

DECISION : W J Tearle : Member. Consumer, Trader & Tenancy Tribunal. General Division. 20th April 2005

BACKGROUND TO THESE PROCEEDINGS

1. The Applicants, Mr P Meyer and Mrs T Meyer, had requested conceptual designs for certain buildings from the Respondent, Cessnock Commercial & Home Design Consultants Pty Ltd t/as Brian Burston Building Design Consultant. According to Mr Meyer, the Applicants agreed to pay the Respondent \$500.00 for each conceptual design. The Applicants and the Respondent did not reduce their agreement to writing.
2. The Applicants claim to have paid the Respondent for all the work performed. The Respondent later made a claim through a debt collector for payment of \$12,068.42. This amount represented the Respondent's claim under the unwritten contract, together with an additional sum representing charges said to be payable to the Respondent's debt collector. The Applicants then commenced proceedings in this Tribunal seeking an order that they did not have to pay the Respondent the sum of \$12,068.42
3. The Respondent, through its Director, Mr B Burston, claimed that the Applicants were legally obliged to pay it the disputed amount. The Respondent relied on the provisions of the *Building and Construction Industry Security of Payment Act 1999*.

CONDUCT OF THESE PROCEEDINGS

4. This matter first came before the Tribunal at a preliminary hearing before Member Thane on 21 December 2004. At that preliminary hearing, Member Thane issued appropriate directions. The substantive hearing was conducted on 25 February 2005 before Member Tearle. Mr P Meyer appeared for himself and his wife, while Mr B Burston, Director, represented the Respondent, Cessnock Commercial & Home Design Consultants Pty Ltd t/as Brian Burston Building Design Consultant.
5. At the substantive hearing, the presiding Member carefully read and considered every word of the detailed written submission and other material submitted by Mr Burston in support of the Respondent's claim to payment. The Respondent relied in particular on the provisions of the Building and Construction Industry Security of Payment Act 1999. At the substantive hearing, the presiding Member gave Mr Burston every opportunity to outline to the Tribunal how that Act might apply in the circumstances of the proceedings then before the Tribunal. The Tribunal went to some lengths to ensure that the Respondent had an opportunity to demonstrate its claim for payment. For instance, the presiding Member restated in different ways the issues as to whether, and how, the Building and Construction Industry Security of Payment Act 1999 might properly be applied in the current proceedings.
6. At the conclusion of the hearing on 25 February 2005, the presiding Member announced to the parties the Tribunal's decision and the Tribunal's orders. The presiding Member also outlined to the parties in some detail the Tribunal's reasons for its decision. Both Mr Meyer and Mr Burston were present to hear the presiding Member give the Tribunal's reasons for its decision.
7. On 21 March 2005, Mr Burston requested on behalf of the Respondent a statement of the Tribunal's reasons for its decision dated 25 February 2005. The Tribunal received this request on 22 March 2005. However, the presiding Member did not receive this request for reasons until Thursday 7 April 2005. By that time, the presiding Member had been appointed to a senior full-time office elsewhere in the New South Wales quasi-judicial system. Accordingly, to avoid any delay to Mr Burston, the presiding Member has prepared this statement of the Tribunal's reasons while absent from the Tribunal. Saturday 17 April 2005 has been the first opportunity the presiding Member has had to prepare these written reasons. The Tribunal now provides these written reasons in response to the Respondent's request.

FINDINGS AND REASONS

APPLICANTS' EVIDENCE AND SUBMISSIONS

8. The Applicants claimed that they requested conceptual designs for certain buildings from the Respondent, Cessnock Commercial & Home Design Consultants Pty Ltd t/as Brian Burston Building Design Consultant. Mr Meyer testified that he offered the Respondent \$500 for each conceptual design, and that he paid the Respondent \$500 for each design completed.
9. Mr Meyer conceded that the contract between the parties was not in writing. Their agreement was formed in September 2003. Mr Meyer told the Tribunal that he received no invoices or statements from the Respondent until he received a tax invoice on 31 August 2004 seeking payment of \$10,655.00. The Respondent then appeared to have engaged a debt collector to recover the money it claimed the Applicants owed to it. The debt collector sent a notice to Mr Meyer, claiming payment on behalf of the Respondent of the amount of \$12,068.42.

RESPONDENT'S EVIDENCE AND SUBMISSIONS

10. The Respondent's Director, Mr B Burston, represented it at the hearings. Mr Burston agreed that the contract between the parties was not in writing. According to Mr Burston, in late 2003 the Applicants had asked him to prepare conceptual plans for buildings. Mr Burston testified that he quoted a fee of \$2,000 plus GST for each full conceptual plan. Mr Burston further testified that he produced seven such plans.
11. The Respondent contended that the provisions of the Building and Construction Industry Security of Payment Act 1999 applied to the arrangement between the parties.

FINDINGS AND REASONS

12. Before giving its decision at the conclusion of the hearing on 25 February 2005, the Tribunal carefully considered all the material, including submissions, presented to it by the parties.
13. The Tribunal had explained to the parties that, once the Applicants had demonstrated the circumstances in which their claim for relief from payment arose, the evidentiary burden shifted to the Respondent to show that it was entitled to payment of the amount that it claimed.

Claim under contract

14. The Tribunal found on the balance of probabilities that the Respondent had not demonstrated an entitlement to any further payment from the Applicants under the terms of any contract. The Respondent produced no evidence whatever in support of its claim that the Applicants had agreed to pay it \$2,000 plus GST for each block. The Respondent relied on its invoice for \$10,655.00. However, the Respondent was not able to demonstrate on the balance of probabilities that the amount claimed in that invoice was owing to it in law by the Applicants. Mr Burston conceded at the hearing on 25 February 2005 that there was an error in that invoice: the claim for payment for Lot 10 should have referred to Lot 5.
15. After carefully considering the evidence, the Tribunal accepted that Mr Meyer's evidence showed that:
 - the Applicants and the Respondent had agreed that the Applicants would pay \$500 for each completed conceptual plan; and
 - the Applicants had paid the Respondent for all the work it had completed.
16. There was no evidence before the Tribunal to suggest that the Applicants were contractually liable to pay any further amount to the Respondent. Similarly, there was no evidence before the Tribunal to support the Respondent's claim for any fees it might have incurred when it engaged a debt collector to act on its behalf.

Building and Construction Industry Security of Payment Act 1999

17. The Respondent claimed to be entitled to rely on the provisions of the Building and Construction Industry Security of Payment Act 1999. According to Mr Burston, the Applicants are developers. It is the Respondent's contention that it made a claim for payment under the provisions of that Act, and that Mr Meyer had failed to provide a payment schedule within the time allowed by that Act.
18. The Respondent also relied on some information gathered from a web site explaining some of the provisions of that Act. In particular, the Respondent relied on the following explanatory material it gathered from the web site: *If you fail to serve a payment schedule within time, you are automatically liable for the amount claimed. If the claimant sues for it, you cannot raise any defence based on the construction contract or raise any cross claim. . . . You cannot raise any defence, set off, cross claim, or other reasons for not paying which you did not state in the payment schedule.*
19. At the substantive hearing, Mr Burston made further submissions to this effect, and also relied on the detailed written submission he had forwarded to the Tribunal.
20. Mr Burston's thoughtful submissions did not examine all of the relevant provisions of the Building and Construction Industry Security of Payment Act 1999. Mr Burston was correct in telling the Tribunal that the Act sets out the consequences of not making a payment to the claimant if there had been no payment schedule under that Act. In those circumstances, the claimant (in this case, the Respondent to the Tribunal proceedings) could take steps to recover the amount in a court of competent jurisdiction. Section 15(4) of that Act does indeed provide that the other party (in this case, Mr and Mrs Meyer) would not, in those court proceedings, be entitled to bring any cross-claim against the claimant, or to raise any defence in relation to matters arising under the construction contract.
21. However, the provisions on which the Respondent relied could not assist it in the Tribunal proceedings. The reason for this is the Respondent did not commence proceedings in a court of competent jurisdiction to recover the amount claimed. In other words, the Respondent did not take the essential step of commencing action itself. Accordingly, the restrictions in section 15(4) simply did not apply to the circumstances of these proceedings before the Tribunal.
22. Further, section 32 of that Act specifically preserves the rights that a party to a construction contract may have under the contract, or might have apart from that Act in respect of anything done, or omitted to be done, under the contract. The relevant provision goes on to confirm that nothing done under, or for the purposes of, the relevant Part of the Act, affects any civil proceedings arising under a construction contract. There is an exception provided for under subsection (3), but that was not relevant to the proceedings before the Tribunal.
23. The Tribunal again records that the presiding Member carefully read and considered every word of the detailed written submission and other material submitted by Mr Burston in support of the Respondent's claim to payment. The presiding Member gave Mr Burston every opportunity to outline to the Tribunal how the Building and Construction Industry Security of Payment Act 1999 might apply in the circumstances of the proceedings then before the Tribunal. Nevertheless, after carefully considering the law and the relevant evidence, the Tribunal found that the Respondent could not rely on the provisions of the Building and Construction Industry Security of Payment Act 1999 in the way that it had claimed.

Summary

P & T Meyer v Cessnock Commercial & Home Design Consultants P/L t/a Brian Burston Building Design Consultant
[2005] Adj.L.R. 05/20

24. The Respondent failed to show, on the balance of probabilities, any legal entitlement to payment of the amount it claimed from the Applicants. The Respondent also failed to show that the provisions of the Building and Construction Industry Security of Payment Act 1999 disentitled the Applicants to the relief that they sought.
25. In these circumstances, the Tribunal ordered that the sum of \$12,068.42 was not owing by the Applicants to the Respondent.

NO SETTLEMENT

26. Before making an order, the Tribunal must use its best endeavours to bring the parties to the proceedings to a settlement acceptable to all of them [Consumer, Trader and Tenancy Tribunal Act 2001, section 54(1)].
27. The Tribunal records that, at the substantive hearing on 25 February 2005, the parties expressly stated that they did not wish to have any settlement negotiations.

ORDERS

1. At the hearing on 25 February 2005, the Tribunal declared that the sum of \$12,068.42 was not due and owing by the Applicants, P Meyer and T Meyer, to the Respondent, Cessnock Commercial & Home Design Consultants Pty Ltd t/as Brian Burston Building Design Consultant, in respect of services identified in the invoice dated 31 August 2004, and the costs claimed in conjunction with that amount.
2. The Tribunal forwarded the exact terms of the relevant order to the Applicants and the Respondent on 4 March 2005

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2. The Tribunal forwarded the exact terms of the relevant order to the Applicants and the Respondent on 4 March 2005.

APPEARANCES:

P Meyer represented himself and T Meyer.

B Burston, Director, represented Cessnock Commercial & Home Design Consultants Pty Ltd t/as Brian Burston Building Design Consultant.