JUDGEMENT: Judge Brabazon QC. District Court of Queensland. Brisbane. 30th March 2007

The Issue

[1] Building and Civil Contractors Pty Ltd (BCC) is a builder. It agreed to build extensions to a Cairns house owned by Greg Kern and Co Pty Ltd (Kern).

[2] A dispute arose. BCC made a claim in the Commercial and Consumer Tribunal (the Tribunal). On 17 August 2006 a member of the Tribunal ordered that BCC give security for Kern's costs, in the sum of $50,000.

[3] Kern appeals against that decision. It says that the decision was wrong, as a matter of law. It says that its submission about security in the sum of $73,000 should have been accepted.

The Appeal

[4] Section 100 of the Commercial and Consumer Tribunal Act 2003 (the Act) says that a party to a proceeding before the Tribunal may appeal to this court against a decision of the Tribunal, with this court's leave, on the ground of an error of law. A decision about security for costs is not a final decision in a proceedings, but it seems clear that there is a right to appeal about such an order. The Tribunal may *"make orders, give directions and do whatever is necessary for the just, fair, informal, cost efficient and speedy resolution of a proceeding"* - s 50(1). There is a power to give directions - s 50(2). There is a specific power to order security for costs - s 67.

[5] The term "decision" includes orders and directions. See the dictionary, in schedule 2. Therefore, the right to appeal against a decision of the Tribunal, means that there can be appeals against orders and directions of the Tribunal.

[6] Clause 100 of the explanatory notes accompanying the Bill in 2003 had said this: *"Clause 100 provides that appeals from decisions of the Tribunal may be made to the District Court ... . Appealable decisions under this provision do not include interlocutory or procedural orders or directions, but only final decisions in proceedings. This provision narrows the scope of appealable decisions in order to give the Tribunal more certainty about its decision making."*

[7] It seems clear that such a restricted intention was not carried through into the terms of the Act.

[8] This is an application for leave to appeal. It was agreed by the parties that the court should consider the merits of the substantive appeal, if leave were given. In either case, it is necessary to consider the merits of the appellant's submissions.

[9] The submissions here reveal a difference, about the precise test which should be applied to an application for leave to appeal. For BCC, it was submitted that the test was accurately summarised by Judge Wilson of this court in ***Clements v Flower*** [2005] QDC 050:

"Appeals may be brought from the CCT to this court, but only with leave and on the ground of error of law. The applicants must show there is a reasonable prospect of demonstrating an error of law on the part of the learned member who constituted the CCT, and that it could have materially affected the decision." (emphasis added)

[10] It was submitted for Kern that the last requirement was not supported by decisions of the Court of Appeal. Reference was made to Greet v Logan City Council [2002] QCA 51 at p 2. However, that decision was not concerned with the precise test, and gives no support to the submission.

[11] Judge Wilson's statement was based on the reasons of Justice Atkinson, in ***McDonald v Douglas Shire Council*** [2002] QCA 387 at para 24: "To obtain leave to argue this ground of appeal the applicant must show a reasonable prospect of showing an error or mistake in law on the part of the primary judge: see ... and that any alleged error is one which could have materially affected a decision: see ***HA Bachrach Pty Ltd v Caboolture Shire Council*** (1992) 80 LGRA 230 at 237238, ***Holts Hill Quarries Pty Ltd v Gold Coast City Council*** [2000] QCA 268 at 9, ***Weightman v Gold Coast City Council*** [2002] QCA 234 at 17."

[12] I doubt that there is a difference in the Court of Appeal about the precise test. There is little point in complaining about an error of law which had no material effect on the decision. It seems that the above approach to leave to appeal is the least that is required. Otherwise, the requirement for leave would be pointless - ***Praxis Pty Ltd v Hewbridge*** (2004) 2 QdR 433. An error of law might be insufficient reason to give leave - ***London & Anor v Reynolds*** (2006) QDC 380. Depending on the facts, the court may also have to consider such things as the gravity of the case, the amount of the dispute, and any public interest in the result. See Johns v Johns 1988 1 QdR 138.

Security for Costs

[13] In April 2004 BCC agreed to build the house extensions for Kern, in return for payment of around $310,000. By about April 2005, the work was substantially complete. A dispute arose. Kern complained of delays and defects. BCC said that it was owed a total of around $120,000, including some $62,000 for variations. It had been paid about $252,000.

[14] The principal of BCC, Mr Mark Moore, prepared an application on behalf of his company. It was filed in the Tribunal on 6 June 2005. Kern filed a defence and counterclaim on 18 July 2005. It asserted a claim for delay at $43,000, and annexed a list of defects. Those defects have no values assigned to them. A reply and answer, prepared by BCC's present solicitors, was filed on 1 August 2005.

[15] A mediation was held in December 2005. It was not successful.

[16] It must have been apparent that BCC had a need to deliver an amended Statement of Claim, in a proper form. An amended Statement of Claim was filed on 16 February 2006.

[17] That is the end of the pleadings. An amended Defence and Counterclaim has still not been filed. The absence of such an amended pleading is linked to Kern's applications for security for costs. That application was filed on 13 February 2006, and was followed by a directions hearing in the Tribunal on 17 February 2006. At that stage, BCC had filed its amended statement of claim. There was no objection to that. However, the solicitor for Kern said this: *"... we shouldn't be forced to plead to it in response before the hearing of the security for costs application. Of course, if our application for security for costs is successful and then (BCC) can't provide security for costs, well, then, of course, the proceeding would be stayed. In that circumstance, we would never have to plead to that amended statement of claim, whereas, if we had to plead to it before the hearing, we might waste some costs that we could never retrieve, ... it can be presumed that it will be quite an expensive process for us to (completely re-plead) ..."* (Transcript 17/2/06, pp 3 and 4).

[18] It seems that BCC's representative did not object to that course. It seems that both the member and the solicitor for BCC accepted what the solicitor for Kern had said. Directions were made about preparation for the security for costs application, and nothing more was said about an amended defence and counterclaim.

[19] The application for security was heard on 5 July 2006. Affidavits from the solicitors, cost assessors, Mr Mark Moore, and his father, Mr John Moore, were all read. It can be seen from the appeal books that those affidavits extended to 722 pages. Mr Mark Moore's affidavit was extensive, designed in part to show that the non-payment of the progress claim had an impact on BCC's financial position. That affidavit aside, the various other affidavits extended to some 360 pages. The effect of them can be simply stated. For Kern, it was said that $73,000 was the appropriate figure for security. For BCC, it was said that $50,000 was the appropriate figure. BCC was in a bad financial way. Mr John Moore agreed to put up security, from his own assets, of $50,000.

[20] At the hearing, each side was represented by counsel. Written submissions were given to the member. He delivered his reasons on 17 August 2006. They extended to nine pages. He decided that security for costs in the sum of $50,000 should be ordered.

[2i] This appeal is against that order. It was submitted that:

(a) The Tribunal failed to properly exercise its discretion in considering the criteria set out in s 67(4) of the Act. Because of that error, there had been a "constructive failure" to exercise the power conferred upon a Tribunal. Alternatively, there had been denial of natural justice.

(b) The Tribunal failed to properly consider on the evidence before it what work was reasonably required to prepare the matter after the first day of the trial, and what was the reasonable quantum for that work. It erred in that respect.

(c) The Tribunal erred in finding that BCC had "a significant equity in the contract", when there was no evidence to support such a conclusion. The absence of evidence concerning the merits of the respective cases resulted from the Tribunal itself not requiring Kern to plead to BCC's amended Statement of Claim.

[22] Paragraph 67(4) of the Act sets out the statutory criteria which the Tribunal may have regard to:

"(a) the means of the parties to the proceeding;
(b) the prospects of success or merits of the proceeding;
(c) the genuineness of the proceeding;
(d) if the party against whom an order for costs is sought suffers from a lack of means, whether this is attributable to the conduct of the applicant for the order;
(e) whether an order for security for costs would be oppressive; (f) whether an order for security for costs would stifle the proceeding;
(g) whether delay by a party in starting the proceeding has prejudiced another party;
(h) the costs of the proceeding;
(i) anything else the tribunal considers relevant."

The Reasons

[23] The member dealt with each of the statutory criteria. Kern complains that the member failed to isolate the relevant criteria. However, it seems that counsel made submissions about all the criteria. The results of his considerations can be set out this way:

(a) The means of the parties

[24] It was found that BCC could not meet a cost order against it, as it had an inadequate source of income and an inability to carry on business.

[25] Kern did not submit evidence of its means. It was submitted for Kern that it was not required to do so.

(b) Prospects of success or merits of the proceeding

(c) Genuineness of the proceeding

[26] Kern conceded that, as it had not responded to BCC's amended Statement of Claim, the claim was to be taken to be both bona fide and to have reasonable prospects of success.

[27] The member noted Mr Mark Moore's affidavit, which claimed payment of the last progress claim, and the cost of variations. The member then went on: *"... Mark Moore provided considerable detail as to BCC's claim. Both such detail and paragraph 40 is not responded to by or on behalf of Kern, although clearly Kern could have done so. In the circumstances the prima facie presumption must be that Kern's defence and counterclaim would fall short, in terms of quantum, of BCC's claim, leading BCC with, in all probability, significant equity in this contract."*

[28] That finding is attacked. It is said that the member acted unfairly in relying on the absence of an amended defence and counterclaim, after he had participated in the directions hearing which led to that result.

[29] It is true that the member agreed that no amended pleading had to be delivered until after the application for security. However, the absence of an amended defence and counterclaim was the result of the request made by Kern's solicitor. While that request was made for an understandable reason, it did mean that the Tribunal was unable to use it to weigh up the merits of the competing cases. Judicial officers in all courts or tribunals will often have difficulty in reaching a view about claims and counterclaims at such an early stage. The pleadings may give some reasonable information about where the merits of the litigation probably lie. The amounts claimed may indicate a balance in favour of one side.

[30] In this case, anyone reading BCC's statement of claim, and Mr Moore's extensive affidavit, would learn that the work had been done to the stage of practical completion, and that the builder had not been paid a final, large progress claim. The reader would also note the assertion that Mr Greg Kern, the principal of Kern, offered to settle the matter for $60,000, reducing for every day that BCC did not accept the offer. (The member declined to fmd that the offer was made on an "without prejudice" occasion - transcript of 5 July 2006, pp 5 and 6). On the other side, apart from the claim for delay at $43,000, there was simply a list of unquantified defects. It is not at all surprising that the member made the finding of probability that he did. It was the appropriate finding, on the available materials.

(d) Whether BCC's lack of means was attributable to the conduct of Kern

[31] The member considered the report of Mr Greg Kern (himself an accountant) and another accountant. There was no challenge to the substantive conclusions of those reports. In the result, he was not satisfied that Kern's conduct had been the material cause of BCC's inability to meet a costs order. He concluded: *"It seems to me that BCC was in a difficult financial position (not insolvent) prior to, or in the early stages of, the financial year 2004/2005. Whilst Kern's non payment may not have helped the situation, I do not consider the applicant has made out, in terms of this criteria, that BCC's lack of means is contributable to (to the extent required) to Kern's conduct in not paying the applicant."*

[32] So, that finding was largely in favour of Kern.

(e) Whether an order for security for costs would be oppressive

[33] The member outlined the submissions for each side. For BCC, it was said that security for costs at up to $76,000 for the first day of the hearing was excessive, unreasonable and therefore oppressive. That was because the correct figure was in the order of $50,000. The member then recorded Kern's submissions to the contrary. However, he reached no conclusion as to the merits of either side's submissions.

(f) Whether an order for security for costs would stifle the proceeding

[34] The member's consideration at this point depended on the fact that Mr Mark Moore had given no revealing details about the limits of his own financial resources. His father had offered to put up $50,000 in security. The member then concluded: *"For my part, I accept that there is no evidence, one way or the other, as to whether BCC's Mark Moore could assist the applicant in meeting any order for security, and that therefore there is no evidence to suggest that any order (beyond that offered by Mr Mark Moore's father) would stifle the proceedings."*

That was another finding, in Kern's favour.

(g) Whether delay in starting the proceeding has prejudiced another party

[35] Each side accused the other of delay. The member sets out each side's contentions, but comes to no conclusion about them. It should be noted that the submissions seem to be directed at suggestions that Kern was late in applying for security, after BCC had proceeded to develop its case, and that Kern's delay in asking for security should count against it. Kern contended that it had made its application at an appropriate stage of the proceedings. There seems to have been no allegation of any prejudice to Kern.

(h) The costs of the proceeding

[36] The member made a fmding that, on any view, the cost of the anticipated proceedings would be substantial. That appears to be a fmding in favour of Kern.

The Member's Decision : In reaching his decision, the member took into account a number of different things. It is necessary to consider them in turn.

[37] He made reference to three earlier decisions, from an Australian Supreme Court or the Federal Court. Those cases discuss various principles applying to similar applications. No complaint is made about that.

[38] Then follows para 49 in the judgment: *"Here we have a clearly impecunious applicant, or more correctly, an applicant suffering a clear lack of means to satisfy any order for costs were such an order made against it. On the other hand, it is accepted that the applicant's claim is bona fide and genuine. However, the same cannot be said for the position adopted by the respondent, as there is simply no evidence upon which to come to any conclusion in that regard."*

[39] It is said that the last sentence was unjustified. For the reasons set out above, it was true that there was no evidence upon which to come to any conclusion about the merits of the case for Kern. The member was justified in making those remarks.

[40] Next, it is said that the member was in error in referring to s 4 of the CCT Act, which relevantly says that:

"Objects of Act
(1) The objects of this Act are:
(a) ...
(b) To have the Tribunal deal with matters in a way that is just, fair, informal, cost efficient and speedy.
(2) The objects of this Act are to be achieved by establishing a system of dispute resolution that -
(a) ...
(b) Is fair by
(i) ensuring litigants have an equal opportunity, regardless of their resources, to assert or defend their legal rights;
(ii) ...
(iii) . . .
(c) has a range of procedures available and minimises costs to the extent practicable; and
(d) deals with applications with reasonable speed and encourages the early resolution of disputes.

[41] It is difficult to see that any complaint could be made about taking such objects into account. Indeed, members of the Tribunal are obliged to do so. While s 67 sets out its own particular criteria to be applied in an application for security for costs, that does not mean that the objects in s 64 are to be forgotten. The member was right to mention s4.

[42] The member then went on:

"51. Notwithstanding, it is, as noted from the above references, a matter of balance in all of the circumstances, one such circumstance is that Mr Moore Senior (the father of the proprietor of the applicant) offers to place an amount of $50,000 into the applicant's solicitor's trust account pending finalisation of the proceedings. Whilst that is relevant to the criteria as to whether proceedings will be stifled by an order for security for costs is also relevant, given its magnitude, to what is just and fair. Such an order then in terms of that offer, would meet, in my view, given the prima facie equity, in favour of the applicant, in the formal payments outstanding under the contract, the fair and reasonable right of the respondent in these circumstances to be secured in respect of its costs against an otherwise impecunious applicant." (emphasis added)

[43] It is submitted for Kern that such a finding failed to answer the question posed by the application, and used "just and fair" to avoid finding what was the proper level of security. It was submitted that the member completely overlooked the fact, that the security which Kern was seeking was in respect of the payment of the costs that might be awarded to Kern in these proceedings. It is said, in other words, that Kern was denied natural justice because the member failed to consider, and determine upon the evidence, the precise application which was made to it.

[44] The application is based on the Tribunal's standard Form 4. See p 72 of the bundle. It asks for security for costs and a stay of proceedings. The attachment says that three sources are relied on by Kern - s 67(1) of the CCTAct, s 1335 of the Corporations Act, and Rule 670 of the UCPR. Then follow some allegations about the facts, in paras 3 to 13, which were designed to show that BBC would not be able to meet an order for costs against it. The affidavit of Mr John Howard, sworn 13 February 2006, is also relied upon. The facts he mentions are also designed to show the risk that Kern would run in trying to enforce an order for costs. Nowhere in the application, or in Mr Howard's affidavit, is any particular sum mentioned as being appropriate. The $73,000 now sought appears in later affidavits. The member took that into account - at para 34, he mentioned a figure of around $76,000.

[45] The figures of $73,000 or $76,000 were not some "all or nothing" bid by Kern. The Tribunal had to take into account the competing considerations raised by each side. Mr Moore Senior offered to put up $50,000. In electing to accept that figure, the member did not fail to consider Kern's application.

[46] It is true that the criteria in s 67(4) of the Act does not mention an order for security which is "just and fair" or "just and reasonable". The expressions are reminiscent of the objects in s 4: see the references to "just" and "fair" in s 4(2)(a) and (b).

[47] It is clear that the member had not abandoned the statutory criteria in favour of some indeterminate test of fairness or reasonableness. Having considered in turn each of the s 67(4) criteria, he pointed out that a balance in all the circumstances had to be made among those criteria. He mentioned several criteria, which were undoubtedly relevant - The discussions of principle in the cases he mentioned, the offer of $50,000, the fact that security at that level would not stifle BCC's claims, his view that BCC had a prima facie "equity" in its favour, the fact that BCC was impecunious, the fact that its claims were bona fide and genuine, and the inability to reach the same conclusion about Kern's claims, because of a lack of evidence. Balancing those factors against Kern's larger claim for security, he was of the view that the $50,000 was a just and fair, or fair and reasonable, response to Kern's claims.

[48] It is also said that the member failed to consider properly the affidavits for each side. The Kern affidavits supported a figure of up to $76,000, while the CCT material suggested $50,000. It is said that a close analysis of the respective affidavits would have shown that the higher figure was more soundly based, and should have been accepted.

[49] It is not right to say that either figure had to be accepted. It is common enough in applications of this kind for courts to fix a figure which may not be precisely what each side contends for. There is usually a balancing exercise, in the selection of an appropriate amount for security. In this case, there was no cross-examination of

any deponent. The figures of $76,000 and $50,000 presented the Tribunal with no more than a range which seemed appropriate to the parties, or their advisers.

[50] It is necessary to turn to the suggestion, that the member made no finding about a number of contested matters. There are no particular findings in the considerations of oppressiveness, and prejudice to a party by delay in starting proceedings. Those matters are not expressly taken into account in the final decision. As Kern did not complain about prejudice caused by delay, that factor was unimportant.

[5i] Perhaps the issue of oppression was thought to be evenly balanced, and have a neutral effect. Perhaps it was really thought to be irrelevant, in the long run. Perhaps the question of oppressiveness was so closely linked to the amounts of $76,000 or to $50,000, that it was impliedly answered, or taken into account, in selecting the $50,000. In my opinion, the conclusion is that the question of oppression was taken into account, by implication, while delay was not a relevant consideration, in any event.

[52] It must be kept in mind, when a discretion is being exercised, that the decision-maker is not automatically at fault, by failing to discuss every point. It is only necessary that an adequate explanation be given about why a certain conclusion has been reached. See the Court of Appeal in ***Holts Hill Quarries PIL v Gold Coast City Council*** (2000) QCA 268.

[53] Overall, the complaint made against the decision is that it amounts to a constructive failure to exercise the discretionary power given under s 67 of the Act. There can be a constructive failure to exercise a jurisdiction when a decision-maker misunderstands the nature of the jurisdiction which is to be exercised, and applies a wrong and inadmissible test, or misconceives his or her duty in considering the question which the law proscribes, or misunderstands the nature of the opinion which he or she is to form. See Gaudron J in ***Re Minister for Immigration and Multicultural Affairs ex parte Miah*** (2001) 206 CLR at 57. There, it was held that there was a clear case of constructive failure to exercise a jurisdiction, because the delegate failed to consider the substance of Mr Miah's application, and that he failed to do so because he misunderstood what was involved in the definition of a "refugee".

[54] Here, the member made a conscientious and successful effort to apply the provisions of the Act. Looked at overall, there is no reason why his conclusion, that $50,000 security should be provided, was not a sound result. Indeed, it is hard to resist the conclusion that $50,000 was a very appropriate figure indeed. It was two-thirds of the figure requested by Kern. It accommodated an important consideration, and that was the right of BCC to have its case heard. Bearing in mind the amount of money in issue in the litigation, it was a substantial figure, in any case.

[55] There was no failure, constructive or otherwise, to exercise the discretion. Senior counsel for Kern said everything possible to support its appeal, but as these reasons show the attack has not been successful. Kern's attempt to insist in this court that its proposed amount should be accepted entirely fails. It is an appeal with no merit.

Delay and Cost

[56] This application for security for costs had its origins in the application of 13 February 2006. It has now consumed 13 months' time, including the appeal to this court. Apart from the appeal, it took up about five months. BCC's application had been filed in June 2005. There is still no amended defence and counterclaim, including a quantification of the defects. It can be seen that it was undesirable, not to insist upon that pleading before the application for security was considered. Apart from the application for security and the appeal, it would not be proper here to attempt to assign blame for the delays. Enough has been said about the application for security and this appeal to show that what has happened is very regrettable. The elaborate affidavits should have been discouraged, and this appeal should never have been brought. Overall, it can be seen that the statutory objects in s 4 of the Act have not been achieved. Matters have been dealt with in ways which are neither fair, informal, cost efficient or speedy.

[57] This sort of building dispute, and the amount of money involved, must come before the Tribunal frequently. It should be possible to apply some standard procedures when applications for security for costs are made. That is, it should not be difficult to rely upon the levels of costs that are usually involved, in cases of this sort. Whatever might be lost by having some standard scales of costs would be more than compensated by the savings in time and expense in preparing for an individual case, as was done here. Those who wish to depart from the standard scales could be permitted to do so, in exceptional circumstances. It is to be hoped that there will not be a repetition of what has happened here.

Conclusion

[58] The application for leave to appeal is refused. The parties can make submissions about the costs of this appeal.

Mr D Cooper S.C for the appellant instructed by Morrow Petersen, Cairns
Mr W Cochrane for the respondent instructed by Marino Moller Lawyers, Cairns