

CATCHWORDS: Whether Tribunal a Court for the purposes of the *Building and Construction Industry Payments Act 2004*

REASONS FOR DECISION : *MR A MOON – MEMBER* . Queensland Commercial and Consumer Tribunal, Brisbane 25th January 2006

Introduction

- 1 This is an application in a proceeding by which the applicant seeks a summary decision presumably pursuant to section 19 of the *Building and Construction Industry Payments Act 2004*.
- 2 The applicant originally commenced proceedings in the Tribunal dated 26 October 2005 in which the applicant sought to recover the sum of \$1,749.00 said to be monies due for certain plumbing goods and services provided to the respondent by the applicant. It was alleged that the total of the costs of the goods and services was \$67,870.00 and that \$66,121.00 had been received from the respondent leaving a balance of \$1,749.00.
- 3 There seems little doubt, that insofar as that amount is concerned and the manner in which it is claimed, the Tribunal has jurisdiction to determine the matter. There are also specific provisions under the *Commercial and Consumer Tribunal Act 2003* which would enable the applicant to seek a summary determination of the application.
- 4 However in the statement of claim the applicant claims in the alternative an entitlement to recover the sum of \$1,749.00 pursuant to the provisions of the *Building and Construction Industry Payments Act 2004* ("the BCIPA"). An amended statement of claim alleges that the amount is payable to the applicant by reason of the provisions of section 18 of the BCIPA. In fact, the application insofar as it is made to the Tribunal has been commenced under section 19 of that Act.
- 5 Sections 18 and 19 of the BCIPA provide as follows

18 Payment schedules

- (1) A respondent served with a payment claim may reply to the claim by serving a payment schedule on the claimant.
- (2) A payment schedule--
 - (a) must identify the payment claim to which it relates; and
 - (b) must state the amount of the payment, if any, that the respondent proposes to make (the scheduled amount).
- (3) If the scheduled amount is less than the claimed amount, the schedule must state why the scheduled amount is less and, if it is less because the respondent is withholding payment for any reason, the respondent's reasons for withholding payment.
- (4) Subsection (5) applies if--
 - (a) a claimant serves a payment claim on a respondent; and
 - (b) the respondent does not serve a payment schedule on the claimant within the earlier of--
 - (i) the time required by the relevant construction contract; or
 - (ii) 10 business days after the payment claim is served.
- (5) The respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates.

19 Consequences of not paying claimant if no payment schedule

- (1) This section applies if the respondent--
 - (a) becomes liable to pay the claimed amount to the claimant under section 18 because the respondent failed to serve a payment schedule on the claimant within the time allowed by the section; and
 - (b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.
- (2) The claimant--
 - (a) may--
 - (i) recover the unpaid portion of the claimed amount from the respondent, as a debt owing to the claimant, in any court of competent jurisdiction; or
 - (ii) make an adjudication application under section 21(1)(b) in relation to the payment claim; and
 - (b) may serve notice on the respondent of the claimant's intention to suspend, under section 33, carrying out construction work or supplying related goods and services under the construction contract.
- (3) A notice under subsection (2)(b) must state that it is made under this Act.
- (4) If the claimant starts proceedings under subsection (2)(a)(i) to recover the unpaid portion of the claimed amount from the respondent as a debt--
 - (a) judgment in favour of the claimant is not to be given by a court unless the court is satisfied of the existence of the circumstances referred to in subsection (1); and
 - (b) the respondent is not, in those proceedings, entitled--
 - (i) to bring any counterclaim against the claimant; or
 - (ii) to raise any defence in relation to matters arising under the construction contract.

- 6 By an application in a proceeding filed on 11 December 2005 the applicant seeks a summary decision based upon the applicant's alleged entitlement to recover the sum of \$1,749.00 (as set out in the amended statement of claim) but limited to its entitlement arising under the BCIPA. In other words, there is no application for a summary decision arising out of the contractual claims as such.

- 7 An issue has arisen as to whether or not the Tribunal has jurisdiction to entertain the application.
- 8 It is apparent from section 19 above, that the amount which is categorised as a debt can be recovered in "a court of competent jurisdiction".
- 9 The critical question in this case is whether or not the Commercial and Consumer Tribunal is a court at all for the purposes of section 19 of the BCIPA. It is only if I am satisfied that it is a court for such purposes that I need consider whether or not it is a court of competent jurisdiction
- 10 In a recent decision in the Court of Appeal in Queensland in *Jackson-Knaggs v Queensland Newspapers Pty Ltd* [2005] QCA 145 the Court of Appeal was concerned with considering whether or not the former Queensland Building Tribunal was a court of justice for the purposes of section 13(1)(c) of the *Defamation Act 1989*.
- 11 As was pointed out by Williams JA in that Decision:

"[1] The critical question for determination in this appeal is whether or not the Queensland Building Tribunal ("the Tribunal") established by s 9 of the Queensland Building Tribunal Act 2000 ("the QBT Act") is a "court of justice" for the purposes of s 13(1)(c) of the Defamation Act 1889 ("the Act") either generally or more specifically when the Tribunal is conducting a public examination pursuant to s 112 of the QBT Act. The answer to that question is essentially dependent upon the proper construction of the Act. The answer has relevance only for the purposes of the Act; the answer will not be necessarily determinative of whether the Tribunal is a court of justice in some other context. Given all that, decisions at common law on whether or not a particular tribunal was or was not a court of justice for some purpose are of little, or no, assistance."

- 12 In the present case, I am not concerned with determining whether or not the Tribunal is 'a court of justice' but determining whether or not it is a 'court' for the purposes of section 19 of the BCIPA
- 13 The word 'court' is not defined in the BCIPA.
- 14 In its submissions, the applicant relied to some extent upon the provisions of section 49A of the *Acts Interpretations Act 1954* (Qld). Section 49A provides as follows

49A Jurisdiction of courts and tribunals

If a provision of an Act, whether expressly or by implication, authorises a proceeding to be instituted in a particular court or tribunal in relation to a matter, the provision is taken to confer jurisdiction in the matter on the court or tribunal.

- 15 As can be seen, the section does not purport to define the meaning of the word 'court'. It simply acknowledges that in so far as any jurisdiction is conferred upon a court or a tribunal that the court or tribunal in fact has that jurisdiction. By its very terms, the section acknowledges the existence of the two separate institutions.
- 16 In *Jackson-Knaggs v Queensland Newspapers Pty Ltd* (supra at paragraph 10), Keane JA with whom Williams JA and Muir J agreed, said as follows
- "[19] Finally, it may be observed that a different conclusion would be distinctly odd having regard to s 96, s 99 and s 117 of the QBT Act which expressly postulate that the QBT is not a court. It would be a strange result if a tribunal which is a creature of statute is not a court for the purposes of that constituting statute but is a court for the purposes of another statute such as the Act."
- 17 Whilst the court was there considering the provisions of the *Queensland Building Tribunal Act 2000*, it seems to me the same analysis applies to the *Commercial and Consumer Tribunal Act 2003*. In particular section 40 of that Act, as did section 117 of the *Queensland Building Tribunal Act 2003*, distinguishes between proceedings started in a court and proceedings which can be heard by the Tribunal. Further, section 93 of the *Commercial and Consumer Tribunal Act 2003* distinguishes between the Tribunal and 'a court of competent jurisdiction'.
- 18 In the circumstances, I am satisfied that at least for the purposes of section 19 of the BCIPA, the Commercial and Consumer Tribunal is not a court or indeed a court of competent jurisdiction and accordingly the application for summary decision filed on 16 September 2005 is not within the jurisdiction of the Tribunal and I dismiss the application.
- 19 The respondent appeared in person; accordingly I make no order as to costs

Order : Upon hearing Mr Zahmel on behalf of the applicant and Mr Greg Campbell on behalf of the respondent, the Commercial and Consumer Tribunal makes the following orders:

1. The application for a summary decision dismissed.

MS J SCHAFFER : CHAIRPERSON Commercial and Consumer Tribunal

McKays Solicitors (applicant)