Vis Constructions P/L (1) : Laman & Charlene Halfhye (2) v James Lawson Cockburn (1) ; Kilfoy Cabinets (2)

JUDGMENT : JONES J. SUPREME COURT OF QUEENSLAND CIVIL JURISDICTION. CAIRNS. 19th April 2007

1. This is an application for costs by the applicants who have been successful in their quest to have set aside the adjudicators determination made pursuant to the Building and Contractors Industry Payments Act 2004(BCIPA). The Court has a general discretion to order costs in proceedings for judicial review but regard must be had to the specific statutory provisions set out in section 49 of the Judicial Review Act 1991. ***Minister for Transport v Anghel*** [1994] QCA 232.

2. These require particularly that the Court may have regard to such matters as the financial resources of the parties, whether the proceeding involves issue or affects or may affect the public interest, whether the proceeding discloses a reasonable basis for the application and whether the case in review can be supported on a reasonable basis..

3. As to these matters, it is clear that the dispute arose out of what was essentially a private matter between the applicants and the second respondent. The choice of progressing the claim to an adjudication was perhaps encouraged by a belief that the remedies under BCIPA were more of expedient, less expensive and generally to be preferred to the normal progress of claims through the Court. At the time when the adjudication proceedings were commenced under the strict timelines provided by the legislation, the amount of the claim was not precisely known but it would not on any view have exceeded $15,000. The fact that the second respondent chose, and persisted in, that course exposed some of the shortcomings of this procedure when claims are small.

4. If the contest had been between a publicly funded organisation and the unsuccessful respondent some reasonable allowance would have to be made on the quantum of costs on this account. But as the issue was essentially between private individuals, the public interest in this incidence must be seen to be less. However, to some extent there is a public interest component which should ameliorate the impact of costs otherwise to be ordered.

5. The applicants, though successful overall, did lose on some issues which were argued. The issues on which the applicants were unsuccessful were not so significant as to impact on costs to any substantial degree, certainly not to the extent that there should be no order for costs as the respondent contends. Nonetheless, this should be a factor for some discretion based reduction on the quantum of costs bearing in mind that it was the choice of the second respondents to go to adjudication that led to the litigation in the first place.

6. The adjudicator was made a party to the proceedings as the first respondent but became involved only to the extent of notifying an intention to abide the Court's order. The first respondent should not, in these circumstances, be subject to any order for costs for his role in these proceedings.

7. There was a submission by both the second applicants and the second respondent that each of them should be entitled to an indemnity certificate under the Appeal Cost Fund Act on the basis that the flawed adjudication proceeding was (a decision) to which the Act applies.

8. I was referred to the decision of **Geraghty v The Dairy Industry Tribunal** (2000)QSC 145 where Justice Wilson granted a certificate pursuant to section 15 of that Act. She held that the tribunal there was a quasi judicial tribunal and came within the definition of "Court" for the purpose of the Act. That definition reads;

9. *"Court" includes any board, other body or person on whose decision there is an appeal to a Superior Court on a question of law or to resolve any question of law in the form of a special case for the opinion of a Superior Court."*

10. It is easy to see how a statutory tribunal would fall within that definition. This has been found in respect of such tribunals as the Small Claims Tribunal, Retail Shop Leases Tribunal and Anti-Discrimination Tribunal. But here the adjudicator by acting in accordance with the statute does not have the same statutory standing, in fact, as Justice McDougall of the New South Wales Supreme Court stated in ***Musico versus Davenport*** (2003) NSW SC977; "The position of an adjudicator is not completely analogous to that of an administrative tribunal."

11. He went on to say, "*Nor is it closely analogous to that of an "inferior Court (which was pointed out in **Craig versus South Australia** (1995) 184 CLR 163).."The position is, in my view, closely analogous to that of an expert by whose determination the parties have agreed to be bound. Care needs to be taken in seeking to apply decisions on a different legislative 10 scheme."*

12. Whilst this passage was concerned with what type of decision by an adjudicator would constitute a jurisdictional error it does offer guidance as to the difference between an adjudicator and a statutory tribunal. That difference leaves me unpersuaded that an adjudicator falls within the definition of "Court" for the purpose of section 15 of the Appeal Cost Fund Act. Nor would it seem that sections 22 or any other provision of the Act is applicable. I decline therefore to grant an indemnity certificate as sought.

13. As to the quantum of the adjudication fee which has been paid already by the owner, the second applicants urge that I should find the adjudicator fees to be excessive and unreasonable contending that they should be assessed in the sum of $1,860 and order a repayment of the fee charged in excess of that amount. No case is shown whereby the Court has power to make such an order. In fact, counsel referred me to authorities which suggest the contrary in ***Queensland Fish Board v Bunny*** (1979) QR301, Connolly J said at (p.303) "*It must be remembered that there is well established principle that apart from the inherent jurisdiction of the Court of Chancery costs are entirely the creation of statute and there is no common law or jurisdiction in tribunals to grant costs. Some of the older decisions suggest that the power to award costs must be conferred in express terms but the better view would seem to*

be that the power can be conferred expressly or by necessary implication. Having regard to this principle however the power must clearly appear."

14. A detailed consideration of an adjudicator's power (or lack of it to order costs was considered by McGill DCJ in ***Woodrange Pty Ltd v Le Grande Broadway Body Corporate*** (2004) QDC 215. He held (at paragraph 42) that "A cost of adjudication" is a reference to the amount payable to the specialist adjudicator and does not include legal expenses incurred by either party in connection with the adjudication.

15. My concern on this application is limited to legal costs incurred in pursuing the application before the Court. In my view, it does not include a consideration of who bears responsibility for the adjudicator's fee. I decline, therefore, to make orders that were sought with respect to the adjudicator's fee.

16. As McGill DCJ noted (at paragraph 47) *"An inability to order costs of an adjudication may often lead to serious injustice because of the way the proceedings are conducted."* That may well be the position here but be that as it may the Court can not rectify that disadvantage. There may, of course, be avenues of redress through the professional associations involved in adjudication proceedings.

17. Taking these matters into account, I am satisfied that the first and second applicants should recover the major proportion of their costs. In this instance the applicants have made a concession by seeking costs only on the relevant Magistrates Court scale that is significantly less than the amount which would ordinarily be paid if the costs, even reduced costs as I had in mind, were to be assessed in the ordinary way in the Supreme Court.

18. My order will therefore be that the second respondent pay the first and second applicants' costs to be assessed on the Magistrates Court scale.