

**CATCHWORDS:** Application for indemnity costs – proceeding struck out – conduct of applicant.

**REASONS FOR DECISION : Mr D Morzone.** Queensland Commercial & Consumer Tribunal - Building List. Brisbane. 11<sup>th</sup> January 2007

### Introduction

1 This is an application made by the respondent seeking indemnity costs of the proceedings against the applicant pursuant to sections 70 and 71 of the *Commercial and Consumer Tribunal Act 2003*. The respondent was represented at the hearing and the applicant failed to appear

### Failure to Appear by Applicant

- 2 At the commencement of the hearing, there was no appearance by the applicant. The Tribunal officer called the name of the applicant in the precincts of the hearing room and there remained no appearance.
- 3 The affidavit of service of Katharine Elizabeth Wright filed 16 November 2006 deposes to service of the application in a proceeding, the outline of submissions, and the affidavit of Craig Mitchell Hall on 15 November 2006. In addition, the Tribunal registry sent by pre-paid post and by facsimile transmission the notice of hearing (application in a proceeding) to the applicant on 21 December 2006. There was no indication on the registry file that the notice was returned unclaimed. The notice of hearing shows the time, date and place of the hearing of the application in a proceeding.
- 4 I am satisfied that the applicant has been given due notice of the proceedings and I direct that the application proceed in the party's absence, pursuant to section 114(4) of the *Commercial and Consumer Tribunal Act 2003* ("the CCT Act").

### Background

- 5 The respondent builder entered into a sub-contract with the applicant in relation to a project for renovations of houses located in Mt Isa, Cloncurry, Cammoweal, Julia Creek and Dajarra Districts. After completing the work, the respondent submitted a payment claim for the amount of \$52,541.12 (including GST) in accordance with the *Building and Construction Industry Payments Act 2004* ("BCIP Act").
- 6 The respondent proceeded under the BCIP Act to adjudication. An adjudication certificate was issued in the sum of \$55,403.28. That certificate was registered as a judgement in the District Court at Southport to constitute a judgement of that Court pursuant to the provisions of the BCIP Act.
- 7 The applicant then embarked upon various court and tribunal proceedings. Shortly after the adjudication, the applicant sued the respondent in the District Court at Mt Isa claiming that the respondent performed defective or incomplete work. Those proceedings were discontinued prior to filing of a defence. The applicant then sought to review the adjudicator's decision in the Townsville Supreme Court without joining the respondent at the time to those proceedings. Again those proceedings were discontinued prior to the respondent being joined. The applicant then commenced these proceedings in the Tribunal for damages to rectify defective and faulty workmanship and incomplete work. The proceedings were contested by the respondent filing a defence. However the applicant failed to advance the Tribunal proceedings in a material way.
- 8 In the meantime the applicant paid an amount of \$54,191.12 into the respondent's solicitor's trust account but failed to authorise the release of those monies. The respondent intended to pay the funds into the Supreme Court and then seek an order releasing the funds to the respondent upon being joined to the review proceedings. That joinder never occurred since the proceedings were discontinued prematurely. The respondent was forced to apply to the District Court and obtained an order for the release of the trust account funds to the respondent.
- 9 On 9 June 2006 the Tribunal made usual directions orders for the parties to file material and otherwise be ready for hearing. The directions noted that the mediation did not proceed. I note the report from the mediator had significant difficulty contacting both the legal representatives and the personnel associated with the applicant. The respondent's solicitor had been informed of the ill health of one of the applicant's representatives and properly assumed similar notice would have been given to the Tribunal and the mediator. The respondent's solicitor properly attended to deal with the matter in those circumstances. On the further directions hearing on or about 28 August 2006, the applicant again failed to appear. The Tribunal made further orders requiring the applicant to file and serve its statements of evidence and documents as previously ordered. Paragraph 2 of the order provides:-  
*2. Noting that the applicant has not complied with the directions made by the Tribunal on 9 June 2006, in the event that the applicant does not comply with paragraph 1 of this order, the application is struck out effective from 4:00pm ON 4 September 2006."*
- 10 Paragraph 1 of the order required the applicant to file and serve statements of evidence and other documents by 4:00pm on 4 September 2006. The Tribunal file demonstrates that the applicant failed to file such documents and the material relied upon by the respondent demonstrates that the applicant never served any such documents.
- 11 In those circumstances the respondent has brought an application for costs of the proceedings to be assessed on an indemnity basis

### Costs

- 12 The Tribunal's jurisdiction in respect of costs is dealt with in Part 5 Division 7 of the *Commercial and Consumer Tribunal Act 2003*. Section 70 provides that the purpose of the Division is to have "parties pay their own costs unless the interests of justice requires otherwise". The costs power has been considered by the Court of Appeal in *Tamawood Ltd & Anor v Paans*.<sup>1</sup> At paragraph [23] Keane JA held that:
- "... The language of s. 70 & s. 71(5)(a) is sufficiently clear to negate the opposition that costs should, prima facie, follow the event unless the Tribunal considers that another order is more appropriate. In this regard, it is clear that the power of the court or tribunal to award costs to a party is now creature of statute. The nature and extent of that power can only be discerned by close consideration of the terms of that statute which creates the power and prescribes the occasions for, and conditions of, its exercise. In the performance of this task, obligations of the courts in relation to the operation of other statutory regimes relating to costs may afford general persistence but they cannot be allowed to distract attention from the terms of the particular statute in question."
- 13 It seems to me that the general rule is that parties should pay their own costs, unless good reason is shown in terms of the interests of justice in making a different order for costs in a proceedings.
- 14 Section 71 of the CCT Act implements the purpose by empowering the Tribunal to award costs it considers appropriate. In deciding whether to award costs, and the amount of the costs, the Tribunal may regard to the following matters listed in sub-section 71(4):
- (a) the outcome of the proceeding;
  - (b) the conduct of the parties to the proceeding before and 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) (not relevant);
  - (g) anything else the Tribunal considered relevant.
- 15 The outcome of the proceeding was governed by the want of prosecution by the applicant. Its failure to comply with the directions and orders of the Tribunal and its apparent disregard for any procedure of the Tribunal after filing the application, met with the order that the application be struck out made on 28 August 2006 effective from 4:00pm on 4 September 2006.
- 16 The conduct of the applicant as set out in the background above showed a party willing to take advantage of forum shopping with the consequence of delaying and avoiding its obligations after the adjudication decision. In stark contrast, the respondent has actively and properly discharged its procedural obligations both before and during these proceedings.
- 17 The circumstances of the determination of these proceedings render my consideration of some of the factors of lesser importance, for example the management and complexity of the proceeding and the relative strengths of the parties' claims. In my view, the conduct of the applicant by the early discontinuance of the Supreme Court and District Court proceedings coupled with its failure to prosecute these proceedings, evidence a complete capitulation and abandonment of any claim.
- 18 I have also had regard to the attempts by the respondent to resolve proceedings with a view to saving costs and inconvenience of further litigation. By letter of 16 March 2006, the respondent's solicitors wrote to the applicant's solicitors making an open offer for the applicant to release the trust account funds in consideration of the respondent and the applicant releasing each other of all claims, rights and remedies that each party had or may have had against each other, including the deficiency in the adjudicated amount/registered judgement. Timely acceptance of that offer would have avoided the delay, inconvenience and cost of these proceedings. Instead, the applicant elected to commence the proceedings in the Tribunal shortly afterwards on 21 March 2006.
- 19 Having regard to those relevant considerations, I will order that the applicant pay the respondent's costs of the proceedings. The respondent relies upon the decision of *Colgate – Palmolive Co & Cussons Pty Ltd*,<sup>2</sup> to submit that those costs should be assessed on an indemnity basis. In that regard, I take account of the following:
- 1. the conduct of the applicant that caused loss of time to the Tribunal and respondent;
  - 2. the contumelious disregard of the applicant to the Tribunal throughout the process in this Tribunal after filing the application;
  - 3. the making of allegations and initiating court and tribunal proceedings with no demonstrative intention to prosecute those proceedings, and apparently capitulating perhaps with acknowledgement that the actions were groundless.
- 20 In my view, the costs should be assessed using the scale of costs applicable to a judgement for a similar amount in the District Court assessed on an indemnity basis.

### Orders

- 21 The Tribunal makes the following orders:
- 1. The applicant will pay the respondents costs of the proceeding to be assessed on an indemnity basis using the District Court Scale relating to judgements of more than \$50,000.00

<sup>1</sup> [2005] QCA 111 at [16] and [23] – [24]

<sup>2</sup> (1993) 118 ALR 248 at 254 - 256

2. The respondent's costs will be assessed and payable as follows

- (a) the respondent shall deliver to the applicant an itemised bill of costs as assessed by Queensland Independent Costing Services;
- (b) the applicant will pay the respondent's costs (as assessed) within 14 days of service of the bill of costs upon the applicant.

**MS J SCHAFER CHAIRPERSON Commercial and Consumer Tribunal**