

**DECISION : D.Sheehan. Member. Consumer Trader & Tenancy Tribunal. General Division. 20<sup>th</sup> October 2004**

**APPLICATION**

The applicant filed an application on 16 April 2004 in this Tribunal for orders under the Consumer Claims Act, asserting goods supplied by the respondent were not of merchantable quality and a breach of a contract with the respondent in that not all goods were supplied by an agreed date.

In an attachment to that application the applicant sought relief from payment and that the respondent pay her the sum of \$3,950.00.

By amendment made at the hearing on 13 August 2004 the applicant sought orders:

- 1 That the respondent pay the applicant the sum of \$3,950.00 or such other sum as the Tribunal determined pursuant to section 8(1)(a) *Consumer Claims Act 1998*.
2. An order declaring that \$7,500.00 or such other sum as the Tribunal determines is not due or owing by the applicant to the respondent pursuant to section 8(1)(d) *Consumer Claims Act 1998*
3. Costs pursuant to section 53 of the Consumer Trader and Tenancy Tribunal Act 2001.

The gist of this amendment had been forecast prior to that hearing.

At the first hearing on 12 May 2004 the director of the respondent who appeared produced a photocopy of a determination by an Adjudicator under the *Building and Construction Industry Security of Payment Act 1989* ("the BCISP Act") dated 7 May 2004, requiring the applicant to pay the respondent the sum of \$7,636.50, by the fifth business day after the date of service of that adjudication, together with the adjudication fees.

In the light of that document, which had apparently not been served at that stage upon the applicant, leave was granted to both parties to be legally represented. Directions were made for the Tribunal to determine at the next hearing, following the receipt of submissions by the parties' legal representatives, whether the Adjudicator's determination disposed of the application before the Tribunal.

The respondent submitted at that hearing, that in view of the determination by the Adjudicator, the Tribunal had no jurisdiction.

Affidavits, the certificate of adjudication, and some written submissions were filed and served.

On 13 August 2004, the application to determine the issue of jurisdiction was heard, with both parties being represented by Counsel. In addition to oral submissions, two submissions from each Counsel were also received, at the hearing and shortly after. There has apparently been subsequent correspondence, but the Tribunal has determined the issue on the basis of the affidavits filed and the written submissions of both Counsel, all of which have clearly been served.

**Chronology**

There has been some dispute by the respondent as to statements made in the applicant's affidavit concerning the order of events. The Tribunal will therefore largely use the chronology supplied by the respondent (with comments) together with information on the Tribunal's file prior to 13 August 2004.

Date	Event
19 December 2003	On or about this date an agreement was reached between the applicant and the respondent for certain construction work at commercial premises to be carried out, including supply of related goods and services. A payment of \$8,000.00 was made by the applicant to the respondent as a deposit.
December 2003 / January 2004	Work was carried out by the respondent and goods supplied at the premises.
3 March 2004	The respondent wrote to the applicant claiming a further \$7,328.50 for work performed to date.
8 March 2004	The applicant wrote to the respondent terminating the arrangement between the parties.
12 March 2004	The respondent's solicitors Turner Freeman wrote to the applicant demanding payment and reserving rights to bring proceedings or refer for adjudication.
19 March 2004	The applicant (apparently) signed an application to the Consumer, Trader and Tenancy Tribunal (but did not file it).
31 March 2004	The respondent served on the applicant a "payment claim" referring to it as a payment claim under the BCISP Act for the above sum.
16 April 2004	The respondent writes again to the applicant with a demand for the above sum.
16 April 2004	Applicant's application is accepted/filed in the Consumer, Trader and Tenancy Tribunal Registry (CTTT), having been forwarded by the applicant by express post
20 April 2004	The applicant is served personally with the letter of 16 April 2004 seeking the above payment and giving the applicant an extension of time to provide the payment schedule, so that procedures under the BCISP Act can be satisfied for the respondent to apply for adjudication.
23 April 2004	The notices of hearing for the CTTT application are posted out by the CTTT Registry to both parties.

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30 April 2004	The respondent files an adjudication application to an (apparent) authorised nominating authority under the BCISP Act, paying the filing and adjudication fee.
5 May 2004	The respondent serves the applicant with a letter dated 4 May 2004 referring to the application to the Adjudicator. It is presumed, but not entirely clear, that the adjudication application and correspondence are annexed to it and also served on the applicant with that letter. (This may be disputed by the applicant).
7 May 2004	The Adjudicator made a determination, as set out above, that the respondent is to pay the applicant the sum of \$7,636.50 together with adjudication fees, the amount of which was not advised at that time.
12 May 2004	The application for conciliation and hearing comes before the CTTT (before the present Member) and directions are made as referred to above. The applicant receives a photocopy of the Adjudicator's determination from the director of the respondent.
13 May 2004	The applicant is served by the respondent with the full copy of the determination and reasons, together with the notice of acceptance of adjudication application, the adjudication response form and other documents apparently before the Adjudicator.
7 June 2004	The adjudication certificate under the BCISP Act is issued, noting the Adjudicator's fees at \$2,100.00.
17 June 2004	The Local Court for enforcement. It appears that the enforcement proceedings in the Local Court are currently stayed.

A copy of the adjudication certificate, the determination and reasons are attached to these reasons.

Relevantly for the purposes of the present decision, the determination by the Adjudicator referred to the BCISP Act and then went on: *"In respect of the claimant's payment of Claim, dated 30 March 2004 and served on the respondent on 31 March 2004, I determine that the amount of the progress payment to be paid by the respondent to the claimant is \$7,636.50 and the date upon which payment became due and payable is 16 April 2004."*

**REASONS**

The Adjudicator refers to matters of jurisdiction, and continues: *"I am satisfied that the claimant's payment claim, being a tax invoice and dated 30 March 2004 meets the requirements of section 13 of the Act and is a valid payment claim. The claimant's payment claim is for \$7,636.50.*

*I am satisfied that the applicant has carried out the work and is entitled to be paid their payment claim in the sum of \$7,636.50.*

*The respondent did not provide a payment schedule within 10 business days. The respondent has provided no reason, or evidence of a valid reason, for not paying the payment claim.*

*The claimant has provided evidence to me and I am satisfied that they have provided the notice to the respondent as required by section 17(2) of the Act on 16 April 2004.*

*I find no express provision in the contract for date of payment: therefore I find that the due date for payment is 10 business days after the payment claim was made [ S11(1) of the Act] the due date is 16 April 2004." .....*

*I am satisfied that the respondent has no valid reasons for not paying the amount claimed. Consequently the respondent should pay the whole of the adjudication fees .....*

Also possibly relevant, the invoice dated 30 March 2004 referred to the relevant business premises and itemised the amount of work to total the amount claimed, describing various itemised parts as joinery works, including supplying a counter, unit and cabinet, a marble counter, grinding washing and painting a concrete floor, fixing of the marble counter and consultation and design work.

**DECISION** : The application in this Tribunal relates to the work in December 2003 and January 2004 and is within the time limits as prescribed in the Consumer Claims Act 1998. The applicant would appear to be a consumer under that Act, and the orders sought relate to the supply of goods and services by the respondent, establishing potential jurisdiction under that Act. The orders for payment of money and relief from payment can be made under section 8 of that Act. The monetary claims are within the jurisdiction of that Act.

The respondent has challenged that jurisdiction and thus the onus lies on the respondent to disprove jurisdiction.

The respondent's Counsel submits, and it does not appear to be disputed by the applicant's Counsel, that the work involved in the contract is construction work, or alternatively related goods and services, under sections 5 and 6 respectively of the BCISP Act.

It would further appear that the right to a progress payment such as was claimed by the respondent before the Adjudicator can be established by the respondent.

The procedure for recovering the progress payment as set out in sections 13 and 14 of that Act refers to the serving of a "payment claim" on the person who under the construction contract may be liable. This would appear to have been done, and section 14 allows for a payment schedule to be then submitted by the person who receives the claim, that is, the applicant in the CTTT proceedings.

In his submission, Counsel for the respondent sets out section 14 (3) of the BCISP Act, which provides;

(3) *If the scheduled amount is less than the claimed amount, the schedule must indicate 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.*

There is no dispute that no payment schedule was ever provided by the present applicant. Section 15 of the Act then sets out the consequences where no payment schedule is submitted. Relevantly it is submitted, section 15(4) sets out :

(4) *If :*

(a) *A claimant commences proceedings under sub-section 2(a)(1) to recover the unpaid portion of the claimed amount from the respondent as a debt:*

(b) *Judgement in favour of the claimant is not to be given unless the court is satisfied of the existence of the circumstances referred to in sub-section (1), and*

(c) *The respondent is not, in those proceedings, entitled:*

*i to bring any cross-claim against the claimant, or*

*ii to raise any defence in relation to matters arising under the construction contract.*

The respondent's Counsel also points out that once the judgement is entered, under section 25(4) (a)(iii), that judgement cannot be attacked on the basis of jurisdictional error in the certificate which led to the judgement. Two decisions of the New South Wales Supreme Court are cited as authority, *Rail Infrastructure Corporation v Veghelyi* [2004] NSWSC 427 (11 May 2004) and *Musico & Ors v Davenport & Ors* [2003] NSWSC 977 (31 October 2003). The Tribunal concurs in that view.

The primary thrust of the submissions of respondent's Counsel is that section 25(4) of the Act makes it impossible for the applicant to succeed in what the applicant is attempting to do in the CTTT proceedings. Once the applicant has proceeded (as she has done) to have the judgement set aside, the applicant is not entitled, in those proceedings, to bring any cross-claim against the claimant (respondent) or raise any defence in relation to matters arising under the construction contract or to challenge the Adjudicator's determination. The applicant must pay into court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings (which has not been done).

In addition, Counsel submits that the reality in the present case is that all the issues between the parties were the subject of proceedings before the Adjudicator and it was always open to the applicant to make submissions or to seek some other orders. The applicant chose not to do that before the Adjudicator or to comply with the BCISP Act. It was submitted that the applicant was in reality attempting to set aside that adjudication and that can only be done in the Supreme Court by means of prerogative writ. It was submitted that the claim in the CTTT was an attempt to defeat the legislative process of the BCISP Act.

Counsel quotes from paragraph 4 of the second reading speech of the Minister of 12 November 2002, an extract of which is as follows: *"...the Bill clarifies that in court proceedings by a claimant to enforce payment of the debt due under the Act, a respondent will not be able to bring any cross claim against the claimant and will not be able to raise any defence in relation to matters arising under the construction contract. A respondent who wants to raise these matters must do so in a payments schedule in response to a payment claim under the Act or in separate proceedings."* [Tribunal's underlining]

Unless the Tribunal is mistaken however, there is an inherent problem in those submissions. Section 15(4) refers to proceedings by the claimant (respondent in these proceedings) to recover the unpaid portion of the claimed amount. Those proceedings could only be the Local Court proceedings that are currently stayed. The section goes on to state: *"the respondent is not, in those proceedings entitled...to bring any cross claim or to raise any defence in relation to matters arising under the construction of contract."* [Tribunal's underlining]

That is those cross-claims or defences cannot be raised in the Local Court proceedings. The proceedings currently in the CTTT are manifestly **not** those proceedings.

Furthermore, the quote from the second reading speech indicates that a respondent who wants to raise those matters (and does not do so in the payment schedule) must do so in *"...separate proceedings"*. The proceedings in the CTTT are those very same, *'separate proceedings'*.

Quite fairly, Counsel refers to section 32 of the Act which allows for the rights that a party may have under a construction contract to be preserved. Those rights, and the rights under the Consumer Claims Act (and per force the Fair Trading Act) are the rights that the applicant is pursuing in these proceedings.

The applicant's Counsel in her submissions supports the above reasoning.

Furthermore, Counsel for the applicant submitted that the BSCIP Act is concerned with progress payments and any determinations made are only interim. They are not intended to finally determine the rights and obligations as between the parties, referring to *Paynter Dixon Construction Pty Limited v JF & CG Tilston Pty Limited and Anor* [2003] NSWSC 869 (25 September 2003) at page 9.

This was emphasised by Einstein J in *Brodyn Pty Ltd T/as Time Cost and Quality v Philip Davenport and Anors* [2003] NSWSC 1019 where His Honour says: *"What the legislature had provided for is no more or less than an interim quick solution to progress payment disputes which solution critically does not determine the parties rights inter se. Those rights may be determined by curial proceedings, the court then having available to it the usual range of relief, most importantly including the right to a proprietor to claw back progress payments which it had been forced to make through the adjudication determination procedures."*

The applicant's Counsel in her supplementary submissions made at the hearing on 13 August 2004 provided submissions in relation to section 22(3) and (7) of the Consumer Trader and Tenancy Tribunal Act 2001 (CTTT Act). Those submissions were made on the assumption that an Adjudicator under the BCISP Act is a court for the purposes of the definition of court in that section.

In the time available, it is not appropriate to set out those submissions in full, but they will be annexed to this decision.

Based on those submissions, and the submissions of Counsel for the respondent put before the Tribunal on 13 August 2004 and subsequently, the Tribunal finds that the Adjudicator is a court for the purposes of section 22(1).

That is because the definition states:

**22. Other jurisdictions excluded in certain cases**

(1) For the purposes of this section, **court** means any court, tribunal, board or other body or person (other than one referred to in subsection (2)) that:

(a) is empowered under any other Act, or

(b) by consent of or agreement between 2 more persons has authority,

to decide or resolve any issue that is in dispute, whether through arbitration or conciliation or any other means.

That is clearly the role of the Adjudicator under the BCISP Act. The definition extends to "... another body or person".

So far as the Tribunal is aware, an Adjudicator under that Act is not exempted under the regulations referred to in subsection 2(b) of section 22.

Referring then to sub-section 3 which is as follows:

**22. Other jurisdictions excluded in certain cases...**

(3) If, at the time when an application was made to the Tribunal in accordance with this Act, no issue arising under the application was the subject of the dispute and proceedings pending before a court, a court has no jurisdiction to hear or determine such an issue.

As noted above, the Tribunal proceedings were filed on 16 April 2004. The application for adjudication was filed on 30 April 2004. Counsel for the respondent submitted that the proceedings before the Adjudicator commenced on 31 March 2004 when the payment claim was served on the applicant. With respect, it would appear to this Tribunal that proceedings are only "pending" before the Adjudicator when the adjudication application is filed, that is 30 April 2004.

Counsel submitted a number of decisions dealing with definitions of the words "pending proceedings", which appear to support in fact the above reasoning. All referred with approval to the submitted definition in the sixth edition of Stroud's Judicial Dictionary (at p 1910), namely:

A legal proceeding is "pending" as soon as commenced, and until it is concluded.

It therefore follows that the Adjudicator's proceedings appear to be caught by section 22(3) of the CTTT Act. Whether that determination is invalid, however is a matter for another jurisdiction, in view of the provisions of section 25(4) (a) (iii) of the BCISP Act referred to above.

Indeed the Tribunal still necessarily has jurisdiction to continue to hear the applicant's claim, in the absence of any finding of an infringement of section 22(3).

Finally, Counsel for the respondent submitted that an issue estoppel arose because the applicant could have availed herself of filing a payment schedule or reasons for dispute in the proceedings before the Adjudicator. Reference was made to *Kuligowski v Metro Bus* [2004] HCA 34.

The passage referred to (at page 7, paragraph 21) is as follows:

In his speech in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at 935, Lord Guest, after noting that the doctrine of estoppel had been accepted by Australian courts for a number of years, indicated that, for the doctrine to apply in the second set of proceedings, the requirements were: "(1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel is said to be final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies."

On the facts as outlined in the respondent's chronology as set out above, the opportunity for the applicant (respondent in those proceedings) to raise those issues appears to have been very limited.

Further, for the reasons set out in section 32 of the BCISP Act, and under the reasoning in *Brodyn* above, the order of the Adjudicator is not a final, but only an interim order. With respect, the estoppel argument does not succeed, as requirement (2) of Lord Guest's summary is not satisfied.

Also, the issue of the merchantable quality of the goods supplied, and any delay in supply (both raised in the present application) were not dealt with as an issue in the Adjudicator's proceedings, which suggests requirement (1) was also not satisfied.

It may be that the application for "**relief from payment**" is in effect an attempt to go behind, or set aside the Adjudicator's determination. If so, it will not be heard at any subsequent hearing. The remaining issues are still extant.

The Tribunal therefore has jurisdiction, at the least to determine the issues other than the application for relief from payment.

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The application will therefore be listed before the Tribunal in due course for directions, to proceed the matter to a hearing.

Costs are reserved, to be addressed at any subsequent hearing.

**APPEARANCES:**

Applicant and Director of Respondent at first hearing

At second hearing L Byrne of Counsel for applicant

J Sharpe of Counsel instructed by Messrs Turner Freeman Solicitors for Respondent