

# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Kenray Construction Pty Ltd v Trevor Buchanan* [2020] QCATA 16

PARTIES: **KENRAY CONSTRUCTION PTY LTD**  
(applicant)

v

**TREVOR BUCHANAN**  
(respondent)

APPLICATION NO/S: APL304-19

MATTER TYPE: Other minor civil dispute matters

DELIVERED ON: 6 February 2020

HEARING DATE: On the Papers

HEARD AT: Brisbane

DECISION OF: Member Fitzpatrick

ORDERS: **The order of the Tribunal below made 17 October 2019 is stayed pending further order.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – whether proceeding commenced as a minor civil dispute is a building dispute – whether Tribunal has jurisdiction - status of mediation agreement – whether adjudicator had jurisdiction to make orders arising out of a mediation agreement – application for a stay – power to determine jurisdiction.

*Queensland Building and Construction Commission Act 1991 (Qld), s 75, s 77, s 4 Schedule 1B.*  
*Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 85(5).*

*Anthony Warren Skaines v Kovac Enterprises Pty Ltd (2006) QSC 120.*

REPRESENTATION:

Applicant: Self-represented

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] Kenray Construction Pty Ltd (Kenray) has sought a stay of a decision made on 17 October 2019 ordering it to pay the sum of \$18,631.00 to Trevor Buchanan (Buchanan).
- [2] In considering the stay application, the history of this matter has been reviewed. As a result a number of issues have been identified which must be addressed before the matter proceeds.
- [3] The relevant background is set out below.
- [4] Kenray is a building contractor. It engaged Buchanan to construct a putting green at a residential property at Stretton. The work is described in a quotation dated 21 September 2018 as:
  - (a) Prepare the base and compact.
  - (b) Lay 100mm of cement stabilised road base.
  - (c) Supply and install putting green and surrounding grass.
- [5] The only evidence of the contract before the Appeal Tribunal is the emailed quotation of 21 September 2018 setting out the work described and the price of \$27,550.00 plus GST.
- [6] A deposit of \$12,000.00 was paid by Kenray.
- [7] The work was performed by Buchanan.
- [8] On 11 December 2018 Buchanan filed an application for a minor civil dispute seeking recovery of moneys said to be due and owing in the sum of \$18,631.00.
- [9] Kenray filed a response seeking orders for full removal and replacement of the putting green or full removal and partial replacement on the ground that the work performed was defective.
- [10] On 15 March 2019 the parties entered into an agreement as a result of a mediation directed to be undertaken in the course of the proceedings. The agreement records that a party may apply to the Tribunal seeking an order in accordance with the terms of the settlement if the other party does not comply with the terms of the filed agreement, pursuant to section 85 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCAT Act). The parties also agreed that the application would be withdrawn as settlement was reached at the mediation.
- [11] The mediation agreement was filed in accordance with the practice of the Tribunal by keeping a copy of the agreement on the Tribunal file. No application to withdraw the underlying minor civil dispute application was made as a consequence of the settlement.
- [12] The mediation agreement contains a work agreement whereby Buchanan agreed to remove a visible edge from the water tank lid, re-glue edges of green, where possible eliminate joins, and to sand the green so that the sand is not visible. Item 4 of the work agreement provides that: “*the workmanship comes with a 6 year warranty that is through the applicants builders licence*” and Item 5 provides that: “*the grass comes with a 7 year warranty that is through the manufacturer*”.

- [13] In accordance with the agreement Kenray paid the sum of \$9,000.00. Buchanan undertook the works. Kenray failed to pay the remaining sum of \$9,631.80 pursuant to the agreement.
- [14] Kenray filed an application for miscellaneous matters on 23 April 2019 seeking directions that Buchanan return all money paid on the basis that the work was defective and the owner of the house did not accept the job as the “artificial putting does not fit its purpose”. It was further alleged Buchanan breached the mediation agreement.
- [15] On 30 April 2019 the matter was referred for listing for hearing.
- [16] The matter was allocated a hearing date of 17 October 2019.
- [17] On 16 October 2019 Kenray filed an application for miscellaneous matters seeking orders dismissing the proceeding pursuant to section 47 or 48 of the QCAT Act on the basis that the dispute is a building dispute not a minor civil dispute. Submissions were filed with that application to the effect that the Tribunal has no jurisdiction to deal with the matter because the pre-condition to the Tribunal’s jurisdiction has not been met under section 77 (2) of the *Queensland Building and Construction Commission Act* 1991 (Qld) (QBCC Act). That is, Buchanan has not complied with the Commission’s dispute resolution process.
- [18] The Tribunal file bears a notation that the application filed 16 October 2019 did not reach the Tribunal file by the time of the hearing on 17 October 2019 and has not been dealt with.
- [19] At this stage I do not have the advantage of a transcript of the hearing on 17 October 2019, however, I have listened to the audio recording of the proceeding. It is possible that once a transcript is available a more accurate understanding of what has transpired can be achieved.
- [20] However, doing the best I can, I note that at the hearing the Adjudicator proceeded to deal with the matter as a claim for a liquidated sum arising out of the mediation agreement.
- [21] At the hearing, Buchanan swore to completion of the work required under the mediation agreement and failure by Kenray to pay the final payment.
- [22] Kenray raised the issue of jurisdiction and handed up the submission prepared by its solicitors in relation to the issue. Kenray also handed up an expert report in relation to the defective nature of the work performed by Buchanan.
- [23] The Adjudicator stated that the matter before him arose out of the mediation agreement. The Adjudicator found that the work under the agreement had been performed and that there was before him a liquidated claim for money owed under that agreement. The Adjudicator ordered that Kenray pay the sum of \$18,631.00 to Buchanan within 14 days.
- [24] The Adjudicator noted that the agreement recorded warranties in relation to work and materials and observed that Kenray could follow the procedures in the QBCC Act to seek relief for defective work if it wished.
- [25] On 12 November 2019 Kenray filed an application for leave to appeal or appeal and also filed an application to stay the decision.

- [26] The grounds of the application for leave to appeal or appeal include that the outstanding amount was \$9,631.80 not \$18,631.80, the work performed was defective and work was not performed in accordance with the mediation agreement. The application for leave to appeal or appeal does not refer to lack of jurisdiction in its grounds, but does attach the submissions made in the application to dismiss the proceedings.
- [27] The stay application sets out reasons for a stay, including that the amount ordered is more than the amount claimed. The works are not complete and defective and not completed in accordance with the mediation agreement. The question of jurisdiction is not raised in the stay application.
- [28] Buchanan has filed submissions in response to the application to stay a decision. Buchanan does not address the question of jurisdiction. Buchanan submits that he completed the work in accordance with the mediation agreement, but that the balance sum agreed to be paid in an amount of \$9,631.80 was never paid. Buchanan asserts the decision should be upheld. Buchanan disputes the claims made in the application for leave to appeal or appeal.

### **Issues**

- [29] The issues which arise are:
- (a) Was the application filed by Buchanan on 11 December 2018 as a minor civil dispute properly within the Tribunal's jurisdiction or did it fall outside the Tribunal's jurisdiction because it is a building dispute and Buchanan has not complied with s77 (2) of the QBCC Act?
  - (b) If the Tribunal did not have jurisdiction to deal with Buchanan's application, what is the effect of the mediation agreement entered into by the parties?
  - (c) Taking into account both the question of jurisdiction and the Tribunal's powers under section 85 (5) of the QCAT Act - did the Tribunal have the power to treat the claim by Buchanan as a claim arising out of the mediated agreement, as a minor civil dispute, and to make the order made on 17 October 2019?
  - (d) How should this matter be dealt with?

### **Jurisdiction of the Appeal Tribunal**

- [30] The Appeal Tribunal must determine its jurisdiction before this matter can proceed further.<sup>1</sup>

### **Stay**

- [31] In the meantime, given that a serious question arises as to the jurisdiction of the Appeal Tribunal to deal with the matter and any appeal, it is appropriate to grant a stay of the order made on 17 October 2019. I consider that I have the power to do so as a matter consequential upon determining the Appeal Tribunal's jurisdiction.
- [32] Apart from that consideration, it is apparent that the Adjudicator was in error in any event, in ordering payment of the sum of \$18,631.00, when the extent of Buchanan's claim was \$9,631.80.

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<sup>1</sup> *Anthony Warren Skaines v Kovac Enterprises Pty Ltd* (2006) QSC 120 at p 9

[33] I order that the order made on 17 October 2019 be stayed pending further order of this Appeal Tribunal.

### **Submissions required**

[34] In order to determine the best means of dealing with the disputes between the parties, I require submissions from the parties which address the issues identified in this decision.

### **Directions**

[35] The Appeal Tribunal directs that:

- (a) the applicant Kenray Construction Pty Ltd file in the Tribunal and serve on the respondent Trevor Buchanan submissions in relation to the following matters:
  - (i) whether the application for minor civil dispute (the dispute) filed by the respondent Trevor Buchanan on 11 December 2018 is properly characterised as a minor civil dispute or a building dispute;
  - (ii) if the applicant contends that the dispute is properly characterised as a building dispute:
    - whether the dispute is a minor commercial dispute or a domestic building dispute as defined in the *Queensland Building and Construction Commission Act 1991* (Qld) (QBCC Act); and
    - what is said to be the nature of either the tribunal work pursuant to section 75 of the QBCC Act or domestic building work pursuant to section 4 of Schedule 1B of the QBCC Act, including if relevant to the contention:
      - how the work is related to tribunal work of a kind mentioned in paragraphs (a) to (d) of section 75 of the QBCC Act; or
      - how the work is associated work of a kind mentioned in sub-paragraphs (3) or (4) of section 4 of Schedule 1B of the QBCC Act.
  - (iii) whether the Appeal Tribunal has jurisdiction to deal with the dispute as a minor civil dispute or in some other way;
  - (iv) the legal effect of the mediation agreement dated 15 March 2019 (mediation agreement);
  - (v) the power of the Appeal Tribunal to deal with the mediation agreement pursuant to section 85(5) of the QCAT Act or otherwise;
  - (vi) whether the Tribunal had the power to hear the matter on 17 October 2019 as a minor civil dispute being a liquidated claim arising out of the mediation agreement;
  - (vii) orders which should be made by this Appeal Tribunal.

by 4:00pm on 21 February 2020.

- (b) The respondent Trevor Buchanan file in the Tribunal and serve on the applicant Kenray Construction Pty Ltd submissions in relation to the matters set out in sub-paragraphs (i)-(vii) above:

by 4:00pm on 6 March 2020.

- (c) The applicant Kenray Construction Pty Ltd file in the Tribunal and serve on Trevor Buchanan any submissions in reply:

by 4:00pm on 13 March 2020.

- (d) The issues identified in this decision to be determined on the papers not before 20 March 2020.