

**QUESTIONS OF JURISDICTION**

**ADVANCE  
EARTHMOVERS PTY  
LIMITED V FUBEW PTY  
LIMITED [2009] NSWCA  
337**

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**IMPACT**

This article considers the scope of 'residential building work' in the context of the *Building and Construction Industry Security of Payment Act 1999* ('SOPA') and the *Home Building Act 1989* ('HBA')

**BACKGROUND**

The applicant, an earthmoving company was contracted by the respondent to do earthmoving work on the respondent's property for the preparation of an access road prior to construction on the property of a proposed residence for the respondent's directors.

The applicant issued a number of invoices for the work completed totalling \$95,000.

The respondent only paid \$15,000 of the \$95,000 claimed on the basis that the estimate for the work was \$15,000.

The applicant also issued a 'Payment Claim' under the SOPA in an attempt to recover payment of the unpaid invoices from the respondent. The respondent did not pay the outstanding invoices as set out in the Payment Claim nor did it serve a payment schedule under the SOPA providing reasons as to why it would not pay the respondent. Consequently, the applicant endeavoured to seek summary judgment against the respondent in the District Court and was successful in doing so

It should be noted that prior to the commencement of District Court proceedings by the applicant, the respondent had filed a claim in the Consumer, Trader & Tenancy Tribunal ('CTTT') against the applicant in respect of alleged overcharging.

However, the respondent was successful in having the District Court set aside the summary judgment on the basis that it would be a denial of natural

justice not to set aside the judgment in the circumstances and that the respondent appeared to have a good defence on the merits based on the interpretation of the *Consumer, Trader & Tenancy Tribunal Act 2001* ('CTTT Act'). Section 22(3) of the CTTT Act states that:

If, at the time when an application was made to the Tribunal in accordance with this Act, no issue arising under the application was the subject of a dispute in proceedings pending before a court, a court has no jurisdiction to hear or determine such an issue.

The applicant appealed the decision to set aside the summary judgment requiring the Court of Appeal to examine the interpretation and operation of the CTTT Act, the HBA and the SOPA. The CTTT has jurisdiction to determine claims regarding residential building work pursuant to ss 48I-48L of the HBA. The CTTT Act removes jurisdiction from a court if an issue is already before the CTTT (s 22(3) of the CTTT Act). The ability of a contractor to make a claim for payment under the SOPA is removed by s 7(2)(b) of the SOPA if the work is 'residential building work' as defined in the HBA on such part of any premises as the party for whom the work is carried out resides in or proposes to reside in.

The two key issues before the Court of Appeal were whether the District Court would be hearing the same 'issue' as the CTTT and whether a corporation for whom residential building work under the HBA was completed could reside in a dwelling thereby excluding the application of the SOPA by virtue of section 7(2)(b) of the SOPA.

## JURISDICTION

The first issue was whether the District Court, in deciding the SOPA claim, would be hearing the same 'issue' as the CTTT hearing the respondents claim for overcharging for the work.

The CTTT proceedings dealt with the ultimate question of whether the respondent must pay to the applicant the outstanding fees. The District Court was only dealing with whether the applicant was entitled, in the interim, to be paid the amount of its demand in accordance with SOPA.

Therefore, as Sackville AJA observed, the applicants' claim in the District Court raised quite different questions to those presented by the respondent's claim in the CTTT in that the respondent's claim in the CTTT that it was not obliged to pay the sum of \$79,500 to the applicant under the construction contract did not depend on proof of any matters under the SOPA (although it was common ground that the parties had entered into a construction contract). The principal question arising in the CTTT is whether the applicant has an entitlement to payment of \$79,500 by reason of the supply of building goods and services. The CTTT has power to allow for and make orders for the restitution of any moneys previously paid by the respondent to the applicant. Accordingly, it is not correct simply to assert that the common issue in applicants' claim under s 15 of the SOPA and respondent's building claim before the CTTT under s 48K of the HB Act is whether the 'claims' must be paid or not.

The Court of Appeal concluded that the District Court would not be determining the same 'issue' as the CTTT (and thus be deprived of jurisdiction by section 22(3)) because the District

Court decision would not be a final decision as to whether the respondent was required to pay the outstanding amount for the contracted work.

## INTERPRETATION OF SECTION 7(2)(b)

The second issue was that if the contract involved residential building work, then it may be that the SOPA did not apply and thus the applicant's proceedings under the SOPA should fail and there was a defence on the merits to the claim

During the hearing there was little discussion of the key point that as the respondent is a corporation it cannot reside in a dwelling, this statement being thought to be obviously correct

Young, JA held that this statement was not so obviously correct. However, notwithstanding, he still considered it to be correct. He reviewed the law regarding the ability of a corporation to be a resident including numerous High Court authorities and concluded at paragraph 69 that 'residential building work performed for a corporation cannot fall within section 7(2)(b) of the SOPA so as to abrogate the right of a contractor to proceed under section 15(2)(a)(i)' in the District Court to obtain summary judgment for the amount claimed'.

The outcome of the above findings was that the appeal was allowed and summary judgment for the applicant was restored.

## IMPLICATIONS

Young JA noted at paragraph 47 that 'there is an awkward fit between the various pieces of legislation that govern the present dispute. Not only are the CTTT Act and the SOPA significant, but so also is the Home Building Act'

This case is notable as providing Court of Appeal authority on some aspects of the operation of the CTTT Act, the SOPA and the HBA and their interrelationship in building cases.