

This is in response to a wordpress.com blog site created by Karen Higgins of Warrawong Lodge. Ash Moseley Homes built Warrawong Lodge, a luxury bed and breakfast lodge located in Far North Queensland. Karen Higgins has titled her blog "QCAT Order against Ash Moseley Homes/ourcairnshouse". This title is misleading, as the QCAT matter proceeded to a compulsory conference IN WHICH BOTH PARTIES agreed to Tribunal orders by consent, meaning it was a QCAT Order by Consent, NOT a QCAT order against Ash Moseley Homes.

Higgins and Baars –v- Moseley Holdings Pty Limited t/as Ash Moseley Homes QCAT BDL040-12

Ash Moseley Homes entered into a Master Builders building contract with Karen Higgins and Frank Baars on 4 May 2011 for the construction of a residential home at 24 Alexandra Street, Clifton Beach in the amount of \$1,634,587.00.

Higgins and Baars had previously made a development application for a bed and breakfast to be approved for the site. The Cairns Regional Council REJECTED this development application. They then sought development approval for a residential home. After practical completion, they sought to operate bed and breakfast from the home. The National Construction Code has different standards of construction between a residence and a bed and breakfast. Occupants of a bed and breakfast face health and safety risks from other occupants. These risks are not present in a residence. Baars and Higgins compliance avoidance with planning and building regulations created construction tensions and a subsequent building dispute.

During the construction of the home, Baars and Higgins sought to unilaterally vary the progress payments under the contract. On 9 February 2012 they filed an application for domestic building dispute with the Queensland Civil and Administrative Tribunal. A declaration was sought to alter the amount of progress claims to increase the amount payable at practical completion. At the time the work was 95% complete, yet Higgins and Baars still owed approximately \$485,000.00 under the contract.

Other builders had been approached by Baars and Higgins to provide quotes to finish the final 5% of the contract. Baars and Higgins were seeking to avoid the payment of the outstanding progress claims and frustrate recovery of the outstanding monies.

Ash Moseley Homes filed a defence disputing the jurisdiction of the Queensland Civil and Administrative Tribunal to make the orders sought as Section 69 of the *Domestic Buildings Contracts Act 2000* was not a provision of an enabling Act. The correct jurisdiction was the District Court.

The matter proceeded to a compulsory conference in which both parties agreed to Tribunal orders by consent.

Baars and Higgins then failed to comply with the consent QCAT decision. The home was brought to practical completion. The independent building inspector, Mr Simon Wonnacott (a qualified engineer and builder) performed an eight hour pre-purchase inspection. Baars and Higgins refused to authorise the release of the outstanding monies held in the Queensland Master Builders Association holding account, took possession of the site by changing the builders locks and in breach of the QCAT Consent Order.

The QCAT consent decision was registered in the Supreme Court and an originating application filed on 27 July 2012 seeking orders for contempt by Higgins and Baars for failing to comply with the Supreme Court registered order of QCAT. The application was set down to be heard on 15 August 2012 and on the preceding day Baars and Higgins finally agreed to authorise the transfer of

the balance of the contract monies from the Queensland Master Builders Association holding account to Ash Moseley Homes.

Complaints by Baars and Higgins to Regulatory Authorities

Baars and Higgins made various complaints to Regulatory Authorities that were ALL DISMISSED. These included complaints to:-

1. Cairns Regional Council;
2. Department of Environment;
3. Queensland Police Service;
4. Queensland Law Society;
5. Queensland Legal Services Commissioner.
6. Queensland Master Builders Association
7. Housing Industry Association

Some five complaints to date have been made by Karen Higgins to the Queensland Building and Construction Commission over a four year period. The Queensland Building and Construction Commission considered the timber boards to the verandah of the home were not fit for their purpose and made a direction to rectify and approved an insurance claim to replace these timber boards. The QBCC made five decisions with respect to this issue being subject to Queensland Civil and Administrative Tribunal proceedings GAR167-13, GAR175-13, GAR177-13, GAR319-13, and GAR146-14. The hardwood timber decking boards were imported and supplied by a local building supply company. The timber decking boards oozed sap and left marks. The importer and the timber coating finish manufacturer advised the parties the boards may take 12 months for the sap and tannins to leach before they can be sanded back and recoated. The expert evidence concluded the boards should be allowed to remain in situ before being sanded and refinished in 12 months time. The expert evidence was of the opinion the boards were fit and suitable for their purpose. The QBCC did not accept this evidence and made the subsequent decisions in an attempt to regularise the original decision to direct. The QBCC consented to directions to provide a durability report on the timber. The QBCC failed to comply with the consent order and was unable to provide a report impugning the durability of the timber.

Ash Moseley Homes brought an application in the proceedings seeking the decisions be set aside on the basis:-

1. The QBCC was causing disadvantage to a party in the proceedings pursuant to Section 48 of the *Queensland Building and Construction Commission Act 1991*;
2. For a decision that decisions be set aside on the basis the QBCC's decision and conduct is frivolous, vexatious or misconceived and/or lacking in substance and/or an abusive process.

The application proceeded to a hearing in which a decision was reserved based on the legal representative of the QBCC obtaining further instructions.

The QBCC then consented to ALL DECISIONS BEING SET ASIDE AND TO PAY ASH MOSELEY HOMES' LEGAL COSTS AND OUTLAYS IN THE PROCEEDINGS.

Higgins and Baars –v- Moseley Holdings Pty Limited t/as Ash Moseley Homes [2014] QCAT 656 and Higgins and Baars –v- Moseley Holdings Pty Limited t/as Ash Moseley Homes [2014] QCAT 331

Higgins and Baars commenced a claim seeking various orders and relief with respect to 15 items of alleged defective building work arising from the building contract of 4 May 2011. **THE TRIBUNAL DISMISSED ALL 15 CLAIMS.** Evidence was given by Frank Baars with respect to all 15 items. His evidence was rejected. The evidence of the independent witnesses (Mr Simon Wonnicott, the QBCC building inspector, and the independent contractors) were all preferred.

THE TRIBUNAL MEMBER IN TAKING ACCOUNT OF ALL THE CIRCUMSTANCES OF THE CASE, SAID IT WAS APPROPRIATE THAT BAARS AND HIGGINS PAY THE COSTS INCURRED BY ASH MOSELEY HOMES IN DEFENDING THE PROCEEDINGS.