaken clearly exceeds the price to be paid.

[28] It is in that context that one finds clause 1.6(b), which imposes a limit on the right to payment under the policy.

[29] Clause 1.6 is headed "Limit on right to payment". It relevantly provides in clause 1.6(b):

> "Where, in the opinion of the QBCC, the Insured pays to or on behalf of the contractor any moneys for the contracted works before they become due ("prepayment"), the QBCC will reduce the amount payable under this policy by the value of that prepayment. (The value of the prepayment is the QBCC's assessment of the value of the incomplete work in the stage of the contract for which the prepayment was made)."

[30] The remaining parts of the policy deal with the other areas in which the policy is answerable. Thus, Part 2 deals with non-completion by reason of acts of vandalism and forcible removal. Part 3 deals with non-completion because of fire, storm or tempest. Part 4 deals with defective construction and Part 5 deals with subsidence or settlement.

[31] None of Parts 1 to 5 contemplates payment for fraud. All of them are concerned with whether the work has been carried out, and to what extent. That is consistent with the evident scope of such insurance from the commencement of the *House-builders' Registration and Home-owners' Protection Act* which created the insurance scheme to respond to a builder's breach of a warranty (implied by that Act) that the work done would be performed in a proper and workmanlike manner and with proper materials, and in accordance with the terms of the contract, the approved plans and specifications (if any), any conditions subject to which the building approval was given, and any relevant Act: s 69(2). The insurance responded to loss caused by

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11 Emphasis in the original text.

12 AB 241.

(i) bankruptcy or winding up of the builder, (ii) failure to complete the construction, (iii) defects first apparent after completion, or (ii) subsidence or settlement (or defects therefrom): s 62(2)A.[13]

[32] Mr Marks QC, appearing with Mr Garlick of Counsel for the Schneiders, accepted that several aspects of clause 1.6(b) were not in issue. Thus, it was not in issue that the Schneiders had paid to the contractor monies for the contracted works, that being a reference to the two payments for the Enclosed Stage and the Fixing Stage. At issue was whether those monies had been paid "before they become due" and were therefore a "prepayment" for the purposes of clause 1.6(b).

[33] In my view, the correct construction of clause 1.6(b) is that money cannot "become due" for works which are not done. There are a number of reasons for that conclusion.

[34] First, the "contracted works" in clause 1.6(b) are defined as "the residential construction work to be performed under a contract": clause 11.1.[14] Therefore the prepayment is defined as money paid for "the work **to be performed** under a contract". The future tense is used in that phrase, signifying that the relevant work is work that has yet to be done.

[35] Secondly, the sentence at the end of clause 1.6(b) provides that the "prepayment" is to be valued by reference to "the incomplete work in the stage of the contract for which the prepayment was made". In other words, the prepayment is payment of money for work not done and therefore "incomplete work" within the meaning of that clause.

[36] The insurance policy imports terms defined in the QBCC Act unless the contrary intention appears: clause 11.2(a).[15] The term "incomplete work" is not defined separately in the QBCC Act, however the word "incomplete" where used in relation to residential construction work is defined in s 67WA (dealing with the insurance scheme):

> "***incomplete***, in relation to residential construction work—
>
> (a) means work that has not reached practical completion; but
>
> (b) does not include –
>
> (i) work that does not comply with the contract because of a cosmetic difference; or
>
> (ii) work that is defective."

[37] That lends some support for the conclusion that "incomplete work" for clause 1.6(b) is work that has not been done.

[38] Thirdly, the phrase "for the contracted works" identifies what the payment is for. But the word "due" qualifies the word "moneys". The clause does not use the phrase "due and payable". The wording of clause 1.6(b) is that the "prepayment" is a payment of money for the contracted works "before they become due". Work which has actually

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13 Nothing in the comments in Parliament on the introduction of the *House-builders' Registration and Home-owners' Protection Bill* suggested any wider ambit was intended: Hansard, 28 September 1976, pp 696-699. The *Builder's Registration and Homeowners Protection Act 1979* had the same scope: s 69(2)A.

14 AB 278.

15 AB 282.

been carried out will be work for which moneys are "due" even though the time to request payment for it has not arrived, for example where the date for a progress claim has not arrived. In that case the work having been done, the monies have become due but are not payable. That form of wording, in my respectful view, compels the conclusion that a "prepayment" under clause 1.6(b) is directed at money paid for works which have not been carried out and are therefore "incomplete work" for the purposes of that clause.

[39] Fourthly, that constructions fits well with the opening clause of Part 1, which deals with incomplete work. Clause 1.1 provides that the policy will respond to loss caused by "a contractor failing to complete the contract for the residential construction work".

[40] Fifthly, in my view, it cannot have been intended that the QBCC would be required to fill the role of an adjudicator between the owner and contractor when issues of the statutory insurance scheme and policy are concerned. By the words "will reduce the amount payable" clause 1.6(b) obliges the QBCC to reduce the amount payable by a "prepayment", if it forms the opinion that there has been such a prepayment. It would be contrary to the intended purpose of the statutory scheme, namely "to provide assistance to consumers of residential construction work for loss associated with work that is … incomplete",[16] to embroil the QBCC in an adjudication of the merits of claims, or the state of mind of either contracting party. Under the construction which I have advanced, the QBCC has a simple consideration to address, has the work been done or not, and has money been paid for work not yet done.

[41] Thus understood, clause 1.6(b) is not dependent upon the particular conditions of a contract or the reason why the works have not been done. It does not depend upon the knowledge of the owner, or the state of mind of the contractor. It operates solely upon the question of whether work has been done and therefore the money for that work has become due. If a payment is made before that point, it is a payment of money for the contracted works before they become due.

[42] In this case there is no controversy that the work for which the payment was made was never done by Line Constructions. The payment made by the Schneiders to Line Constructions was payment of money for the contracted works before they became due, simply because the work had not been done.

Contention on the proposed appeal – impact of clause 17.8 of the contract

[43] Mr Marks QC advanced a single contention before this Court, to support the grant of leave and the proposed ground of appeal. It was that the effect of clause 17.8 of the building contract was to make the payment under the two progress claims[17] payments of monies which were due and therefore not a prepayment under clause 1.6(b) of the insurance policy. The argument ran thus:

(a) a progress claim had been made, albeit fraudulently because the work had not been done;

(b) in each case Line Construction had issued a tax invoice to the Schneiders containing a description of the work (respectively, "Enclosed Stage" and "Fixing Stage"), and in each case the amount applicable under the contract if that stage had been completed;[18]

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16 Defective work is excluded from the definition of "incomplete" work.

17 Those for the Enclosed Stage and the Fixing Stage.

18 AB 364 and 365.

(c) under clause 17.8(a), the claim having been made, the Schneiders were obliged to pay the progress payment within five business days, or at least so much of it as was not the subject of any dispute, and there was no dispute; and

(d) therefore, notwithstanding that the claim was made fraudulently, the payments actually made were payments which were due to be made.

[44] In my respectful view, for a number of reasons that contention must be rejected.

[45] First, as examined above, clause 1.6(b) does not depend upon the terms of any particular building contract. It turns solely on the question whether the work has been done. It is concerned with money that is due, even if not payable, whereas clause 17.8 makes money payable at a particular time.

[46] Secondly, the contractor is only entitled to make a valid claim for a progress payment "when the Contractor **has achieved completion** of each of the stages set out …": clause 17.4.[19] Unless the contractor has achieved completion of a stage, it has no entitlement to claim a progress payment. In other words, the work must be done before any entitlement to claim a progress claim arises. Mr Marks QC conceded that in the present case, "in terms of the contract the builder was not entitled to claim".[20] Here, no work had been done on either of those stages, and therefore there was no entitlement on the part of Line Construction to seek a progress payment.

[47] This is made even more clear when one considers the definition of each of the relevant stages into clause 17.4. The "Enclosed Stage" means "that stage when the external wall cladding and roof covering **is fixed**, the structural flooring **laid** and the external doors and windows **fixed** …", and the "Fixing Stage means "that stage when all internal linings, architraves, cornices, skirting, doors to rooms, baths, shower trays, wet area tiling, built-in cabinets and built-in cupboards **are fitted and fixed in position**."[21]

[48] Thirdly, clause 17.5(c) stipulated that a progress claim must certify that the work under the contract had been completed. That was not done here, nor could it have been done (other than fraudulently) because no work had been done at all in respect of either of those stages.

Reliance on the *Domestic Building Contracts Act 2000* (Qld)

[49] One contention advanced by the applicants' legal representatives derived from the fact that the building contract, having been entered into on 26 November 2013, was regulated by the *Domestic Building Contracts Act 2000* (Qld).

[50] Section 39 of the *Domestic Building Contracts Act* relevantly provided:

> "**39 Copies of contract related documents**
>
> (1) This section applies if the building contractor under a regulated contract receives a contract related document for the contract.
>
> …

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19 Emphasis added.

20 Appeal transcript T1-8 line 5.

21 Emphasis added.

> (3) If the contract related document is a document other than a certificate of inspection, the building contractor must give a copy of the document to the building owner as soon as practicable after completion of the subject work.
>
> …
>
> (5) In this section—
>
> …
>
> ***contract related document***, for a regulated contract, means—
>
> (a) a certificate of inspection; or
>
> (b) a report, notice, order or other document about the subject work given or issued by a supplier of services, including, for example, electricity, gas, telephone, water or sewerage."

[51] It was contended that s 39 had an impact because of the fact that when the two false invoices were sent to the Schneiders, at least one of them was accompanied by photographs showing the work completed to the requisite stage.[22] The contention was that the invoice and photographs fell within the definition of a "contract related document" for the purposes of s 39 and thus provided proof that the work had in fact been done and therefore the monies were due.

[52] In my view, this point has no merit for the following reasons:

(a) s 39 only applies if the building contractor "receives a contract related document": s 39(1);

(b) the photograph which is said to constitute a "contract related document" was not received by the contractor, but created by it for the purpose of perpetrating a fraudulent claim;

(c) when one reads the definition of "contract related document" into s 39(1), it becomes evident that such a document is one received by the building contractor from someone else; importing the definition has the consequence that s 39 applies "if the building contractor … receives a report, notice, order or other document about the subject work given or issued by a supplier of services …"; that subsection plainly does not contemplate that the contractor might create the document and give it to itself; and

(d) s 39(3) creates the obligation on the contractor to give a copy of a "contract related document" to the owner, but that obligation only arises "after the completion of the subject work"; the section is not directed at the situation of a contractor creating a document that falsely pretends that work has been completed when it has, in fact, not been completed.

Conclusion

[53] For the reasons given above the Appeal Tribunal was correct to find that the two progress payments, namely $71,225 on 17 June 2015 (based on purported completion

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22 Of course, provision of the photographs was fraudulent because they were of a different building.

to the Enclosed Stage) and $56,980 on 11 September 2015 (based on purported completion to the Fixing Stage), were pre-payments for the purposes of clause 1.6(b) of the statutory insurance policy.

[54] Therefore, there being no merit in the proposed appeal, leave to appeal should be refused.

[55] I propose the following orders:

1. The application for leave to appeal is refused.

2. The applicants pay the respondent's costs of the application for leave to appeal.

[56] **MULLINS JA:** I agree with Morrison JA.

[57] **BROWN J:** I agree with the reasons for judgment of Morrison JA and the orders proposed by his Honour.