

DECISION : W J Tearle : Member : Consumer Trader and Tenancy Tribunal : Home Building Division. 2nd April 2005

BACKGROUND TO THESE PROCEEDINGS

1. These proceedings involve a claim by the Applicant, Precision Flooring Pty Ltd, for payment of the amount it says remains outstanding under a contract it entered into with the Respondent, Tricon Projects Pty Ltd. According to the Applicant, the contract related to the supply and installation of timber flooring in residential premises in the Sydney suburb of Coogee. The Applicant was a sub-contractor to the Respondent. The Respondent, in turn, was a party to a contract with the developer of the property, Ziade Investments No 1 Pty Ltd.
2. In these proceedings, the Applicant sought an order that the Respondent pay it \$21,600.00.

JURISDICTION: THRESHOLD ISSUE FOR DETERMINATION

3. At the preliminary hearing before Member McDonell on 20 October 2004, the parties canvassed the issue raised by the Respondent as to whether this Tribunal has jurisdiction to hear and determine these proceedings. The Respondent claimed that the Tribunal lacks jurisdiction. In the Respondent's view, issues arising in the proceedings before this Tribunal have already been decided in an adjudication under the *Building and Construction Industry Security of Payment Act 1999*. The Respondent argues that the Tribunal lacks jurisdiction, even though a third party (Ziade Investments No 1 Pty Ltd, the developer) has, in effect, challenged the adjudication in proceedings being conducted in the Supreme Court of New South Wales.
4. The Tribunal was called upon to determine only the issue of jurisdiction in this stage of the proceedings.

CONDUCT OF THESE PROCEEDINGS

5. These proceedings first came before the Tribunal on 7 June 2004. At a preliminary hearing on that day, Member Moore gave leave for each party to be legally represented. A further preliminary hearing took place before Member Reid on 2 August 2004. On 20 October 2004, at another preliminary hearing, Member McDonell gave appropriate directions for the parties to file and serve evidence and submissions as to the jurisdictional issue that had then been identified. Member McDonell also directed that the matter was to be dealt with in chambers, by the consent of the parties.
6. The matter was next listed before Member Tearle for consideration in chambers on 17 February 2005. Unfortunately, the time allocated to the Member for that purpose was barely sufficient even to read the very considerable amount of documentary evidence and submissions relied upon by the parties to support their claims. There was insufficient time to prepare the Tribunal's decision. Accordingly, on 17 February 2005, the presiding Member reserved the Tribunal's decision.
7. The presiding Member did not see this matter again until Thursday 3 March 2005, but no time had been allocated on that day for the preparation of the decision. By that time, the presiding Member had been appointed to a senior full-time office elsewhere in the New South Wales quasi-judicial system, and he took up that new office on Monday 7 March 2005. Accordingly, to avoid any further delay to the parties in these proceedings, the presiding Member has prepared this decision while absent from the Tribunal. Saturday 2 April 2005 has been the first opportunity the presiding Member has had to prepare this decision.

RESPONDENT'S SUBMISSIONS

8. The Respondent claims that, under section 22(7) of the *Consumer, Trader and Tenancy Tribunal Act 2001*, this Tribunal has no jurisdiction to hear and determine this matter. Section 22(7) states: *If, at the time when an application is made to the Tribunal in accordance with this Act, an issue arising under the application was the subject of a dispute in proceedings pending before a court, the Tribunal, on becoming aware of those proceedings, ceases to have jurisdiction to hear or determine the issue.*
9. The Applicant had commenced the current proceedings in this Tribunal on 10 May 2004. However, by that time, the Respondent was a party to an adjudication under the *Building and Construction Industry Security of Payment Act 1999*. The other party to the adjudication was the developer, Ziade Investments No 1 Pty Ltd. Among the issues before the Adjudicator was the question as to whether Ziade Investments No 1 Pty Ltd was responsible for the invoices of various trade contractors, including Precision Flooring Pty Ltd.
10. The Respondent, Tricon Projects Pty Ltd, had made a progress claim against the developer, Ziade Investments No 1 Pty Ltd, on 16 February 2004. That progress claim, identified as Progress Claim 17, included an amount of \$24,000.00 for timber floors. This item is the subject of the claim by Precision Flooring Pty Ltd against Tricon Projects Pty Ltd.
11. In the adjudication under the *Building and Construction Industry Security of Payment Act 1999*, Mr I Hillman, Adjudicator, determined on 3 May 2004 that Ziade Investments No 1 Pty Ltd was liable to Tricon Projects Pty Ltd for the payment of the amount claimed by Tricon Projects Pty Ltd. Tricon Projects Pty Ltd then filed this adjudication certificate as a judgment for debt in the District Court.
12. Ziade Investments No 1 Pty Ltd next commenced proceedings in the Supreme Court, seeking to set aside the Statutory Demand by Tricon Projects Pty Ltd. The developer argued that it had a genuine offsetting claim, in the order of, or exceeding, the amount of the Statutory Demand issued by Tricon Projects Pty Ltd. On 16 September 2004, Master Macready reserved his decision on this application by Ziade Investments No 1 Pty Ltd.
13. In its Supreme Court proceedings, the developer had raised an issue concerning defects in the timber floors, and had tendered an expert report seeking to establish those defects.

14. The Respondent in the Tribunal proceedings, Tricon Projects Pty Ltd, claims that there were two issues decided in its favour in the adjudication proceedings under the *Building and Construction Industry Security of Payment Act 1999*. Accordingly, in the Respondent's view, this Tribunal may not "re-try" (in the words of the Respondent's Solicitors) these issues. The Respondent further claims that this is so, even though the developer, Ziade Investments No 1 Pty Ltd, is effectively challenging these aspects of the adjudication in current Supreme Court proceedings.
15. The Respondent also argues that, if this Tribunal did hear and determine the proceedings commenced in this Tribunal by the Applicant, an estoppel would arise, preventing the Respondent from recovering against Ziade Investments No 1 Pty Ltd in the proceedings being conducted in the Supreme Court.

APPLICANT'S SUBMISSIONS

16. The Applicant contends that this Tribunal does have jurisdiction to hear and determine its claim against the Respondent.
17. In the Applicant's view, in considering the proper effect of section 22(7) of the *Consumer, Trader and Tenancy Tribunal Act 2001*, it is necessary to determine the principal issue in the current proceedings. Next, the question arises as to whether that precise issue is the subject for determination in the proceedings being conducted elsewhere.
18. According to the Applicant, the issue before the Tribunal is whether the Respondent is liable to the Applicant for the cost of work done or services performed by the Applicant, for and at the request of the Respondent, under a written contract or otherwise.

FINDINGS AND REASONS

Jurisdiction

19. The question as to whether this Tribunal has jurisdiction to hear and determine the proceedings commenced by the Applicant is governed by section 22(7) of the *Consumer, Trader and Tenancy Tribunal Act 2001*. The Tribunal has set out the text of section 22(7) above.
20. In recent proceedings in the Supreme Court, His Honour Justice Barrett provided guidance as to the proper understanding of the effect of section 22(7). In *Cohen-Hallaleh v Cyril Rosenbaum Synagogue [2003] NSWSC 395*, Barrett J explained: *The purpose of s.22(7) is to avoid the risk of concurrent findings by the CTTT and a "court" (as defined by ss.22(1) and 22(2)) with respect to a particular "issue". For the section to operate, more must be shown than that the proceedings in the respective forums concern the same subject. It must be seen that disposition of each will require determination of the same question. [Paragraph 38]*
21. It is the Tribunal's view that, for the proceedings in the Tribunal and in a Court to require determination of the same issue, the parties in the Tribunal proceedings must also be parties in the proceedings being conducted by the Court.
22. Section 22(7) refers to "an issue arising under the application [before this Tribunal]" as being "the subject of a dispute in proceedings pending before a court". The Tribunal considers that "an issue arising under the application [before this Tribunal]" cannot arise in proceedings to which the current Applicant was not a party. If the current Applicant was not a party to those other proceedings, that Applicant would have had no opportunity to present evidence, or to make relevant submissions.
23. Even if the Respondent is correct in its assertion that there were two issues decided in its favour in the adjudication proceedings under the *Building and Construction Industry Security of Payment Act 1999*, this does not affect the jurisdiction of this Tribunal. The Applicant was not a party to that adjudication.
24. Similarly, even if the developer is effectively challenging these aspects of the adjudication in current Supreme Court proceedings, this does not affect the jurisdiction of this Tribunal. The Applicant is not a party to those Supreme Court proceedings.
25. Although the Tribunal received considerable assistance from the Solicitors for the parties as to the nature of measures or steps taken under the *Building and Construction Industry Security of Payment Act 1999*, the Tribunal has not found it necessary, in reaching its decision, to canvass this issue further. The Tribunal has decided this aspect of the current proceedings on the clear basis that proceedings elsewhere, and to which the Applicant is not a party, do not have the effect of preventing the Applicant from pursuing its claim against the Respondent in this Tribunal. In short, proceedings to which the Applicant is not a party do not call into operation section 22(7) of the *Consumer, Trader and Tenancy Tribunal Act 2001*.
26. For similar reasons, the Tribunal does not intend to examine further the submissions of the parties' Solicitors concerning the effect of the Supreme Court proceedings involving Tricon Projects Pty Ltd and Ziade Investments No 1 Pty Ltd. Precision Flooring Pty Ltd is not a party to those Supreme Court proceedings. Accordingly, those proceedings do not impact on the jurisdiction of this Tribunal.
27. The Tribunal finds that, under section 22(3) of the *Consumer, Trader and Tenancy Tribunal Act 2001*, the Tribunal alone has jurisdiction to hear and determine the proceedings commenced by the Applicant, Precision Flooring Pty Ltd. Section 22(3) states: *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 a dispute in proceedings pending before a court, a court has no jurisdiction to hear or determine such an issue.*

Estoppel

28. The Respondent in the Tribunal proceedings had also argued that a decision in favour of the Applicant would create an estoppel in proceedings currently before the Supreme Court involving the Respondent and the developer, Ziade Investments No 1 Pty Ltd. The Tribunal finds little merit in this argument. The Respondent has not advanced sufficient reasons to show that, even if such an estoppel did arise, it should be used as a basis for a stay of proceedings commenced by an Applicant who is not a party to the Supreme Court proceedings.

Other issues

29. In this stage of the proceedings, the Tribunal was called upon to determine only whether or not the Tribunal has jurisdiction to hear and determine the proceedings commenced by the Applicant, Precision Flooring Pty Ltd. The Tribunal has determined this question in favour of the Applicant.
30. The Respondent had asked that the Tribunal give it leave to join Ziade Investments No 1 Pty Ltd in these proceedings, so as to explore further the issue of alleged defects. The Applicant indicated that it was content to leave this question to the discretion of the Tribunal.
31. The Tribunal takes the view that this, and other matters relating to the hearing of the substantive aspects of the Applicant's claim, should be the subject of a one-hour directions hearing, to be conducted as soon as this can possibly be arranged. Given the decision that the Tribunal does have jurisdiction to hear and determine this matter, it is proper to ensure that the parties have a fair opportunity to reflect on the joinder issue before the final substantive hearing.

COSTS

32. The Tribunal reserves the costs associated with the determination of the issue of jurisdiction.

DIRECTIONS

1. The Tribunal, having found that it has the jurisdiction to hear and determine this application, directs that these proceedings are to be listed for a further one-hour directions hearing on the first available date.
2. The Tribunal reserves the costs associated with the determination of the issue of jurisdiction.

Solicitors for the Applicant: Deutsch Partners Lawyers Pty Ltd, Bondi Junction.

Solicitors for the Respondent: KQ Lawyers, Bowral.