

# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Kime & Anor v Klepper* [2020] QCAT 207

PARTIES: **CATHERINE MARY KIME**  
**CRAIG KIME**  
(applicants)  
**v**  
**TONY KLEPPER**  
(respondent)

APPLICATION NO/S: BDL 346-18

MATTER TYPE: Building matters

DELIVERED ON: 2 June 2020

HEARING DATE: On the Papers

HEARD AT: On the Papers

DECISION OF: Member Fitzpatrick

ORDERS: **1. The application for domestic building dispute filed by Catherine Mary Kime and Craig Kime on 3 December 2018 is dismissed for want of jurisdiction.**  
**2. The counter-application filed by Tony Klepper on 21 December 2018 is dismissed for want of jurisdiction.**

CATCHWORDS: CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – OTHER MATTERS – whether compliance with s 77(2) *Queensland Building and Construction Commission Act* 1991 (Qld) – whether Queensland Civil and Administrative Tribunal has jurisdiction where no sufficient evidence the building dispute falls outside the Early Dispute Resolution Process of the Queensland Building and Construction Commission.  
  
*Queensland Building and Construction Commission Act* 1991 (Qld), s 77(2), Schedule 1B s 46  
*Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 61  
*Queensland Civil and Administrative Tribunal Rules* 2009 (Qld), r 51  
*Uniform Civil Procedure Rules* 1999 (Qld), s 311  
  
*Bein v Brooks & Anor* [2020] QCAT 5

*Redding v Simmons* [2016] QCATA 100  
*Yongwoo Park v Betaland Pty Ltd* [2017] QCAT 228

REPRESENTATION:

Applicant: D Riwoe of Aden Lawyers Pty Ltd

Respondent: Self-represented

APPEARANCES: This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld)

**REASONS FOR DECISION**

- [1] This dispute involves a claim by the applicants Mr and Mrs Kime against Mr Klepper arising out of what is alleged to be a contract with him for:
- (a) the renovation of a shed at their home, so that it was suitable for the conduct of a small cake baking business; and
  - (b) the re-positioning of stumps under their home for the creation of two car parking spaces.
- [2] The work has not been completed. Mr Klepper does not hold an appropriate contractor's licence for the work in question.
- [3] Mr Klepper has filed a counter-application seeking payment of an unpaid invoice.
- [4] The Tribunal does not have jurisdiction to determine a matter if an applicant has not complied with a process established by the Queensland Building and Construction Commission (QBCC) to attempt to resolve the dispute.<sup>1</sup>
- [5] Section 77 of the *Queensland Building and Construction Commission Act 1991* (Qld) (QBCC Act) provides:
- (1) A person involved in a building dispute may apply, as provided under the QCAT Act, to the tribunal to have the tribunal resolve the dispute.
  - (2) However, the person may not apply to the tribunal unless the person has complied with a process established by the commission to attempt to resolve the dispute.
- [6] A building dispute is defined in the QBCC Act as a domestic or commercial building dispute. Relevantly a domestic building dispute includes a dispute between a building owner and a building contractor relating to the performance or a contract for the performance of work involving the renovation or extension of a home or associated work such as the construction of a building or fixture associated with a home.
- [7] Relevantly a commercial building dispute includes a dispute between a building owner and a building contractor relating to the performance or a contract for the performance of work which is not domestic building work, but involves the renovation or extension of a building.

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<sup>1</sup> *Redding v Simmons* [2016] QCATA 100 at [24].

- [8] By Directions made 26 February 2020, the parties were required to address any process established by the QBCC to attempt to resolve the dispute between them as referred to in s 77(2) of the QBCC Act. The applicants were further required to provide evidence of compliance with any such process.
- [9] In the ordinary course, an applicant in a building dispute, will file evidence of compliance with s 77(2) of the QBCC Act in the form of a letter from the QBCC indicating that the requirements of s 77(2) have been met. No such letter has been obtained from the QBCC. Filing such a letter is a procedural requirement of the Tribunal. That requirement can be waived by the Tribunal,<sup>2</sup> however the obligation to comply with s 77(2) of the QBCC Act cannot be waived. Compliance is a condition precedent to this Tribunal's jurisdiction in the matter.
- [10] The applicants have filed an affidavit of Mrs Kime, sworn 18 March 2020, which sets out the applicants' interactions with the QBCC. Mrs Kime attaches:
- (a) a non-completion Claim Form lodged with the QBCC, dated 13 October 2017;
  - (b) a letter from the QBCC dated 19 October 2017, advising that as Mr Klepper was unlicensed, no policy of insurance exists to enable the work to be covered by the statutory insurance scheme. The QBCC advise that the applicants may have other options including lodging an application with QCAT. A notice is provided as to the applicants' rights to an external review of the decision by QCAT;
  - (c) a bare non-completion Claim Form including advice from the QBCC that a non-completion claim should be lodged when work is not complete and the contract has been terminated;
  - (d) a QBCC Fact Sheet: "Complaints before your contract has been completed" which gives advice in relation to the QBCC Early Dispute Resolution (EDR) service, including that EDR cannot help, where inter alia:
    - (i) the work is commercial or industrial building work; or
    - (ii) the contract has been terminated or completed.

Further the Fact Sheet provides that a party should: "Avoid wasting time by checking if our EDR service is right for you before you apply".

The types of disputes said to be dealt with by the service are disputes about the quality of work and disputes about a contract, for example payments, incomplete work and delays.

The Fact Sheet contemplates that a party to the dispute will make an EDR request.

The Fact Sheet states that even if the dispute is not eligible for the EDR service, QCAT requires parties to apply to resolve the dispute through QBCC before they will accept an application. At the end of the process QBCC will issue a letter so that a party can apply to QCAT.

- [11] The applicants' solicitors have filed submissions that:

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<sup>2</sup> *Bein v Brooks & Anor* [2020] QCAT 5 at [25] and [26].

- (a) the QBCC's EDR process is the only process established by the QBCC to attempt to resolve disputes;
- (b) the EDR service does not apply to terminated contracts. The contract between the parties was terminated when the applicants became formally aware that Mr Klepper did not have a building licence;
- (c) as a result, there was no process within the meaning of s 77(2) of the Act with which the applicants could have complied prior to filing the application in the Tribunal on 7 December 2018;
- (d) the applicants have therefore complied with s 77(2) of the QBCC Act; and
- (e) the Tribunal has the jurisdiction to hear and determine the proceeding.

[12] Mr Klepper has not filed any submissions which bear on the question of whether the requirements of s 77(2) of the QBCC Act have been met. He re-asserts his response to the application.

### **Consideration**

[13] The applicants do not have a letter from the QBCC indicating that they have either complied or attempted to comply with a process contemplated by s 77(2) of the QBCC Act.

[14] It appears that the applicants have not sought to submit to any QBCC process.

[15] On the face of s 77(2) of the QBCC Act, one might think the QBCC has a very broad dispute resolution role with respect to both domestic and commercial building disputes. For the public and QCAT alike there is a lack of clarity as to what the QBCC chooses to accept as part of its dispute resolution process. That lack of clarity can leave parties to building disputes in a difficult position if they do not submit their dispute to the QBCC for assessment as to whether it falls within the ambit of its dispute resolution process, or they make a wrong decision as to whether their dispute is covered by the process.

[16] It is unsatisfactory that the jurisdiction of the Tribunal should have to be determined by attempting to discern the operational processes of the QBCC as undertaken by the Commission from time to time.

[17] Section 46 of Schedule 1B of the QBCC Act requires the publication of a consumer building guide in a form prescribed by Regulation. The Guide "may" contain information about dispute resolution procedures. The Guide is available on the QBCC's website. The Guide relates to domestic building contracts. Clause 17 of the Guide provides that QBCC's EDR process is a free service which offers a facilitation-based approach to resolving disputes while the contract is "still on foot".

[18] I have also noted the QBCC publishes some Fact Sheets which refer to the EDR process relevant to domestic building disputes. The Fact Sheets appear to be re-drafted from time to time. On 27 May 2020, I noted a Fact Sheet "Building complaints – Complaints about your contract". That Fact Sheet does not refer to "termination" of a contract, but rather to whether the "contract is still active", in which case EDR will aim to facilitate an acceptable agreement between both parties. The Fact Sheet contrasts that circumstance with a building contract which has been "completed". Neither "still active" nor "completed" are defined.

- [19] The applicants say that there is no process established by the QBCC to attempt to resolve their particular dispute because the contract between the parties has been terminated. They rely on the Fact Sheet attached to Mrs Kime's affidavit for information about the extent of the dispute resolution process established by the QBCC.
- [20] There is no evidence given of termination of the contract other than the submission that it came to an end when the applicants became "formally" aware that Mr Klepper was unlicensed. Mrs Kime's statement filed in the Tribunal on 25 June 2019 sets out that the applicants were told by Mr Klepper that he was unlicensed on 28 July 2017. Thereafter Mrs Kime asked when more work would be done. Mrs Kime records that Mr Klepper attended at site and performed work on 2 August 2017. As at 28 July 2017 there appears to have been an affirmation of the contract.
- [21] Although not capable of being a legal determination of the question, the letter from the QBCC dated 19 October 2017 says:
- Additionally, as per the conditions of the insurance policy below (full conditions attached) if a policy was taken out we would be unable to assist with this claim due to the contract not being properly terminated.
- [22] The response and counter-application filed by Mr Klepper deals with the end of performance of work under the contract. It is said that following a complaint by the applicants to the QBCC, he was not able to complete the job as he was not licenced to carry out the relevant work. That may be a reference to the non-completion claim lodged on 13 October 2017. It may also be a response to the complaint made to the QBCC on 30 August 2017. The applicants have not given any evidence about the 30 August 2017 complaint. I have simply observed reference to the complaint and the complaint number allocated to it, in the non-completion claim form and in the application for domestic building dispute.
- [23] Mr Klepper has also filed a copy of solicitors' correspondence in the matter. By letter dated 9 August 2017 from the solicitors for the applicants, Emmerson Legal and Accounting Pty Ltd, notice was given that should Mr Klepper fail to complete the agreed works under the contract within two weeks, Mr and Mrs Kime will exercise their right to terminate the contract and sue for the cost of a suitable tradesperson to complete the agreed works.
- [24] By letter dated 16 August 2017, Fallu and McMillan on behalf of Mr Klepper responded disputing the nature and scope of the agreement for the works described by the Kimes' solicitors and advising that Mr Klepper will complete the work as per his quotation for a C10 shed. The letter says that if the Kimes do not accept the proposition that the remaining work is limited to what was quoted then they are free to carry out the remaining work through some alternative contractor themselves.
- [25] Mr Klepper says that there was no response to that letter.
- [26] There are many disputed facts in this matter which can only be determined on a full hearing.
- [27] For this Tribunal to have jurisdiction in the matter, I must be satisfied that there was no dispute resolution process provided by the QBCC to which the applicants could submit their dispute with Mr Klepper.
- [28] On the basis of the QBCC Fact Sheet attached to Mrs Kime's affidavit, I find that:

- (a) the dispute resolution process contemplated by s 77(2) of the QBCC Act is the EDR service referred to in the QBCC's Fact Sheet; and
- (b) there is no dispute resolution process established by the QBCC as contemplated by s 77(2) of the QBCC Act, which deals with a commercial building dispute or a domestic building dispute in circumstances where the contract has been terminated.

- [29] It is a contentious issue as to whether the building work relates to a domestic or commercial building dispute. On the one hand the building work performed relates to the renovation of a shed associated with a home. The shed is renovated to include a kitchen and toilet. Arguably it is habitable. On the other hand the building work is said by Mr Klepper to be a non-habitable C10 shed. Mrs Kime asserts that she intended to conduct a commercial business from the renovated shed. There is insufficient evidence before me to make a finding in this regard. The hearing of the matter may traverse compliance of the structure with the Building Code and town planning requirements and the knowledge of each of the parties in relation to those requirements. A finding at this stage in relation to the nature of the building work, without all the evidence would not be appropriate.
- [30] If I could be satisfied that the contract was for domestic building work and that the contract had been terminated that would be a sufficient basis to find that the Tribunal has jurisdiction.
- [31] The law is not settled as to the effect on a contract of a building contractor being unlicensed to perform the relevant work. However, it is strongly arguable that the contract is not vitiated.<sup>3</sup> If the contract was on foot, it must be brought to an end by acceptance of Mr Klepper's breach of the contract in being unable to lawfully complete the works.
- [32] There is no evidence of an express acceptance of Mr Klepper's breach of the contract by the applicants. Mrs Kime does not address the issue in her affidavit. That is strange. The applicants' solicitor's submission is unhelpful. The solicitor does not say how or when the contract was terminated, just that it occurred when the applicants became "formally" aware Mr Klepper was unlicensed. The evidence referred to earlier is the only evidence before me as to the applicants' knowledge that Mr Klepper was unlicensed and the actions they took.
- [33] It may be that there is conduct by the applicants consistent with an election to accept Mr Klepper's breach of the contract, which is sufficient to terminate the contract. No submissions have been made in this regard. I am not satisfied that at this preliminary stage it would be prudent to make findings in relation to what might be suggested from the material before me.
- [34] The problem for the applicants is that they did not apply to the QBCC to participate in the QBCC dispute resolution process. There is insufficient evidence before me to find that the contract related to commercial building work or domestic building work and that the contract was terminated before the proceedings commenced. In terms of the future conduct of the matter I wish to make it clear that I have not made a finding that the contract was or was not terminated by the applicants.

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<sup>3</sup> See the discussion in *Yongwoo Park v Betaland Pty Ltd* [2017] QCAT 228.

- [35] I simply cannot be sure that the Tribunal has jurisdiction in the matter. For that reason, I intend to follow the path taken in *Redding v Simmons*.<sup>4</sup> The application is dismissed. As in *Redding's* case the cause of action has not been dismissed on the merits, but merely on the procedural ground of want of jurisdiction. The substance of the case remains for determination. It is not *res judicata*, but still alive.<sup>5</sup>
- [36] The applicants are at liberty to file and serve a fresh application after submitting to the QBCC's EDR process or otherwise acting as they may be advised.
- [37] The next issue for the Tribunal is the status of the counter-application.
- [38] Rule 51 of the QCAT Rules provides that a counter-application must be dealt with in the proceeding. The proceeding so far as it relates to the counter-application must be conducted as if it were a proceeding for an application for orders and the respondent who made the counter-application is taken to be the applicant.
- [39] Once the Kimes' application is dismissed, Mr Klepper's counter-application will stand alone as a claim.<sup>6</sup> It will fall foul of the same jurisdictional hurdle which faced the Kimes.
- [40] On the basis that there is no evidence Mr Klepper has complied with s 77(2) of the QBCC Act, his counter-application is dismissed on the procedural ground of want of jurisdiction. Mr Klepper is also at liberty to file and serve an application or to make a counter-application to any fresh proceedings brought by the Kimes after submitting to the QBCC's dispute resolution process or otherwise as he may be advised.
- [41] I order that the application for domestic building dispute filed 3 December 2018 by Catherine Mary Kime and Craig Kime is dismissed and the counter-application filed by Tony Klepper on 21 December 2018 is dismissed for want of jurisdiction.

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<sup>4</sup> *Redding v Simmons* [2016] QCATA 100.

<sup>5</sup> *Ibid* at [27] noting in particular the cited authorities which are adopted by me in this matter.

<sup>6</sup> See for a similar circumstance, the way in which a counterclaim is treated in the event of a discontinuance of an action pursuant to Rule 311 of the *Uniform Civil Procedure Rules 1999* (Qld).