

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Yen v Darryl Hathway Painting and Decorating Pty Ltd*
[2021] QCAT 111

PARTIES: **MAVIS LUAN-YING YEN**
(applicant)

v

**DARRYL HATHWAY PAINTING AND
DECORATING PTY LTD**
(respondent)

APPLICATION NO/S: BDL054-20

MATTER TYPE: Building matters

DELIVERED ON: 30 March 2021

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Senior Member Brown

- ORDERS:
- 1. Wang Pi-Chu Yen and Kuo-Shun Yen are joined as applicants;**
 - 2. Mavis Luan-Ying Yen is removed as an applicant;**
 - 3. The application for miscellaneous matters filed by the respondent on 11 September 2020 is refused;**
 - 4. The applicants must file in the Tribunal two (2) copies and give to the respondent one (1) copy of an amended application for domestic building disputes by:**
4:00pm on 15 April 2021.
 - 5. The respondent must file in the Tribunal two (2) copies and give to the applicants one (1) copy of an amended response and counter application (if any) by:**
4:00pm on 29 April 2021.
 - 6. The applicants must file in the Tribunal two copies and give to the respondent one (1) copy of any further statements of evidence on which the applicants intend to rely by:**
4:00pm on 29 April 2021.
 - 7. The respondent must file in the Tribunal two (2)**

copies and give to the applicants one (1) copy of any further statements of evidence in response by:

4:00pm on 20 May 2021.

- 8. The applicants must file in the Tribunal two copies and give to the respondent one (1) copy of any further statements of evidence in reply by:**

4:00pm on 3 June 2021.

- 9. The parties must file in the Tribunal two (2) copies and exchange one (1) copy of any submissions on costs in relation to the application for miscellaneous matters filed by the applicants on 5 January 2021 and the application for miscellaneous matters filed by the respondent on 11 September 2020 by;**

4:00pm on 15 April 2021.

- 10. The parties must file in the Tribunal two copies and exchange one (1) copy of any submissions in reply by;**

4:00pm on 22 April 2021.

- 11. Each of the submissions in accordance with order 9 and order 10 must not exceed 2 pages in length.**

- 12. The Tribunal will consider the question of the costs of the applications for miscellaneous matters after 4:00pm on 22 April 2021.**

CATCHWORDS:

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PARTIES AND REPRESENTATION – PROPER OR NECESSARY PARTY AND STANDING – where the applicant is the daughter of the building owners – where the building owners are elderly and not fluent in English – where the applicant acted as agent for the home owners under a power of attorney – where the applicant contracted in her name with the respondent – whether the applicant has standing to bring the proceedings – whether the building owners should be joined as parties

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND FEDERAL COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – SUMMARY JUDGMENT FOR DEFENDANT OR RESPONDENT – whether proceedings should be dismissed on the basis that the applicant lacks standing

Campbell v Pye (1954) 54 SR (NSW) 308

Gray v Pearson (1870) 5 LRCP 568

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] There are two applications before the Tribunal for determination: an application to join additional applicants, and an application by the respondent to dismiss the proceedings.

The dispute

- [2] Ms Yen's parents, Wang Pi-Chu Yen and Kuo-Shun Yen, are the owners of a property north of Brisbane.
- [3] Hathway undertook painting work at the property. The parties fell into dispute. Ms Yen commenced proceedings in the tribunal.
- [4] In the originating application Ms Yen says, inter alia:
- (a) Hathway ceased work after receiving a 'large amount of payment' and engaged in 'illegal behaviour to mislead us making such payments';
 - (b) A complaint was made to the QBCC however the QBCC advised that the dispute was contractual in nature and not within their jurisdiction;
 - (c) The painting work performed by Hathway was defective in the following respects:
 - (i) External timber walls not painted or stained;
 - (ii) Timber frame adjacent to front door not painted;
 - (iii) Timber deck not adequately prepared before applying stain and stain applied in a defective manner;
 - (iv) Roof support posts and rafters not properly or adequately stained;
 - (d) Ms Yen's parents are elderly and, while they understand and speak some English, they do not do so fluently;
 - (e) Ms Yen entered into the contract with Hathway.
- [5] In its response, Hathway says, inter alia:
- (a) The tribunal does not have jurisdiction in matters involving the Australian Consumer Law;
 - (b) Ms Yen lacks standing to bring the proceedings as she 'is merely an agent of the property owners';
 - (c) All work was carried out and completed in accordance with the scope of works.
- [6] Ms Yen has filed a statement of evidence in which she says:
- (a) Her parents, Mr and Mrs Yen, are the owners of the property;

- (b) She was asked by her parents to assist them in engaging a painting contractor to undertake works at the property;
- (c) She arranged for a number of painting contractors to attend at the property for the purposes of quoting for the painting works;
- (d) Among those painting contractors who attended at the property was Mr Darryl Hathway;
- (e) Mr Hathway inspected the property with Ms Yen and her father;
- (f) A contract was subsequently prepared by Hathway and emailed to Ms Yen;
- (g) The contract was signed by Ms Yen and the works commenced.

The application to be joined as a party

[7] Ms Yen's parents, Mr and Mrs Yen, have applied to be joined as applicants. For reasons that will become apparent, it is appropriate to first deal with this application.

[8] Section 42 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) provides:

42 Joining and removing parties

- (1) The tribunal may make an order joining a person as a party to a proceeding if the tribunal considers that—
 - (a) the person should be bound by or have the benefit of a decision of the tribunal in the proceeding; or
 - (b) the person's interests may be affected by the proceeding; or
 - (c) for another reason, it is desirable that the person be joined as a party to the proceeding.
- (2) The tribunal may order that a party be removed from a proceeding if the tribunal considers that—
 - (a) the party's interests are not, or are no longer, affected by the proceeding; or
 - (b) the party is not a proper or necessary party to the proceeding, whether or not the party was one originally.
- (3) The tribunal may make an order under subsection (1) or (2) on the application of a person or on its own initiative.

[9] As s 42 makes clear, an application to join a person to a proceeding may be made by an existing party to a proceeding or by a person seeking to be joined as a party.

[10] Accompanying the joinder application is an affidavit by Mr and Mrs Yen in which they attest to the following:

- (a) They are the parents of Ms Yen;
- (b) They are the joint owners of the property;
- (c) Ms Yen was authorised to act on their behalf 'at all material times' as Mr and Mrs Yen's attorney pursuant to a registered power of attorney;
- (d) Ms Yen signed the contract with Hathway on behalf of Mr and Mrs Yen;

- (e) Mr and Mrs Yen agree to be joined as parties to the proceedings on the basis that they are the registered owners of the property.
- [11] Despite being directed to do so, Hathway has filed no submissions in response to the joinder application. The Tribunal observes that the registry endorsement on the directions made by the Tribunal on 25 January 2021 notes that the parties were forwarded the directions by email on 12 February 2021. Unfortunate as it may be that there was obvious delay in sending the directions to the parties, Hathway has not filed an application to extend the time to file submissions.
- [12] The Tribunal directed the joinder application be determined on the papers after February 2021. Neither party has filed an application for an oral hearing in respect of the joinder application.
- [13] I am satisfied as to the following and find accordingly:
- (a) Mr and Mrs Yen are the owners of the subject property;
 - (b) Ms Yen was acting as the agent for Mr and Mrs Yen when the contract was entered into for the performance by Hathway of the painting work;
 - (c) As the owners of the property:
 - (i) Mr and Mrs Yen should be bound by or have the benefit of a decision of the tribunal in the proceeding;
 - (ii) Mr and Mrs Yen's interests may be affected by the proceeding.
- [14] Accordingly, it is appropriate that Mr and Mrs Yen are joined as applicants in the proceedings.

Application to dismiss

- [15] The application to dismiss by Hathway relies upon a single ground, that is, Ms Yen lacks standing to bring the proceeding.
- [16] I have ordered the joinder of Mr and Mrs Yen as applicants. There is no suggestion in the application by Hathway or its submissions that Mr and Mrs Yen themselves lack standing to bring the proceedings. Accordingly the application to dismiss must fail on the basis that Hathway has not made out any of the grounds referred to at s 47(1) of the QCAT Act, at least insofar as the claim by Mr and Mrs Yen is concerned.
- [17] That leaves the question of whether Ms Yen should remain a party. Ms Yen says that she was, at all times, acting as the attorney for her parents. The relationship created by a power of attorney is one of agency, with the attorney having power as agent for the principal.¹ However as noted by Dal Pont in *Law of Agency* 3rd edition:

The basic principle is that 'if a man signs a written contract, he is to be considered as the contracting party, unless it clearly appears that he executes it as agent only'. Hence, at common law a person who in making a contract, as opposed to executing a deed, discloses both the existence and the name of a principal on whose behalf he or she purports to make it, is not as a general rule liable on the contract to the other contracting party if he or she has the

¹ Dyson Heydon and Mark Leeming, *Cases and Materials on Equity and Trusts* (LexisNexis Butterworths, 8th ed, 2011).

authority from the principal, whether actual or ostensible, to make the contract.²

- [18] There is no direct evidence that Ms Yen disclosed that she was acting as agent for her parents in entering into the contract although the evidence of Ms Yen is that when Mr Hathway attended at the property before the contract was entered into, Ms Yen and her father were both present. In its submissions, Hathway says that Ms Yen's involvement was as bare agent for her parents.
- [19] The general rule, as articulated in the various authorities including *Campbell v Pye*³ and *Gray v Pearson*⁴ in relation to enforcement of a contract by an agent is that the agent can only bring an action to enforce the contract in the name of the principal with the consent of the principal. The agent themselves has no cause of action and no interest in the subject matter of the suit. The person whose right has been violated is the most appropriate person to bring the suit.⁵ *Campbell v Pye* is also clear authority for the proposition that where an attorney has decided to bring action under the authority given to him or her by a power of attorney, the action must be brought in the principal's name.⁶
- [20] It follows that the action must be brought in Mr and Mrs Yen's name and that Ms Yen, as attorney for her parents, has no cause of action and no interest in the subject matter of the proceedings.
- [21] I have referred earlier in these reasons to s 42 of the QCAT Act. By s 42(2) of the QCAT the tribunal may order the removal of a party from a proceeding. I am satisfied that Ms Yen is not a proper party to the proceeding. Her interests are not affected by the proceeding nor is she a proper party to the proceeding for the other reasons set forth. It is appropriate that Ms Yen is removed as a party and I order accordingly.

Conclusion

- [22] In light of the foregoing reasons, I order that Wang Pi-Chu Yen and Kuo-Shun Yen are joined as applicants. I also order that Mavis Luan-Ying Yen is removed as an applicant.
- [23] As to the application to dismiss, it is apparent from the orders in relation to the joinder and removal of parties that the application must be refused.
- [24] It is necessary however to make further orders to regularise the proceedings. An amended application must be filed by Mr and Mrs Yen and Hathway given the opportunity to file an amended response. It is also necessary for the applicants to file any further statements of evidence upon which they seek to rely. Orders will therefore be made for the filing of evidence by both parties.
- [25] I will also make orders for the parties to file and exchange submissions on costs.

² Footnotes omitted.

³ (1954) 54 SR (NSW) 308.

⁴ (1870) LR 5 CP 568

⁵ See *Owners - Strata Plan No 43551 v Walter Construction Group Ltd* (2004) 62 NSWLR 169.

⁶ (1954) 54 SR (NSW) 308, 309.