

JUDGMENT : Nase DCJ. Queensland District Court, Rockhampton. 8th April 2008

- [1] This is an appeal (and application for leave to appeal) from a decision of the Commercial and Consumer Tribunal constituted by Mr A Collins. Appeals from the Tribunal are confined to an appeal on an error of law or, excess or want of jurisdiction (s 100 Commercial and Consumer Tribunal Act 2003). Argument on both the substance of the appeal and the separate issue of leave was heard at the same time.
- [2] A basic narrative of the events leading up to the present appeal is as follows: in November 2004 Mr McAlpine contracted with a builder¹ for the construction of a dwelling. The builder, in about April 2005, in turn contracted out certain concreting works to Mr Wieland. Wieland's contract was for laying slabs for the house and for the veranda. Shortly after the house slab was laid the builder went into voluntary administration. At that time the builder owed Wieland \$22,000 for laying the house slab. Later in April 2005 Wieland sent an invoice for \$13,000 to McAlpine. The invoice on its face related to work already done.² On 20 May 2005 McAlpine paid the \$13,000. In October 2005 Wieland completed the concreting on the house site. What remained to be done was to lay a slab for the veranda. For that work he rendered an account to McAlpine, who by that stage was registered as an owner/builder of the dwelling.
- [3] Unfortunately, that was where the goodwill stopped. McAlpine refused to pay the account for the October work. Wieland brought a claim before the Commercial and Consumer Tribunal for recovery of \$15,500 for those works. In response, McAlpine counterclaimed seeking recovery of the \$13,000 and damages in the amount of \$3,045.90 arising out of the October work.³

The hearing before the tribunal

- [4] The fact the October work was done was not in dispute at the tribunal hearing. Although the contract between Wieland and McAlpine for that work, whatever its precise terms, was unenforceable because it was not in writing, Mr Collins allowed recovery for work done on a quantum meruit basis.
- [5] The contest in the Tribunal surrounded the payment of \$13,000 in May 2005. McAlpine claimed the payment was one made under a mistake. He pleaded he paid the \$13,000 believing the works claimed for "*did not relate to any works that could be considered part of the base stage [the house slab] and did not consist of works*" that Wieland had contracted to perform with the builder.⁴ In the alternative he claimed the \$13,000 related to works Wieland had contracted to do for the builder. McAlpine claimed the return of the \$13,000 therefore on the basis of money paid under a mistake or because of an absence of consideration. In his evidence McAlpine said he paid the \$13,000 invoice because he thought it was for "*the further section of the veranda to be paid for and mistakenly I paid it.*"⁵ Although his explanation in court is suggestive of a claim the \$13,000 was a part-payment for the October work, his evidence is, I think, consistent with a claim of mistake (as pleaded) rather than a claim for part-payment.
- [6] Wieland's evidence on the other hand was that the two men agreed that McAlpine would pay him \$13,000 out of the \$22,000 he was owed by the builder for the house slab. He said he agreed to complete the works (the veranda slab) with McAlpine acting as an owner/builder.
- [7] Mr Collins specifically rejected McAlpine's evidence he paid the \$13,000 under a mistake,⁶ and accepted Wieland's evidence of the contractual discussions between the two men.⁷ Those are the primary findings of fact made by Mr Collins. In combination those findings both dispose of the counterclaim and provide a satisfactory basis for the decision to uphold Wieland's claim.

The first two points argued on appeal

- [8] Mr Collins thought the payment of the \$13,000 was associated with a contract between the two men which he characterised as an agreement to engage.⁸ Mr Deaves, on appeal, argued he was not given a fair opportunity at the hearing to respond to the interpretation of the evidence ultimately settled upon by Mr Collins (that is, that the \$13,000 was paid as consideration for a contract of engagement). As the particular interpretation of the evidence was not pleaded, and was raised explicitly only after the close of evidence, I have some sympathy with this argument.
- [9] Mr Deaves also argued that Mr Collins was simply wrong in thinking there was a contract of engagement between the two men. I tend to agree with both of Mr Deaves' criticisms. A contract of engagement was not pleaded. Indeed, Wieland's case at trial was that the payment for \$13,000 was a proportionate payment for work he had carried out for the builder, but which remained unpaid. When giving evidence McAlpine said he paid the \$13,000 because "*contractors, at that time, were very hard to get and to keep them on side I paid as I went.*"⁹ Although this answer looks more like a statement about motive, it is possible the statement led Mr Collins

¹ In fact, he contracted with two separate entities, who for present purposes I will simply refer to as the builder.

² This much seemed to be accepted by McAlpine at the Tribunal hearing, but it was not conceded by Mr Deaves in argument before me.

³ McAlpine succeeded on this aspect of the counterclaim, and as Mr Collins' finding on this aspect is not challenged before me, no further reference will be made to this aspect of the counterclaim.

⁴ Counterclaim paragraphs 2, 3

⁵ Transcript p 46,15

⁶ Reasons for decision para 37

⁷ Reasons for decision para 31

⁸ Reasons for decision para 42

⁹ Transcript p 46

to characterise the transaction as a contract of engagement.)¹⁰ If the transaction was not contractual, however, then on the primary findings of fact what is left is simply a voluntary payment of \$13,000. The payment was a voluntary one because McAlpine had no legal obligation to make a payment. In the circumstances, however, the conclusion of a voluntary payment is not implausible.¹¹

The first two points: conclusion

[10] The onus of proof for the counter claim fell on McAlpine, not Wieland. The counterclaim is in theory a restitutionary claim based on mistake. The primary findings of fact, however, negate such a claim and it is immaterial, then, whether Mr Collins' characterisation of the transaction as a contract of engagement is correct or not. It follows logically, also, that the denial of procedural fairness is immaterial in the circumstances of this appeal.

[11] The test usually employed on an application for leave to appeal is whether the applicant for leave has shown a reasonable prospect of demonstrating an error of law of such a nature that it may have materially affected the decision under appeal (*Clements v Flower* [2005] QDC 50). Both the denial of procedural fairness and the finding of a contract of engagement involve apparent errors of law which would warrant a grant of leave but for the circumstance the errors do not affect the ultimate decision.

The last point: a challenge to the primary findings of fact

[12] Mr Deaves, in his written and oral submissions, challenged the Tribunal's finding of fact that it preferred the evidence of Wieland to the evidence of McAlpine. Those of us who did appellate work when in practice know how difficult it is to find an error of law in a finding of credibility. In this case both men gave their account of the critical conversations between them, and, after hearing their evidence, and taking time to consider his decision, Mr Collins said he preferred the evidence of one over the evidence of the other. The situation of course is not one where there is no evidence to support a particular finding of fact. Where there is an absence of evidence to support a finding of fact the error is one of law (*Sinclair v Maryborough Mining Warden* (1975) 132 CLR 473).

[13] The fact is that in this case there was not an absence of evidence. Both men gave direct evidence of, and both were subject to cross-examination on, the critical conversations between them. Mr Deaves' argument is simply that the conclusions of fact reached by Mr Collins 'defied logic'¹² and that the decision has 'no basis in evidence having rational probative force'.¹³ It may be important to note that the two arguments are quite distinct. An argument a conclusion on the facts defies logic is to attack the process of reasoning followed by the fact finder. The second argument (the no probative value argument) looks to the quality of the evidence on which the Tribunal acted.

[14] The second argument can be dealt with shortly. When the expression "probative evidence" is used in this context, it refers to evidence which tends logically to show the existence or non-existence of a relevant fact.¹⁴ In this case Wieland's direct evidence of the conversations is "probative evidence" of the conversations, and remains probative evidence (in the sense that it tends to prove the critical conversations) whether his evidence is persuasive or not.

[15] Mr Deaves' real argument, as I understand it, is that the Tribunal's primary findings of fact were against the weight of the evidence. In developing this point he relied on arguments of fact. For example he argued McAlpine could not have told Wieland he had paid \$9,000 to the builder for the works because he had, in reality, paid a different sum. The correctness of the argument is however a question of probability. While it may be improbable McAlpine told Wieland he had already paid \$9,000 it is nonetheless possible that he did so. Mr Collins, in reaching the conclusions he did necessarily accepted that possibility reflected what happened. A finding of credibility is often an amalgam of assessments of demeanour and of probability formed against the objective factual matrix of the particular case.

[16] In other words, if Mr Collins erred in reaching his primary findings of fact, the error lay in his factual analysis of the evidence. As no appeal lies from an error of fact, the final point argued is also one that cannot succeed.

[17] In the circumstances, the application for leave to appeal is refused.

ORDER: 1 Application for leave to appeal refused

2 Appellant pay the respondents costs of and incidental to the appeal assessed on the standard basis

Mr S Deaves for the applicant/appellant instructed by South and Geldard Solicitors
Mr T Arnold for the respondent instructed by Simpson and Grant Solicitors

¹⁰ One logical problem in using the statement to infer a contract between the parties is that it is arguably related to evidence which was rejected by the member in his primary findings of fact.

¹¹ Wieland had completed concreting works worth \$22,000 and had not been paid. McAlpine had paid some money to the builder for the works but had not paid the builder the full value of the concreting works. After the builder was placed in administration McAlpine assumed the role of an owner builder in order to complete the dwelling, and he may have been anxious that Wieland complete the works

¹² Written submissions para 4.14.

¹³ Written submissions para 4.12.

¹⁴ Per Diplock LJ in *R v Deputy Industrial Injuries Commissioner, ex parte Moore* [1965] 1 QB 456