IN THE COUNTY COURT OF VICTORIA

Revised
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AT MELBOURNE
COMMERCIAL DIVISON
BUILDING CASES LIST

Case No. CI-15-04736

J G KING PTY LTD — Plaintiff

v.

ADIEL PROPERTY HOLDINGS PTY LTD — Defendant

JUDGE:	His Honour Judge Anderson
WHERE HELD:	Melbourne
DATE OF HEARING:	13 November 2015
DATE OF JUDGMENT:	20 November 2015
CASE MAY BE CITED AS:	J G King Pty Ltd v. Adiel Property Holdings Pty Ltd
MEDIUM NEUTRAL CITATION:	[2015] VCC 1600

REASONS FOR JUDGMENT

Catchwords: Practice and procedure – Application for summary judgment – Building Contract – *Building and Construction Industry Security of Payment Act 2002* (Vic) – Whether the Act applies – Each construction contract a "*domestic building contract*" – Whether defendant "*in the business of building residences*" in the terms of section 7(2)(b) of the Act – *Director of Housing v Structx Pty Ltd* [2011] VSC 410 applied.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr D. McAndrew	Champions Lawyers
For the Defendant	Mr J.A.F Twigg QC with Dr K. Weston-Scheuber	Millens Pty Ltd

HIS HONOUR:

1 In March and April 2014, J G King Pty Ltd ("*King*") entered into 10 contracts for the construction of residential dwellings for Adiel Property Holdings Pty Ltd ("*Adiel*"). The contracts included two dwellings on Lots 5 and 6 of a subdivision in Delacombe.

2 Adiel failed to pay the final claims made by King in respect of two construction contracts. King now seeks judgment for the unpaid claims totalling $415,856.32 pursuant to section 16(4)(a) of the *Building and Construction Industry Security of Payment Act 2002* (Vic) ("*the Act*").

3 Adiel submits that it has a "real prospect" of successfully defending the claim on four bases:

a. the construction contracts were "*domestic building contracts*" and Adiel was not "*in the business of building residences*", as it did not enter into the contracts "*in the course of, or in connection with*" the "*business of building residences*". Therefore, by section 7(2)(b), the Act does not apply to the construction contracts;

b. the two payment claims, both dated 30 June 2015, are not valid claims as they included the "*balance owing*" for previous progress claims. This was contrary to section 14(4) of the Act which required progress claims for earlier stages of the work to be served within the period calculated in accordance with the sub-section. The claims, served on 1 September 2015, were not within that period;

c. the two payment claims, insofar as they purported to be final claims were not valid claims as, pursuant to the construction contract, a final claim could only be made "*at completion*" or "*upon completion*". The contract works were not complete on 30 June 2015, the date completion was said to have taken place, because final inspection by Adiel revealed the existence of defects, which meant that the works were "*incomplete*" or "*not in accordance with the plans and specifications*";

d. the two payment claims, insofar as they purported to be final claims did not comply with section 14(5) of the Act as the claims were not made within the appropriate period specified in that sub-section.

Adiel not "*in the business of building residences*"

4 It was conceded by King that the two construction contracts were "*domestic building*

contract[s] within the meaning of the Domestic Building Contracts Act 1995 between a builder and a building owner … for the carrying out of domestic building work". Accordingly, the Act does not apply to such contracts, "*other than a contract where the building owner is in the business of building residences and the contract is entered into in the course of, or in connection with, that business*".

5 Adiel claimed that it is not "*in the business of building residences*". Adiel's counsel, Mr Twigg QC, with whom Dr Weston-Scheuber appeared, submitted that Adiel, as trustee of the Adiel's Property Trust ("the Adiel Trust") was in the business of leasing residences to Ethan Residential Pty Ltd ("*Ethan*") which operates in a consortium with Ethan Affordanble Housing Limits ("*EATH*") for the purposes of the National Rental Affordability Scheme ("*NRAS*").

6 Each of the relevant entities is associated with Mr Ashley Fenn and his family. Mr Fenn swore the affidavit filed on behalf of Adiel in opposition to summary judgment. The relevant bodies are as follows:

a. Adiel – Mr Ashley Fenn is the sole director and shareholder of the company;

b. Adiel Trust – The trustee is Adiel. The appointor is Mr Ashley Fenn. Eligible beneficiaries include members of Mr Fenn's family. The trustee "*has an absolute discretion to decide to distribute any part of the income of the trust fund for a financial year*";

c. Ethan – Mr Ashley Fenn is the sole director and shareholder of the company;

d. EAHL – The company is limited by guarantee. Mr Ashley Fenn is one of three directors of the company.

7 The consortium Deed between Etahn and EAHL is undated. The intention of the parties, expressed in the deed, is to "*participate in the National Rental Affordability Scheme*" under the relevant Commonwealth Legislation, including the Income Tax Assessment Act 1997. The NRAS was established by the Australian Government to "*stimulate the supply of affodable rental housing*" and to encourage investment by the provision of incentives paid by government. The scheme targets "*property developers, not-for-profit organisations and community housing providers*". The investment required is "*large scale*", which is "*usually 100 or more houses*", and dwellings must "*not have been previously lived in as a resdience*" or not "*since having been made fit for occupancy where previously … uninhabitable*" or not since having been "*converted to create additional residences*". Participation in NRAS is generally "*not directly available to small-scale private, individal investors in the rental property / market*". Participation in the

scheme "*as part of a consortium arrangement*" is envisaged.

8 In his affidavit, Mr Fenn said that the Adiel Trust "*was established to hold residential property to be used as affordable housing in partnership*" with Ethan and EAHL. The word "*partnership*" is, apparently, used loosely to describe the structure established by Mr Fenn whereby:

a. Adiel through the Adiel Trust purchases dwellings, or land upon which it contracts with a builder for a dwelling to be constructed;

b. The properties are leased to Ethan "*for a ten year period on a long term lease*";

c. Pursuant to the consortium deed, Ethan arranges for EAHL to use the dwellings "*for the provision of affordable housing*".

9 The leases between Adiel Trust and Ethan apparently use the Law Institute Victoria standard form "*lease of real estate*". The tenant's "*obligations*" under the lease include the payment of rent.

10 The arrangements between Ethan and EAHL are governed by the NRAS Consortium Deed. The provisions of the deed include:

a. noting that, "*Ethan has leased and will continue to lease residential dwellings from third party investors* (Recital I)";

b. noting that Ethan has "*the exclusive rights to provide … tenancy and property management services*" (Recital H, and clause 6);

c. noting that Ethan "*will continue to provide financial support to EAHL…to establish itself until it reaches … a financially sustainable position*" (Recital L, and clause 2);

d. EAHL agreeing that it will ensure that Ethan or its nominee "*receives the incentive payments*" from the relevant governments (clause 3.2(b)).

11 Mr Twigg submitted that adopting the approach taken by Vickery J, in *Director of Housing v Structx Pty Ltd* [2011] VSC 410 ("*Structx*"), would lead to the conclusion that Adiel was not "*in the business of building residences*".

12 In *Structx,* the Director of Housing of the State of Victoria ("*the Director of Housing*") contended that an adjudicator, who had purported to make a determination pursuant to the Act, lacked jursidiction because the Director of Housing was not "*in the business of*

building residences", as that phrase is used in section 7(2)(b) of the Act.

13 At paragraph 28, Vickery J stated that, "*The expression 'in the business of buidling residences…' connotes the construction of dwelling houses as a commercial enterprise on the basis of a going concern, that is, an enterprise engaged in for the purpose of profit on a continuous and repetitive basis*". In reaching this conclusion, Vickery J relied upon the decision of the High Court in *Hope v Bathurst City Council* (1980) 144 CLR 1 and a decision of McLelland J in the Supreme Court of New South Wales in *National Management Services v Commonwealth* (1993) 9 BCL 190,

14 Vickery J noted at paragraph 35 that pursuant to section 15 of the *Housing Act*, the Director of Housing had the power to "*develop any land vested in him or in which he had a leasehold estate*". Vickery J examined the objects of the *Housing Act* which included encouraging "*the provision of well meaintained public housing*" and "*the participation of non-profit bodies in the provision of … affordable rental housing*".

15 Vickery J, at paragraphs 39 and 40, said that, "*There was no evidence that the Director is or was at any time in the business of building residences within the meaning of section 7(2)(b) of the Act … Insofar as the Director arranges, as an owner of land or as lessee for the construction of residences, it does so principally in pursuit of the objectives set out in section 6 Housing Act*". Accordingly, Vickery J was "*not satisfied that there is any probative evidence upon which the Court can act to determine the Director is or was at any material times in the business of building residences*".

16 I must be satisfied, for the plaintiff to succeed on the present application, that there is no real prospect of a similar conclusion in this case, or that such a prospect is "*fanciful*" (see *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd* [2013] VSCA 158).

17 In *Structx*, Vickery J expressed his conclusion, partly, in terms of him not being satisfied on the available evidence that the precondition for the application of the Act was present. In the current proceeding, it is likely that King will have the onus of proving that Adiel was "*in the business of building residences*", or that it is at least arguable that King would bear that onus.

18 Section 7 prescribes the circumstances in which the Act applies. The Act generally applies "*to any construction contract*". However, this is "*subject to this section*". Subsection (2)(b) excludes domestic building contracts from the application of the Act, unless the construction contract is "*a contract where the building owner is in the business of building residences*".

19 In order for the Act to apply, the following questions must be answered:

a. Is there a "*construction contract*"?

b. Is the construction contract "*a domestic building contract… between a builder and a building owner … for the carrying out of domestic building work*…"?

c. Is the building owner "*in the business of building residences*"?

20 In the present case, questions arise as to whether –

a. King, as the applicant for judgment pursuant to section 16 of the Act, must establish the factual matters which make the Act applicable. In the present case, that would include (a) and, (b) having been conceded, also (c), or

b. Adiel, who is seeking to assert that the Act has no application, must establish both (b) and (c).

21 The task is not simple. In *Webster v Lampard* (1993) 177 CLR 598, the High Court considered the question of the onus of proof in relation to section 138 of the *Police Act 1892* (WA), as it incorporated paragraph H of the Second Schedule to the *Interpretation Act 1918* (WA). Section 138 provided as follows:

> "*No action shall lie against any … officer of police … on account of any act, matter, or thing done … in carrying the provisions of* [the Police] Act into effect again[st] any parties offending or suspected of offending against the same, unless there is direct proof of corruption or malice".

22 At page 607, the majority judgment of Mason CJ, Deane and Dawson JJ referred to the burden of proof in the situation where, "*the prima facie inference from the conceded or proven facts is that the defendant was genuinely, albeit mistakenly, purporting or intending to act in pursuance of statutory authority or duty but it is alleged by the plaintiff that the defendant was really actuated 'not … by an honest desire to do his [or her] duty' but by some impermissible purpose or motive. In that situation, the onus of establishing that the defendant's ostensible pursuit of public duty was pretended rests only upon the plaintiff as the party who asserts it. As has been indicated, however, that stage will not be reached unless and until the defendant prima facie brings himself or herself within the words of the relevant statutory requirement*".

23 In the present case, I consider that there is more than a "*fanciful*" prospect that –

a. as a matter of construction of section 7(2)(b) of the Act, that the evidence established that Adiel is not in the business of building residences, because the overall scheme in which it is a part, is not engaged in a "*commercial*" enterprise (a necessary element of the conduct of a business); or

b. on the present state of the evidence, if the onus of proof were upon King to establish that Adiel is in business, that this requirement may not be satisfied.

24 The following matters are presently unclear, on the evidence:

a. the precise nature of the business operations of Adiel and, specifically, the extent of its operations involving the building of residences and the proftability of those activities;

b. the number of properties it has purchased and the number of houses erected, apart from the 10 construction contracts with King;

c. the rental received by Adiel for the properties leased to Ethan and how that compares with market rentals;

d. the fees charged for management services by Ethan to EAHL, and how they compare with market charges;

e. whether Adiel has any formal or informal involvement with the consortium between Ethan and EAHL.

25 Mr Twigg submitted that Adiel was in the business of leasing houses not building residences. On the other hand, it could be said that where an owner arranges for the building of a number of houses, that they are being constructed for the purpose of the dwellings being occupied, either by the purchasers themselves or someone else or, so that the residences may be directly tenanted by the owner. In either case, it could be said that the owner by arranging the construction of the houses was involved in building residences. If the activity of building residences is a commercial activity which is repeated, then the activity would generally be regarded as a business.

26 The facts which distinguish the position of the Director of Housing in *Structx*, include:

a. the Director was performing a statutory duty to provide public housing. This was not intended to have a commercial focus, in the sense of being profit driven, continuous and repetitive;

b. Adiel has buildings constructed in order to provide rental properties to Ethan;

c. It is likely that Adiel carries out the responsibilities during the construction and rental phases with a commercial objective;

d. Whilst the building of the residences might be the first step in the process of providing "*affordable housing*",

i. in the NRAS, affordable housing is defined as being for "*eligible low and moderate income households at a rate that is at least 20% below market value rentals*";

ii. the scheme itself anticipates that property developers will participate and will presumably derive income from the incentives paid by governments to encourage the reduced rentals;

iii. it is likely that both Adiel and Ethan receive profitable returns for their work – Ethan for management services and Adiel for arranging the construction of the dwellings and by leasing them to Ethan.

27 Nevertheless, I consider that there is a real, rather than simply a fanciful, prospect of Adiel succeeding in showing that it was not involved in the business of building residences, or King being unable to establish that Adiel was so involved, if the onus rests with it.

Claims included "*balance owing*" *for previous progress claims*

28 Each of the final claims dated 30 June 2015 includes the amount of $23,647.29 as the "*balance owing*" for the "*final*" stage of the contract works. However, each claim includes other amounts. For example, the claim in respect of Lot 5 includes:

Date	Invoice	Item	Claim
26/2/15	invoice 31403516	frame	$70,941.90
17/4/15	invoice 41403516	lock up	$59,118.25
28/5/15	invoice 51403516	fix out	$35,470.95
30/6/15	invoice 61403516	final	$23,647.29
30/6/15	invoice 81403516	post contract variations	$12,891.00
30/6/15	invoice 881403516	building variations	$6,510.00

29 Mr Twigg had no complaint about the last 3 items; the final stage claim was appropriately included in the final claim and the variations claims were envisaged by the contract definition of "*final claim*". A "*final claim*" is defined in clause 1.0 of the contract as meaning "*the builders' claim upon completion of the works for the balance of the contract price together with any other monies payable by owner (including any interest) under the contract*".

30 Mr Twigg submitted that the first 3 claims related to earlier progress payments and could not be incldued in the final claim because the claim was served on 1 September 2015

and this was not within the period specified in section 14(4) for the service of "*a payment claim in respect of a progress payment*".

31 Pursuant to section 14(4), such a claim "*may be served only within*" the later of the period determined in accordance with the construciton contract, or "*the period of, 3 months after the reference date referred to in section 9(2) that relates to that progress payment*". The latter period is the "*later*". By section 9(2), the relevant date is nominated by sub-section (a) as the "*date on which a claim for a progress payment may be made*" as "*determined by or in accordance with the terms of the contract*".

32 Under clause 10.3 of the construction contract, King must give Adiel written progress claims "*at the times implied by item 23.2 of the Appendix*". Item 23.2 of the Appendix provides that progress payments must be made at the completion of the relevant stage or when a specified percentage of the work is complete, for example, for "*fix out stage*", when "*90% of the value of work complete*".

33 Mr Twigg submitted that the final claims made it clear that each of earlier stages had been completed more than 3 months before the service on 1 September 2015 of the final claims. For the final claim for Lot 5, the dates were:

frame stage	26 February 2015
lock up stage	17 April 2015
fix out stage	28 May 2015

34 In my view, however, the simple answer to this submission is that the amounts unpaid from earlier progress claims are "*other monies payable by owner*" and are properly included in a final claim. I do not consider that this defence has a real prospect of success.

Final claims not made "*at*" or "*upon completion*"

35 Clause 10.3 of the contract anticipates that there will be "*a written final claim at completion*". Item 23.2 of the Appendix may also apply. It provides that there shall be a "*final payment due upon completion*" of 10% of the total contract price, being $23,647.30.

36 "*Completion*" is defined as meaning "*when the works to be carried out under the contract*:

- *have been completed in accordance with the plans and specifications, and*
- *if a building permit was issued for the works, the owner is given an occupancy permit if required or a copy of the certificate of final inspection*".

37 Adiel submitted that the final claim was not a valid claim as it had not been made "*at*" or "*upon completion*", for the following reasons:

a. inspections of each construction site by Adiel after purported completion of the works by King disclosed the existence of defective works, a list of which was provided by Adiel to King;

b. section 42(a) of the *Domestic Building Contracts Act 1995* (Vic) ("DBCA") prevents a builder demanding final payment until the works have been completed in accordance with the plans and specifications.

38 Mr Fenn, in his affidavit, stated that when Adiel's representative attended each of the building sites on 6 July 2015, a written list specificying defects for both properties was provided to a representative of King. A further inspection on 21 September 2015 found a number of the defects at each property had not been rectified.

39 Section 42(a) of the DBCA provides that "*a builder must not demand final payment*" until "*the work carried out under the contract has been completed in accordance with the plans and specifications set out in the contract*" and the owner is given either a copy of the occupancy permit or a final inspection certificate.

40 I consider the first matter raised by Adiel does not affect the validity of the final claims. Pursuant to section 16(4), a respondent in proceedings under section 16 may "*recover the unpaid portion of the claimed amount from the respondent as a debt*". By section 14(1) of the Act, a progress claim may be served by a person "*who is or who claims to be entitled to a progress payment*". However, by section 16(4)(b)(ii), Adiel "*is not, in those proceedings, entitled…to raise any defence in relation to matters arising under the construction contract*". Adiel seeks to rely upon an alleged breach by King of its obligations to complete the works under the construction contract to an appropriate standard as the reason for denying King's entitlement to make the claim. This is not permissible under the Act.

41 In regard to the DBCA if, notwithstanding the construction contract being a domestic building contract, the Act applies pursuant to section 7(2)(b), it would be unlikely that section 16(4)(b)(ii) would not exclude reliance upon contractual matters made relevant by section 42(a) of the DBCA. However, unless such an argument were regarded as no more than fanciful, it is not an issue that Adiel should be precluded from raising at trial.

Final claims not made within the period specified in section 14(5) of the Act

42 Alternatively, it was submitted by Mr Twigg that the final payment claims were not valid because the claims were not served within the period specified in section 14(5) of the

Act.

43 Section 14(5) requires "*a payment claim in respect of a progress payment that is final*" to "*be served only within*" the specified period in the sub-section. The relevant "*period*" is either:

a. "*the period determined by or in accordance with the terms of the construction contract*; *or*

b. *if no such period applies, within 3 months after the reference date referred to in section 9(2) that relates to that progress payment*".

44 By the contract, the final claim was to be given "*at*" or "*upon completion*". Otherwise, no "*period*" for the service of the final claim can be "*determined by or in accordance with the terms of the construction contract*". Accordingly, "*the reference date referred to in section 9(2)*" will determine the starting date of the three months "*period*" during which the final claim is to be served.

45 By clause 9(2) of the Act, the relevant reference date will be the "*date determined by or in accordance with the terms of the contract as…a date on which a claim for a progress payment may be made…in relation to a specific item of construction work carried out…under the contract*". The definition of "*progress payment*" in section 4 of the Act "*includes…the final payment for…construction work carried out under a construction contract*".

46 The final claims made by King are each dated 30 June 2015. For the purposes of this submission, Adiel assumed that this was the date of completion under the Act. Three months from that date would be 30 September 2015. However, the final claims were served on 1 September 2015 which would be within the period specifed by section 14(5) of the Act. I do not consider that this defence has a real prospect of success.

Conclusion

47 Adiel has raised matters of defence which are not, in my view, simply to be regarded as "*fanciful*". In these circumstances, it is entitled to defend the claim.

48 Accordingly, the plaintiff's summons filed 13 October 2015 will be dismissed and orders will be made fixing the proceeding for trial and providing for the interlocutory processes to be completed.

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Certificate

I certify that the 10 preceding pages are a true copy of the reasons for decision of His Honour Judge Anderson delivered on 20 November 2015.

Dated: 20 November 2015

Olivia Bramwell
Associate to His Honour Judge Anderson