

**REASONS FOR DECISION MR P LOHRISCH** Commercial and Consumer Tribunal Brisbane 5<sup>th</sup> June 2008

**Introduction**

1. This is a decision about the jurisdiction of the Tribunal to hear and determine all issues in this application. The facts and the respective positions of the parties appear adequately from the parties' submissions.

**Orders Sought by the Applicant**

1. That the Tribunal has jurisdiction to hear all matters the subject of the application.
2. No order as to costs.

**SUBMISSION**

**History of the Proceedings**

1. The Application was commenced by the Applicant on or about 8 August 2007 in person.
2. The application arose out of a building contract between the applicant as the contractor and the respondent as a plumbing sub contractor for certain plumbing work at Mayfair, Medical Centre in Mayfair Village shopping Centre dated 22 March 2007 as part of a renovation and fit out of a shop as a medical centre ("the building contract").
3. The applicant is seeking orders for payment by the Respondent to the Applicant of \$8,990.52 made up of:
  - a. restitution of \$3226.09 paid by the applicant to the respondent in excess of the monies due to the respondent under the building contract; and
  - b. Reimbursement by the respondent of unnecessary expenses incurred by the applicant by way of relief consequential and/or ancillary to the order for restitution.
4. The Respondent filed a Defence prepared by its solicitors Colville Johnstone Lawyers seeking orders that:
  - a. The Application be dismissed, in the alternative;
  - b. The Application be permanently stayed;
  - c. Costs;
  - d. Any such further Order that the Tribunal deems necessary.
5. In its Defence, the Respondent, by its solicitor, has alleged that the Commercial and Consumer Tribunal does not have jurisdiction to hear and determine the application on the grounds that:
  - a. The Applicant appears to be alleging that the Respondent has breached s52 of the Trade Practices Act 1974 (Cath) ("TPA") - paragraph 9. d) 1) of the Defence; and
  - b. The Applicant appears to be appealing an Adjudication Decision or parts thereof made pursuant to BCIPA.
6. The Tribunal has called for submissions from the parties on fact and law in relation to the issue of jurisdiction.

**As to Jurisdiction**

7. The applicant and respondent have a dispute arising out of the building contract.
8. The respondent delivered a payment claim under BCIPA, and the respondent had the dispute adjudicated as a result of which certain monies were paid to the respondent by the applicant and certain expenses were incurred by the applicant.
9. The applicant says, with respect to the claim for \$3226.09 that:
  - a. the contract amount payable to the respondent under the building contract was \$20,461.40;
  - b. the respondent has been paid \$23,486.83;
  - c. the respondent has been overpaid by \$3226.09;
  - e. restitution of the amount of \$3226.09 should be made by the respondent to the applicant under the building contract.
10. The applicant says, with respect to the claim for reimbursement by the respondent of unnecessary expenses incurred by the applicant by way of relief consequential and/or ancillary to the order for restitution, that as a result of the dispute with the Respondent, the Applicant has been put to unnecessary expense in the amount of \$5,734.43 as set out in the application and which it seeks from the Respondent.
11. The Defendant denies it owes the applicant the monies claimed for restitution or otherwise.
12. The application does not include any claim by the applicant under the Trade Practices Act 1974 or by way of an appeal from an adjudication or any claim under BCIPA.
13. The use of the term "false and misleading information" in the applicant's statement of claim refers to the applicant's view of the respondent's evidence in relation to the building dispute rather than as a apparent reference to a breach under the TPA.
14. The applicant does not to seek a review of the adjudication decision.
15. The respondent's allegations that the application includes matters that exceed the jurisdiction of the Tribunal are not strong and are based on the Respondent's perception of what the applicant "appears to be alleging" or "appears to be appealing"
16. It is submitted that the Tribunal has jurisdiction to hear and determine the application in this matter.
17. s31(1) of the CCT Act provides that the Applicant may start a proceeding for a matter for which the Tribunal has jurisdiction by filing an application in the approved form in the Tribunal and paying the prescribed fee.

18. s77 of the BSA Act provides as follows:
- (1) A person involved in a building dispute may apply to the tribunal to have the tribunal decide the dispute.
  - (2) Without limiting the tribunal's powers to resolve the dispute, the tribunal may exercise 1 or more of the following powers -
    - (a) order the payment of an amount found to be owing by 1 party to another;
    - (b) order relief from payment of an amount claimed by 1 party from another;
    - (c) award damages, and interest on the damages at the rate, and calculated in the way, prescribed under a regulation;
    - (d) order restitution;
    - (e) declare any misleading, deceptive or otherwise unjust contractual term to be of no effect, or otherwise vary a contract to avoid injustice;
    - (f) avoid a policy of insurance under the statutory insurance scheme;
    - (g) order rectification or completion of defective or incomplete tribunal work;
    - (h) award costs.
19. "Building dispute" is defined by Schedule 2 of the BSA Act as follows:
- (a) domestic building dispute; or
  - (b) a minor commercial building dispute; or
  - (c) a major commercial building dispute if the parties to the dispute consent to the dispute being heard by the tribunal under section 79
20. The Application has been made to the Tribunal as a minor commercial building dispute under s31 of the COT Act and s77 of the BSA Act.
21. Section 8(1) of the OCT Act provides that the Tribunal has jurisdiction to deal with the matters it is empowered to deal with under the CCT Act or an empowering Act such as BSA Act.
22. "**Minor commercial building dispute**" is defined by Schedule 2 of the BSA Act as follows:  
minor commercial building dispute means a commercial building dispute where neither the claim nor the counterclaim exceeds \$50 000.
23. "**Commercial building dispute**" is relevantly defined by Schedule 2 of the BSA Act to include:
- (b) a claim or dispute arising between 2 or more building contractors relating to the performance of reviewable commercial work or a contract for the performance of reviewable commercial work;
24. "**Reviewable commercial work**" is defined by Schedule 2 of the Act as:  
tribunal work other than reviewable domestic work.
25. "**Tribunal work**" is defined by s. 75 of the BSA Act as follows:
- 1) The following is tribunal work—
    - (a) the erection or construction of a building;
    - (b) the renovation, alteration, extension, improvement or repair of a building;
    - (c) the provision of electrical work, water supply, sewerage or drainage or other like services for a building;
    - (d) the demolition, removal or relocation of a building;
    - (e) any site work (including the construction of retaining structures, driveways, landscaping and the construction of a swimming pool) related to tribunal work of a kind mentioned in paragraphs (a) to (d);
    - (f) the preparation of plans, specifications or bills of quantity for the carrying out of tribunal work;
    - (g) the inspection of a completed building;
    - (h) subject to subsection (3), work prescribed under a regulation.
  - (2) To remove doubt, it is declared that reviewable domestic work is tribunal work.
  - (3) A person carries out tribunal work whether the person carries it out personally, or directly or indirectly causes it to be carried out.
  - (4) A person is taken to carry out tribunal work if the person provides administration<sup>1</sup> services, management services or supervisory services relating to the tribunal work.
  - (5) A person undertakes to carry out tribunal work if the person enters into a contract to carry it out or submits a tender or makes an offer to carry it out.  
The work carried out pursuant to the building contract is not "reviewable domestic work"
26. "**Reviewable domestic work**" is defined in Schedule 2 of the BSA Act as domestic building work under the Domestic Building Contracts Act 2000 which includes the renovation of a home only and is not applicable to commercial premises such as a medical centre.
27. The applicant submits that so long as the matters the subject of the application are otherwise within the jurisdiction of the Tribunal, that the Tribunal is expressly permitted to deal with the applicant's claim for restitution and other appropriate orders pursuant to Si 00 of BCIPA, which provides:
- (1) Subject to section 99, nothing in part 3 affects any right that a party to a construction contract—
    - (a) may have under the contract; or
    - (b) may have underpart 230 in relation to the contract; or
    - (c) may have apart from this Act in relation to anything done or omitted to be done under the contract.

- (2) *Nothing done under or for part 3 affects any civil proceedings arising under a construction contract, whether under part 3 or otherwise, except as provided by subsection (3).*
- (3) *In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal-*
  - (a) *must allow for any amount paid to a party to the contract under or for part 3 in any order or award it makes in those proceedings; and*
  - (b) *may make the orders it considers appropriate for the restitution of any amount so paid, and any other orders it considers appropriate, having regard to its decision in the proceedings.*
28. *It is submitted that, for the purposes of this section, construction contract includes the building contract in this matter.*
29. *It is submitted the applicants are entitled to apply to the Tribunal to have the alleged dispute decided as a minor commercial building dispute.*
30. *The Applicant submits that s40 (2) of the CCT Act is not applicable in the circumstances of this matter.*

**As to Costs**

31. *The Tribunal has not to this point received an Application from either party for leave to be legally represented and the Tribunal has not granted the parties leave to have legal representation.*
32. *The Applicant submits that in the circumstances that should the Tribunal order that the Application be transferred under s40 of the CCT Act or otherwise that it is not appropriate that any Order be made as to the payment of costs by either party.*
33. *Section 70 of the CCT Act provides that the main purpose of Division 7 of the CCT Act is to have parties pay their own costs unless the interest of justice require otherwise.*
34. *Section 71 of the OCT Act sets out the circumstances under which the Tribunal may award costs if it considers appropriate.*
35. *Section 71(5) provides that a party to a proceeding is not entitled to costs merely because the party was legally represented at the proceedings.*
36. *An award of costs is not appropriate in the circumstances of this matter. The self- represented Applicant has prepared the Application and has clearly represented the nature of its claims. The Defendant has been adequately appraised of the claims of the Applicant as is evidenced in its Defence by paragraphs 1c, 2c, 3c, 4c, 5c, 6c, 7c, 8c and 9c.*
37. *It is submitted that the Tribunal make the Orders sought by the Applicant.*

**Respondent's submissions**

**BACKGROUND**

1. The parties entered into a written contract on or about 22 March 2007.
2. Pursuant to the contract, the Respondent was to provide construction (plumbing) goods and services ("the works") for the Applicant at the premises of "Mayfair Medical Centre", situated in the Mayfair Village Shopping Centre, corner of Manly and Hargraves Roads, Manly West, Queensland.
3. Between 2 April 2007 and 9 May 2007, the Respondent performed works in accordance with the contract.
4. On 2 May 2007, the Applicant issued the Respondent with a purchase order for a hot water return pump in the amount of \$1,153.26.
5. On 11 May 2007, the Applicant recalled the Respondent to the site to perform extra work and the Respondent invoiced the Applicant in the amount of \$286.00.
6. On 16 May 2007, the Respondent issued its tax invoice, number 107542, to the Applicant for the amount of \$20,175.40, which included the amount of \$1,153.26 for the hot water return pump.
7. The total amount outstanding by the Applicant to the Respondent as of 18 May 2007, was \$20,461.40 ("the outstanding amount").
8. The Applicant failed to pay the outstanding amount within the terms of the contract and the Respondent served a payment claim, in accordance with the Building and Construction Industry Payments Act 2004 (QLD), on or about 30 May 2007.
9. The Applicant failed to serve a payment schedule, in accordance with the statutory time frame of the Building and Construction Industry Payments Act 2004 (QLD), and the matter proceeded to adjudication.
10. On or about 15 June 2007, the Respondent served a "Notice of Intention to Apply for Adjudication" on the Applicant.
11. On 19 June 2007, the Applicant served a "Payment Schedule" on the Respondent.
12. On 2 July 2007, the Respondent served on the Applicant and lodged with the Authorised Nominating Authority, RICS Dispute Resolution Service, its Adjudication Application.
13. The Applicant failed to serve on the Respondent and lodge on the Authorised Nominating Authority an Adjudication Response.

14. The matter proceeded to adjudication and the adjudicator requested further written submissions from the Respondent, which the Respondent provided.
15. The Applicant did not provide any comments on the Respondent's further written submissions.
16. On 18 July 2007, Mr Ken Spain, Adjudicator, found in favour of the Respondent and made the following order;
  - the Adjudicated amount in respect of the Adjudication Application dated 2 July 2007 is \$20,461.40 inclusive of GST;
  - the date on which the amount became payable is 23 May 2007;
  - the applicable rate of interest payable on the adjudicated amount is 10% per annum plus the Reserve Bank of Australia interest rate for 90 day bills; and
  - the Applicant is liable for both the ANA Application fees and the adjudicator's fees and expenses.
17. On or about 9 July 2007, the Respondent received a cheque from the Applicant for the amount of \$1,439.26.
18. On or about 13 July the Respondent received a second cheque from the Applicant for the amount of \$15,796.05 leaving a balance of \$6,251.52 outstanding from the Claimed/Adjudicated amount.
19. The Applicant failed to pay the full Adjudicated amount within the statutory time frame under the Building and Construction Industry Payments Act and the Respondent filed the Adjudication Certificate in the Magistrates Court at Brisbane, number 9450/07 on 30 July 2007, as a Judgment debt.
20. On 10 August 2007, the Respondent, through its solicitors, forwarded a letter of demand to the Applicant for the Judgment debt plus interest and filing fees of the Adjudication Certificate in the amount of \$104.24, totalling \$6,355.76.
21. On 14 August 2007, the Respondent received a cheque in the amount of \$6,251.52 (the amount of the judgment debt).
22. The amount of \$104.24 remains outstanding to the Respondent. This amount relates to the interest component on the judgment debt and the filing fees incurred by the Respondent when filing the Adjudication Certificate in the Magistrates Court.
23. On 21 August 2007, the Applicant served its Application by facsimile on the Respondent.
24. On 29 August 2007, the Respondent served its defence on the Applicant.
25. On 21 September 2007, the Applicant served its submissions as to the jurisdiction on the Respondent.

#### **ORDERS SOUGHT BY THE RESPONDENT**

1. The Application be dismissed; or in the alternative
2. That the Applicant file and serve the Respondent with a properly pleaded Application within seven (7) days; and
3. Should the Applicant fail to file and serve the Respondent with a properly pleaded Application within seven (7) days the matter will be struck out with costs awarded to the Respondent on an indemnity basis; or
4. Should the Applicant file and serve a properly pleaded Application within seven (7) days, the Respondent will have 14 days to file and serve its defence and/or counterclaim.
5. Costs to be reserved; and
6. Any such further Orders as this Honourable Tribunal deems necessary.

#### **RELEVANT LEGISLATION**

1. *Commercial & Consumer Tribunal ACT 2003*
2. *Queensland Building Services Authority Act 1991*
3. *Building and Construction Industry Payments Act 2004 (OLD)*
4. *Trade Practices Act 1974 (Cth)*

#### **AUTHORITIES**

1. *The Haggarty Group Pty Ltd v Harmony Group Pty Ltd* [2006] QCCTB 6 (25 January 2006)
2. *Northside Roofing Pty Ltd v Pires Constructions Pty Ltd* [2007] QDC 172 (17 January 2007)
3. *T & M Buckley Pty Ltd t/a Shailer Constructions v Sunbright Engineering Pty Ltd* [2007] CCT BN 106-06
4. *Di Carlo v Dubois & Ors* [2002] QCA 225;
5. *Fountains Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* [1988] 81 ALR 397;
6. *Colgate Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225

#### **HISTORY OF THE PROCEEDING**

1. The Respondent respectfully submits that as a result of the Applicant's insufficient and embarrassing pleadings contained in the statement of claim of its Application, the Respondent was unable to define the issues that the Applicant had raised.
2. On the Respondent's knowledge of the background of this dispute, the Respondent assumed that the Applicant:
  - was alleging that the Respondent had breached section 52 of the Trade Practices Act 1974 (Cth); or alternatively
  - was appealing or seeking a rehearing of the adjudication decision.
3. The Respondent submitted that; should it be correct in its above assumptions, the Commercial and Consumer Tribunal did not have jurisdiction to hear and determine the matter.

4. On 4 September 2007, the Commercial and Consumer Tribunal ordered that each party provide submissions in relation to jurisdiction.
5. On 21 September 2007, the Applicant served its submissions <sup>1</sup> as to the jurisdiction for the Respondent.
6. It is noted that; in those submissions:
  - the Applicant submits that <sup>2</sup> it is seeking an order for payment by the Respondent to the Applicant of \$8,990.52 made up of:
    - a. restitution of \$3226.09 for moneys allegedly paid by the Applicant to the Respondent in excess of the monies due to the Respondent under the building contract (“the amount in dispute”); and
    - b. reimbursement by the Respondent of unnecessary expenses incurred by the Applicant by way of relief consequential and/or ancillary to the order for restitution; and
  - the Application does not include any claim by the Applicant under the Trade Practices Act 1974 or way of an appeal from an adjudication or any claim under BCIPA.<sup>3</sup>
  - the Applicant’s term of “false and misleading information” in the Applicant’s statement of claim, refers to the Applicant’s view of the Respondent’s evidence in relation to the building dispute rather than as a reference to a breach under the TPA.<sup>4</sup>
  - the Applicant does not seek a review of the adjudication decision.<sup>5</sup>
  - the Respondent’s allegations that the Application includes matters that exceed the jurisdiction of the tribunal are not strong and based on the Respondent’s perception of what the Applicant “appears to be alleging” or “appears to be appealing”.<sup>6</sup>
7. **The Respondent respectfully submits that:**
  - a. The Applicant’s submissions, as well as its pleadings do not clarify or define the issues in dispute.
  - b. The Applicant’s submissions merely refute the Respondent’s assumptions, contained in its defence, that were based on the Applicant’s insufficiently pleaded statement of claim.
  - c. The Applicant has failed to support its denials that the tribunal does not have jurisdiction to hear and determine this matter with an explanation by way of supporting submissions, pleadings, statements, evidence or otherwise.
  - d. In accordance with the decision of *The Haggarty Group Pty Ltd v Harmony Group Pty Ltd* [2006] QCCTB 6 (25 January 2006) and *Northside Roofing Pty Ltd v Pires Constructions Pty Ltd* [2007] QOC 172 (17 January 2007): “The Commercial and Consumer Tribunal is not a court of competent jurisdiction to hear and determine matters under the BCIPA. “
  - e. The Applicant’s claim for reimbursement by the Respondent of alleged unnecessary expenses incurred by the Applicant by way of relief consequential and/or ancillary to the order for restitution appear to relate to the expenses directly incurred by the Applicant in relation to the adjudication decision. This includes <sup>7</sup>:
    - i. adjudicators fees - \$2,293.17;
    - ii. Respondent’s Application fee and interest - \$732.26;
    - iii. Applicants fee - \$229.00
    - iv. Applicant’s solicitors fees - \$2510.00
  - f. Whilst the Respondent acknowledges that the “amount in dispute” relates to a minor commercial building dispute pursuant to schedule 2 of the Queensland Building Services Authority Act, and the tribunal has jurisdiction to hear and determine such matters, the Respondent submits that until the Applicant files a properly pleaded statement of claim, which clearly identifies the claim for restitution as well as the claim for reimbursement (see paragraph 7(e) above) it can only be assumed that the Applicant is attempting to appeal or rehear the adjudication matter.
  - g. The Respondent respectfully submits that the Application on foot is an indivisible dispute between a minor commercial building dispute and an Adjudication, and when such matters as indivisible, the Tribunal, simply, does not have jurisdiction.<sup>8</sup>
  - h. Accordingly, the Respondent submits that the Commercial and Consumer Tribunal does not have jurisdiction to hear and determine the matter.

**In the Alternative:**

8. Should the Commercial and Consumer Tribunal hold that it does have jurisdiction, the Respondent respectfully submits:

<sup>1</sup> Submissions of the Applicant

<sup>2</sup> Ibid at Paragraph 3

<sup>3</sup> Ibid at Paragraph 12

<sup>4</sup> Ibid at Paragraph 13

<sup>5</sup> Ibid at Paragraph 14

<sup>6</sup> Ibid at Paragraph 15

<sup>7</sup> See the Orders that the Applicant seeks on its Application and at Paragraph 9 of the Statement of Claim

<sup>8</sup> *T & M Buckley Pty Ltd t/a Shailer Constructions v Sunbright Engineering Pt Ltd* [2007] CCT BN106-06

- a. That until the Applicant can provide to this tribunal a properly pleaded statement of claim (Application), the Respondent cannot provide the tribunal with submissions in respect to the jurisdiction; and
- b. The Respondent reserves its rights to query the jurisdiction of the tribunal on receipt of an amended and properly pleaded statement of claim (Application).

#### COSTS

1. The Respondent notes in the Applicant's submissions:
  - o The tribunal is not, as yet, received an Application from either party to be legally represented; and
  - o The tribunal has not granted the parties legal representation.
2. The Respondent respectfully submits as follows:
  - a. On 29 August 2007, the Respondent served its defence by facsimile on the Applicant under the cover of a letter from the Respondent's solicitors.
  - b. In that letter, the Respondent requested the Applicant's consent for legal representation.
  - c. The Applicant failed to respond to the Respondent's request.
  - d. Since then, the Respondent is aware that the Applicant has engaged legal representation, and indeed the solicitors of either side have been corresponding about this matter.
  - e. Therefore, the Applicant, whilst it has not formally engaged lawyers on the tribunal's record, cannot be said to be a true, self-represented Applicant.
  - f. In any event, the Respondent hereby gives notice that should this Honourable Tribunal find that it does have jurisdiction to hear and determine the Application on foot, the Respondent will make an Application for legal representation.
3. The Respondent acknowledges that should the Tribunal find that it lacks jurisdiction to hear this matter, the Tribunal is without jurisdiction to make any order as to costs.<sup>9</sup>
4. However, should this Honourable Tribunal order the Applicant provide a properly pleaded statement of claim as per the alternative orders sought by Respondent, the Respondent requests that the tribunal take into account the following submissions as to costs should the Applicant fail to file and serve the amended pleadings within the appropriate time.
5. Section 71 of the Commercial and Consumer Tribunal Act 2003 provides as follows:

71 Costs

  - (1) In a proceeding, the tribunal may award the costs it considers appropriate on -
    - (a) the Application of a party to the proceeding; or (b) its own initiative.
  - (2) The costs the tribunal may award may be awarded at any stage of the proceeding or after the proceeding has ended.
  - (3) If the tribunal awards costs during a proceeding, the tribunal may order that the costs not be assessed until the proceeding ends.
  - (4) In deciding whether to award costs, and the amount of the costs, the tribunal may have regard to the following—
    - (a) the outcome of the proceeding;
    - (b) the conduct of the parties to the proceeding before end during the proceeding;
    - (c) the nature and complexity of the proceeding;
    - (d) the relative strengths of the claims made by each of the parties to the proceeding;
    - (e) any contravention of an Act by a party to the proceeding;
    - (f) for a proceeding to which a State agency is a party, whether the other party to the proceeding was afforded natural justice by the State agency;
    - (g) anything else the tribunal considers relevant. Examples of paragraph (g)-The tribunal may consider whether a party to a proceeding is acting in a way that unreasonably disadvantages another party to the proceeding. The tribunal may consider whether the proceeding, or a part of the proceeding, has been frivolous or vexatious.
  - (5) A party to a proceeding is not entitled to costs merely because—
    - (a) the party was the beneficiary of an order of the tribunal; or
    - (b) the party was legally represented at the proceeding.
  - (6) The power of the tribunal to award costs under this section is in addition to the tribunal's power to award costs under another provision of this or another Act.
  - (7) The tribunal may direct that costs be assessed—
    - (a) in the way decided by a presiding case manager; or (b) by a person appointed by the tribunal.
    - (b) by a person appointed by the tribunal.
6. White, Williams and Wilson JJ in *Di Carlo v Dubois & Ors* [2002] QCA 225, cited two authorities which set out the circumstances in which the Court will be justified in making an order for indemnity costs. There were:
  - a. **Fountains Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd** (1988) 81 ALR 397;
  - b. **Colgate Palmolive Co v Cussons Pty Ltd** (1993) 46 FCR 225

<sup>9</sup> *Chancellor Park Retirement Village Pty Ltd v – Squire District Court of Queensland* 12 May 2004, McGill DCJ; *Carlson v Queensland Building Tribunal* [1999] 2 QdR 483 at 488 (White J).

7. Woodwod J in *Fountain* stated:  
*"I believe that it is appropriate to consider awarding "solicitor and client" or "indemnity" costs, whenever it appears that an action has been commenced or continued in circumstances where the Applicant, properly advised, should have known that he had no chance of success. In such cases the action must be presumed to have been commenced or continued for some ulterior motive, or because of some wilful disregard to the known facts or the clearly established law."*
8. In *Colgate*, Sheppard J, having reviewed the authorities in relation to indemnity costs stated that:  
*"There should be some special or unusual feature in the case to justify the court in departing from the ordinary practice [that being, to award costs on a party and party basis]."*
9. Sheppard J then went on to list the circumstances which warranted the exercise of the discretion to award indemnity costs and in doing so, agreed that because of some *"wilful disregard to the known facts or the clearly established law."*

**Applicant's submissions in reply**

1. The Respondent's Submissions in respect to the jurisdictional issues are largely contained in paragraph 7(a) to (h), occupying 1 page, of its Submissions.
2. The Respondent's Submissions 1 to 6 are under the heading of "History of the Proceedings" and in respect of those Submissions, the Applicant replies:
  - a. The Application was drawn by a lay person but adequately refers to the matters in dispute and the real issues of the matter have been denied in the Defence at paragraph 1(c), 2(c), 3(c), 4(c), 5(c), 6(c), 7(c), 8(c), 9(c) and 12. These denials indicate that the Respondent has been adequately apprised of the claims of the Applicant by the Application.
  - b. This was raised in paragraph 36 to the Applicant's previous Submissions and was not addressed directly by the Respondent in its subsequent Submission.
  - c. It is submitted that the pleadings are sufficient in this matter for the matter to proceed. In any case, the matters in dispute between the parties will be fleshed out in the parties' statements as is often the case in this jurisdiction.
  - d. The Submissions 2 to 6 are otherwise largely a recitation of what has occurred.
  - e. In respect of paragraph 7(a), it is submitted that the Application and the Submissions clarify the issues in dispute sufficiently for the purpose of the Tribunal in deciding whether this matter is within its jurisdiction.
  - f. However, a further point does need to be clarified in respect of the breakdown of the Applicant's claim.
  - g. The amount claimed by the Applicant in its statement of claim at Order 1(d) Applicant's fee \$229.00 refers to the Application fee paid to the Commercial and Consumer Tribunal upon filing of the Application; and the claim at Order 1(e) of Applicant's solicitor's fees \$2,510.00 is not a claim for solicitor's fees already incurred but is a speculation of what fees may be incurred by the Applicant in retaining solicitors in the Application before the Commercial and Consumer Tribunal. These items have been included in the statement of claim as a result of the Applicant's inexperience in the Tribunal practice and following on from ticking of the legal costs box in Part B of the Application.
  - h. Accordingly, the amount of the Applicant's claim is, in effect, amount in dispute \$3,226.09, the adjudicator's fee \$2,293.17, Respondent's Application fee and interest \$732.26 plus legal costs of the Application including the Application fee.
  - i. The Applicant's Submissions contain clear statements that the Application does not include the claims alleged by the Respondent in its Defence. That is a statement of fact and of the Applicant's position.
  - j. The Respondent, in its Submissions, appears to accept that if the Applicant has a claim from restitution then that can be heard by the Tribunal.
  - k. The Applicant submits that it is clear from the Application and the Submissions that the Applicant's claim for \$3,226.09 is simply a claim for restitution of an amount the Applicant claims has been overpaid pursuant to an Adjudication.
  - l. The Applicant repeats its Submission at paragraph 27 of its earlier Submissions that the Tribunal is expressly permitted by s100 of the Building and Construction Industry Payments Act ("BCIPA") to deal with the Applicant's claim for restitution and other appropriate orders.
  - m. The Applicant says that its claim for restitution of \$3,226.09 is for money overpaid pursuant to the building contract between the parties and that the claim for other expenses it has incurred are claimed for damages for breach of the building contract between the parties or indemnity under that contract for loss incurred.
  - n. The reference by the Applicant in its Claim to adjudicator's fee \$2293.17 and the Respondent's application fee and interest \$732.626 is simply to assist in the quantification of the loss the Applicant believes it has suffered in part as a result of the breach of the terms of the Building Contract by the Respondent. The Applicant may or may not be able to prove those items of loss as such damage but nevertheless is claiming them as damages arising out of the alleged breach of the Building Contract by the Respondent and not otherwise.
  - o. It is not for the Tribunal to assume that the Applicant is attempting to appeal or re-hear an adjudication matter as alleged by the Respondent.

- p. It is noted that the Respondent's Submissions appear to abandon its contention that the Applicant's claim contains a claim under the Trade Practices Act 1974.
  - q. The Applicant concedes that the Commercial and Consumer Tribunal is not a Court for the purpose of s19 of BCIPA.
  - r. With respect to the Respondent's advice that it will make an Application for legal representation, the Applicant advises that its present view is that given the very small amount of money involved in these proceedings that it would not be economical to have the parties legally represented and the issues are relatively straight forward and relate simply to whether the Respondent has been overpaid under the building contract between the parties or not and any other appropriate orders for damages for breach of contract that may flow therefrom.
  - s. It is submitted that the case referred to by the Respondent, namely **T & M Buckley Pty Ltd t/as Shailer Constructions v Sunbright Engineering Pty Ltd** [2007] CCT BN 106-06 has no application to these proceedings. It does not relate to a matter under s100 of BCIPA and is simply an authority for the proposition that a Counterclaim which is in the nature of a major commercial building dispute means that the proceeding as a whole becomes a major commercial building dispute and therefore cannot be heard by the Tribunal.
  - t. The Tribunal has not asked for The filing of further material such as an Amended Application or Affidavit material but simply for Submissions in respect of the nature of the Applicant's claim. The Applicant is happy to file an Amended Statement of Claim reflecting the matters stated in its Submissions if the Tribunal believes that appropriate, however it is the Applicant's position that the material is sufficiently clear on its face when the Application is read in conjunction with these Submission.
  - u. There is nothing in the Respondent's material which submits that one part or other of the Applicant's claim is outside of the Tribunal's jurisdiction.
  - v. The Applicant has never denied that an adjudication between the parties has taken place.
  - w. BCIPA, by its very nature, is meant to deal with an interim situation and that is why provision is made at s100 for parties to commence proceedings in a Court of Tribunal to make permanent findings with respect to disputes arising out building contracts.
  - x. The Applicant submits that this is one of those matters and refers to the following case authority in that regard.
3. **Cant Contracting Pty Ltd v Casella and Anor** [2006] QCA 538 is authority for the proposition that adjudication is only applicable in respect of an enforceable building contract which then may result in a payment on account, in effect, between the parties. Section 100 of BCIPA allows for a cross-claim to be made by a party to the building contract in another proceeding in respect of an enforceable building contract.
  4. The Applicant is not aware of any Queensland case authority on s100 of BCIPA. Section 32 is the similar provision in the Building and Construction Industry Security of Payment Act 1999 which is the New South Wales predecessor of BCIPA.
  5. **Shellbridge Pty Ltd v Rider Hunt Sydney Pty Ltd** [2005] NSWSC 1152 (14 November 2005) states in respect of s32 of the Building and Construction Industry Security of Payment Act 1999 (NSW) that:  
*"But it seems sometime to be not sufficiently appreciated that, although a judgment in debt may result from the adjudication process, there is no curtailing of contractual and other rights arising in relation to the performance of the relevant work. This is made clear by s32. Thus, if the principal has a claim for defective work or can show that the work charged for was not done or that there has been some other breach of contract or other actionable wrong by the contractor, the principal is free to pursue that claim in the ordinary way; and this is so regardless of the findings of the adjudicator..."*  
*It was pointed out in **Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd** (2005) 62 NSWLR 385 by Handley JA (with whom Santow JA and Pearlman AJA agreed) that a judgment entered under s25 is, by reason of s32(3)(b), effectively a provisional judgment, both in what it grants and what it refuses. His Honour added (at [21]):*  
*"A builder can pursue a claim in the Courts although it was rejected by the adjudicator and the proprietor may challenge the builder's right to the amount awarded by the adjudicator and obtain restitution of any amount it has overpaid."*  
*As Handley JA observed, the specific statutory context is one in which inconsistent judgments are contemplated and allowed" - Barrett J.*
  6. The Respondent's Submissions in respect to costs are contained under that heading in paragraphs 1 to 9, occupying 3 pages.
  7. With respect to the Respondent's Submission as to the costs, the Applicant does not believe there is anything in the Respondent's Submissions as to costs which justifies the Tribunal in the circumstances of this matter in ordering costs in this matter.
  8. With respect to the Respondent's advice that it will make an Application for legal representation, the Applicant advises that its present view is that given the very small amount of money involved in these proceedings that it would not be economical to have the parties legally represented and the issues are relatively straight forward and relate simply to whether the Respondent has been overpaid under the building contract between the parties or not and any other appropriate orders for damages for breach of contract that may flow therefrom.



## Decision

1. I agree with the respondent's submission that the applicant's statement of claim is inadequate and embarrassing and ought to be struck out, with the applicants being given leave to re-plead. For example, paragraphs four and seven of the statement of claim appear inconsistent with the applicant's submissions as to what it is claiming and the basis for those claims, whereas paragraphs eight and nine are neither particularised, nor are they related to any relief sought.
2. Nonetheless, what the applicant's submissions establish is that the applicant is claiming –
  - I. Restitution of an amount, allegedly overpaid under a construction contract; and
  - II. Restitution of amounts allowed to the respondents by an adjudicator under an adjudication pursuant to the *Building and Construction Industry Payments Act 2004* ("the BCIP Act") and, more particularly and importantly, Part 3 of that Act.
3. As to the first of those claims, that is clearly a matter in respect of which the Tribunal has jurisdiction as, on the face of the material, the proceedings are about a commercial building dispute between a building owner and a building contractor. So much, in any event, appears to be common ground between these parties.
4. It is the second of the abovementioned claims, about which there are concerns as to the Tribunal's jurisdiction. In terms of the QBSA Act this claim would not appear to be a matter within the Tribunal's jurisdiction as it would not be within the definitions of either commercial building dispute or domestic building dispute.
5. In submissions the applicant appeared to endeavour to bring this claim within the jurisdiction by categorising it as damages arising from some breach by the respondent of the construction contract. The breach is not identified or particularised in the applicant's submissions. Frankly, it is somewhat difficult to understand the nature of any breach which would give rise to such damages.
6. In any event, that would appear to me to be unnecessary in order to invest the Tribunal with powers to make orders as to restitution in respect of monies paid pursuant to the adjudication under Part 3 of the BCIP Act. This is because of the effect of section 100 of the BCIP Act, and more particularly sub-section (3). Section 100 of the BCIP Act is as follows:

### **100 Effect of part 3 on civil proceedings**

- (1) Subject to section 99, nothing in part 3<sup>10</sup> affects any right that a party to a construction contract –
  - (a) may have under the contract; or
  - (b) may have under part 2<sup>11</sup> in relation to the contract; or
  - (c) may have apart from this Act in relation to anything done or omitted to be done under the contract.*
- (2) Nothing done under or for part 3 affects any civil proceedings arising under a construction contract, whether under part 3 or otherwise, except as provided by subsection (3).*
- (3) In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal-
  - a. must allow for any amount paid to a party to the contract under or for part 3 in any order or award it makes in those proceedings; and
  - b. may make the orders it considers appropriate for the restitution of any amount so paid, and any other orders it considers appropriate, having regard to its decision in the proceedings.*
7. Pursuant to section 100 (3)(b) then, the Tribunal is empowered to make appropriate orders as to restitution in respect of any monies paid to a party to the construction contract (in this case by the applicant to the respondent) under part 3 of the BCIP Act. As I have noted the second part of the applicant's claim seeks orders in respect of some of such payments, those payments having been made under Part 3, namely, further to orders made by the adjudicator under that Part.
8. Accordingly, in my view, the Tribunal has jurisdiction to deal with all matters in issue before it and to make appropriate orders upon claims made, after dealing with, and making determinations upon, matters arising under the relevant construction contract.
9. Having said that, I direct that the applicant file an amended statement of claim within fourteen (14) days of the date of this decision, and the respondent, an amended defence within a further fourteen (14) days. The matter then should be referred to mediation. In the event that the mediation is unsuccessful the matter can be listed for further directions.

<sup>10</sup> Part 3 (Procedure for recovering progress payments)

<sup>11</sup> Part 2 (Rights to progress payments)