

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Alluvion Property Pty Ltd v MDP Developments Pty Ltd*
[2020] QCAT 73

PARTIES: **ALLUVION PROPERTY PTY LTD**
(applicant)

v

MDP DEVELOPMENTS PTY LTD
(respondent)

APPLICATION NO/S: BDL105-19

MATTER TYPE: Building matters

DELIVERED ON: 11 March 2020

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Senior Member Brown

ORDERS:

- 1. Application for miscellaneous matters filed 3 July 2019 refused.**
- 2. Proceeding dismissed.**
- 3. The parties must file and exchange submissions on costs of the proceedings within 14 days of the date of this decision.**

CATCHWORDS: CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – THE CONTRACT - where applicant is not a party to the contract – where applicant does not assert claim in negligence, nuisance or trespass – whether QCAT has jurisdiction

COURT PRACTICE & PROCEDURES – AUSTRALIA – QUEENSLAND CIVIL PRACTICE – QCAT LEGISLATION - *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 47 – where respondent seeks to have the applicant’s claims in QCAT struck out for want of jurisdiction – whether applicant’s application should be struck out pursuant to s 47

COURT PRACTICE & PROCEDURES – AUSTRALIA – QUEENSLAND CIVIL PRACTICE – QCAT LEGISLATION - *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 52 – where applicant commenced proceedings in QCAT – where applicant seeks to amend claim and transfer QCAT proceedings to

the Magistrates Court – whether appropriate case to transfer proceedings to Magistrates Court

Property Law Act 1974 (Qld), s 55

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 47, s 52(2)

Queensland Building and Construction Commission Act 1991 (Qld), s 1, s 4(1)(a), s 4(8), s 75, s 76, s 77(1), sch 1B, sch 2

Uniform Civil Procedure Rules 1999 (Qld)

Black, G. D Toowoomba Resort Pty Ltd [2007] QCCTB 122

David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 353

Lumbers v W Cook Builders Pty Ltd (in liq) (2008) 232 CLR 635

M & J Gray Investments Pty Ltd v AMP Pacific Fair Pty Ltd & Ors [2010] QCAT 454

Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 221

REPRESENTATION:

Applicant: Self-represented

Respondent: R Champney, solicitor of Redchip Lawyers

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] MDP Developments Pty Ltd ('MDP'), contracted with Ruby RG Pty Ltd ('Ruby') to undertake building work. Alluvion Property Pty Ltd ('Alluvion'), was not a party to the building contract. Alluvion was however a joint venture partner with MDP.
- [2] Alluvion has filed an application for commercial building disputes in which it claims an amount of \$49,300.01 from MDP.¹ Alluvion says that the amount claimed is 'To repay the monies owed, costs and damages ... that were misrepresented by MDP Developments as payments that were required to be made under the contract.'²
- [3] MDP has filed an application to dismiss the proceedings.³ MDP says that Alluvion was not a party to the building contract, that Alluvion is a party to a joint venture agreement with Ruby, that Alluvion has no authority to bring the present proceedings and that the proceedings disclose no cause of action against MDP.⁴

¹ Application for commercial building disputes filed 3 April 2019.

² Ibid.

³ Application for miscellaneous matters filed 11 June 2019.

⁴ Affidavit of Mathew Pitman filed 11 June 2019.

- [4] Alluvion has filed an application to amend its initiating application and seeking to transfer the proceedings to the Magistrates Court. Alluvion says that the amendment is necessary to properly articulate its cause of action against MDP. The proposed amendment details a claim for money paid by Alluvion to MDP under what is said to be a mistake of fact. No further particulars are provided. Alluvion says that the Tribunal does not have jurisdiction in respect of the dispute and that the proceedings should be transferred to the Magistrates Court which, says Alluvion, does have jurisdiction.
- [5] MDP opposes the application to transfer the proceedings on the basis that the Tribunal does not have jurisdiction to hear and decide the dispute and that the claim by Alluvion is bound to fail, wherever the proceeding is heard.⁵

Consideration

- [6] The relevant enabling Act for the purpose of this proceeding is the *Queensland Building and Construction Commission Act 1991* (Qld) ('QBCC Act').
- [7] The Tribunal may decide a building dispute.⁶ A building dispute means a domestic building dispute, a minor commercial building dispute or a major commercial building dispute.⁷ A domestic building dispute means a claim or dispute arising between a building owner and a building contractor relating to the performance of reviewable domestic work or a contract for the performance of reviewable domestic work; or a claim or dispute in negligence, nuisance or trespass related to the performance of reviewable domestic work other than a claim for personal injuries.⁸
- [8] Reviewable domestic work means domestic building work.⁹ Domestic building work includes the erection or construction of a detached dwelling.¹⁰ Domestic building work does not include excluded building work.¹¹ A building contractor includes a person who carries out building work or manages the carrying out of building work.¹² Building work is defined.¹³ Building work does not include work of a kind excluded by regulation.¹⁴
- [9] A commercial building dispute means a claim or dispute arising between a building owner and a building contractor relating to the performance of reviewable commercial work or a contract for the performance of reviewable commercial work; or a claim or dispute in negligence, nuisance or trespass related to the performance of reviewable commercial work other than a claim for personal injuries.¹⁵ Reviewable commercial work means tribunal work other than reviewable domestic work.¹⁶

⁵ Respondent's submissions filed 25 July 2019.

⁶ *Queensland Building and Construction Commission Act 1991* (Qld) ('QBCC Act') s 77(1).

⁷ *Ibid* sch 2.

⁸ *Ibid*.

⁹ *Ibid*.

¹⁰ *Ibid* sch 1B, s 4(1)(a).

¹¹ *Ibid* sch 1B, s 4(8).

¹² *Ibid* sch 2.

¹³ *Ibid*.

¹⁴ *Ibid*.

¹⁵ QBCC Act sch 2.

¹⁶ *Ibid*.

- [10] Tribunal work has the meaning at s 75 and s 76 of the QBCC Act.
- [11] The description of the building works in the contract includes, ‘Keep the existing house and build two new dwellings at the rear.’¹⁷
- [12] It is not clear from the material before me whether the building work undertaken by MDP related to a detached dwelling¹⁸ and was therefore domestic building work, or whether the building work was reviewable commercial work. If the building work referred to in the contract involved the construction of a duplex or two single detached dwellings, then it seems to me that the work was probably domestic building work.
- [13] It is uncontentious that Alluvion was not a party to the building contract. Alluvion and Ruby were parties to a Joint Venture Agreement (‘JVA’).¹⁹ Pursuant to the JVA, the parties agreed to develop the property at which the subject building work was performed. Under the JVA, Ruby was the property owner and Alluvion was the developer. By clause 5.1 of the JVA the business and operations of the joint venture were controlled by the Project Committee. The Project Committee comprised a representative of Ruby and a representative of Alluvion. Among other things the Project Committee was empowered to make decisions about ‘the builder and the terms of the Building Contract’. By clause 19.3 of the JVA, Ruby was required to ‘do all acts and things and sign all documents reasonably required to facilitate the construction, titling of the Building Works ...’ Among other things, Ruby was required to sign the building contract.
- [14] After completion of the building works, by clause 21 of the JVA, Alluvion was required to take the necessary steps to register the community titles scheme established in accordance with the *Body Corporate and Community Management Act 1997* (Qld) and complete the development.
- [15] The obligations arising out of the performance of the building work relating to the development were, under the JVA, Ruby’s obligations. The JVA did not require the building contract to be entered into in the joint names of Alluvion and Ruby. Under the terms of the JVA, Alluvion’s role was to ‘provide Project Management Services to the Joint Venture.’²⁰ Details of the ‘Project Management Services’ are contained in an annexure to the JVA. The specified services include ‘day to day co-ordination and liaison with the Builder’ and ‘contract management’.²¹ ‘Builder’ is defined in the JVA as ‘the builder agreed upon by the Parties to be engaged to carry out the construction work for the Building’.²² Contract management is not defined in the JVA.

¹⁷ Residential Building Contract – Level 2 (‘Building Contract’) dated 16 January 2017.

¹⁸ QBCC Act sch 1B, s 1, s 4(1)(a).

¹⁹ Affidavit of Mathew Pitman filed 11 June 2019, exh MDP-1.

²⁰ Building Contract cl 4.1(1).

²¹ Ibid annex B.

²² Ibid cl 1.1(9).

- [16] The essential requirement for a person to be a ‘building owner’ under the QBCC Act is that they are a person *for whom* building work is to be, is being or has been carried out.²³
- [17] Alluvion is referred to in the building contract as supplying the plans, specifications and foundations data. Ms Hollie Layton, a director of Alluvion, is identified in the building contract as Ruby’s agent. The building contract provides that the agent is to act on the owner’s behalf with respect to the administration of the contract and the performance of the owner’s obligations under the contract.²⁴ It seems tolerably clear on the material before me that the building contract was entered into by Ruby in accordance with, and to facilitate, the JVA.
- [18] The parties have not yet filed their statements of evidence. The Tribunal is not a pleadings jurisdiction. It is the statements of evidence that, to a large extent, perform the functions of pleadings in articulating, particularising and clarifying the issues in dispute. In the absence of statements of evidence there is something of a lack of clarity in relation to the issues.
- [19] MDP’s evidence, limited as it is, is that it was not aware of the existence of the JVA at the time the building contract was entered into. Alluvion has filed no evidence.
- [20] I would make the observation that it is a curious feature of the proceeding that Ruby is not a party nor has Alluvion taken any steps to join Ruby.
- [21] Neither party has referred me to any relevant authority in QCAT or any predecessor tribunal addressing the issue as to the jurisdiction of the tribunal in respect of a dispute between a builder and a person who was not a party to the building contract but who asserts an interest in the building works pursuant to a separate agreement with the owner.
- [22] In *Black, G. v Toowoomba Resort Pty Ltd* (*‘Black’*)²⁵ the former Commercial and Consumer Tribunal was required to decide a dispute between a builder (Black) and an owner (Toowoomba) in relation to a contract for the construction of a townhouse development. The evidence before the tribunal was that the owner was a joint venturer with other persons who were not parties to the proceedings.
- [23] The tribunal found:

On the evidence, the respondent, when entering into the building contracts was doing so on behalf of, and to facilitate, the joint venture arrangements. The transfer of the units to one of the joint venturers affects no change in the nature of the respondent’s loss, which is synonymous, at all relevant times, with the loss suffered by the joint venture. It is not, as the applicant submitted, a different loss (or no loss) that the respondent has suffered as a result of the transfer of the units.²⁶

²³ QBCC Act sch 2. This is so in respect of both commercial building disputes and domestic building disputes.

²⁴ Building Contract cl 29.11.

²⁵ [2007] QCCTB 122.

²⁶ *Black, G. v Toowoomba Resort Pty Ltd* [2007] QCCTB 122.

- [24] *Black*²⁷ is clearly distinguishable on its facts. Firstly, the parties to the proceedings were the parties to the building contract. Secondly, the issue was not one of the jurisdiction of the tribunal to hear and decide the claim, but rather the recoverability of damages for defective building work claimed by the owner who was a joint venturer. *Black* has no application in the present case.
- [25] As I have observed, Alluvion was not a party to the contract. Alluvion does not seek to rely upon s 55 of the *Property Law Act 1974* (Qld) and in any event it is difficult to apprehend how s 55 would have application in the present case. The only claim by Alluvion against MDP is one in restitution. It seems to me that any claim for restitutionary relief as sought by Alluvion against MDP effectively seeks to redistribute the risks and the rights and obligations for which provision was made by the contract between Ruby and MDP.²⁸ The contract between Ruby and MDP clearly stipulates the available remedies in the event of a breach. Whether and to what extent the terms of the contract exclude the availability of common law and other remedies is relevant only to the rights of the parties to the contract.
- [26] The rights and obligations of Alluvion, such as they are relating to the building work, are governed by the JVA. Those are rights and obligations as between Alluvion and Ruby. Alluvion was not the builder and, pursuant to the JVL, Alluvion was required to facilitate a building contract between the builder and Ruby. Ruby was required to do all acts and things and sign all documents reasonably required to facilitate the building works. As I have observed, the obligations as between the builder and Ruby in respect of the building works were exclusively Ruby's.
- [27] In these circumstances it would, in my view, be to introduce an unacceptably elastic construction of the QBCC Act to accept that a party to a joint venture agreement, in circumstances such as presently pertain, is a person for whom building work was, is being, or is to be, carried out and hence, a building owner for the purposes of the QBCC Act. This view is reinforced where, as here, the builder says it had no knowledge of the joint venture arrangement at the time the building contract was entered into with Ruby.
- [28] There are other hurdles facing Alluvion. It seeks the recovery of monies paid under a mistake of fact. In the document 'Claim' attached to the originating application, Alluvion says that it paid monies to MDP it was not required to pay.²⁹ Alluvion says that this occurred as a result of it not reviewing certain invoices before payment 'due to a prior friendship'.³⁰
- [29] Since the decision of the High Court in *David Securities Pty Ltd v Commonwealth Bank of Australia*,³¹ there is no distinction to be drawn between payments made under a mistake of law and payments made under a mistake of fact. Underpinning this is the 'unifying concept' of unjust enrichment adopted by the High Court in *Pavey & Matthews Pty Ltd v Paul*.³² A 'voluntary' payment (that is, one made in satisfaction of an honest claim) is not recoverable on the ground of mistake. A payment is voluntary if the payer chooses to make the payment even though he or

²⁷ Ibid.

²⁸ *Lumbers v W Cook Builders Pty Ltd* (in liq) (2008) 232 CLR 635.

²⁹ Applicant's claim filed 3 April 2019.

³⁰ Ibid.

³¹ (1992) 175 CLR 353.

³² (1987) 162 CLR 221.

she believes a particular law or contractual provision requiring the payment is, or may be, invalid, or is not concerned to query whether payment is legally required, or if the payer is prepared to assume the validity of the obligation, or is prepared to make the payment irrespective of the validity or invalidity of the obligation, rather than contest the claim for payment.

- [30] It seems to me therefore that, aside the question of the jurisdiction of this tribunal to hear and decide the matter, the claim as presently framed by Alluvion faces a number of challenges.
- [31] MDP seeks to have Alluvion's application dismissed. Section 47 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act') is a summary judgment power. The power conferred by s 47 should only be exercised in those cases where it is clear that a party has no real prospects of success and there is no need for a hearing. For MDP to be successful in the application for summary dismissal, I must be satisfied that Alluvion has no real prospect of success in the proceedings.
- [32] I am satisfied the tribunal does not have jurisdiction to hear and decide the matter. The proceedings brought by Alluvion are misconceived and should be dismissed.
- [33] Alluvion says that the proceedings should be transferred to the Magistrates Court.³³
- [34] The Tribunal may, if the Tribunal considers it does not have jurisdiction to hear all matters in a proceeding, order the transfer of the matter or matters to a court of competent jurisdiction.³⁴
- [35] I am not satisfied that it is appropriate to transfer the proceedings to the Magistrates Court. The application filed by Alluvion does not articulate a cause of action in a form in any way harmonious with the *Uniform Civil Procedure Rules 1999* (Qld). In *M & J Gray Investments Pty Ltd v AMP Pacific Fair Pty Ltd & Ors*³⁵ then QCAT President Alan Wilson J stated:

[14] Procedural difficulties will arise here if M & J's application to QCAT is transferred to the Supreme Court. Despite substantial verbiage and attachments, it is not in a form which would constitute an adequate pleading. Because it was filed before the lessors' action was commenced in the Supreme Court, it is also unresponsive and on any view M & J, or both parties, would be required to re-plead if the QCAT application was simply transferred to the Court.

[15] It is not, then, a matter in which a transfer to the Court can be readily or comfortably facilitated. It is not impossible that, had M & J's legal representatives turned their minds to the matter, appropriate directions may have been fashioned but, in the absence of any attempt to do that, the better course is to simply dismiss the QCAT proceeding and allow M & J to seek its relief in the present Supreme Court action (or elsewhere if it chooses).

³³ Application for miscellaneous matters filed 3 July 2019.

³⁴ *Queensland Civil and Administrative Tribunal Act 1991* (Qld) s 52(2).

³⁵ [2010] QCAT 454, [14]-[15].

- [36] The proceedings should be dismissed and I order accordingly. Alluvion may commence proceedings in another place by filing a properly articulated and particularised pleading.
- [37] I also order that the parties file and exchange submissions on costs.