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VCAT BUILDING AND PROPERTY LIST CASE UPDATE 2016
DOMESTIC BUILDING CASES

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1. This paper was prepared for Leo Cussens Annual Property Law Conference and discusses recent building cases arising in, or appealed from the Building and Property List of the Victorian Civil and Administrative Tribunal.

SUMMARY

2. Three cases described in more detail later in this paper may be summarised as follows:

    i. *Macdonald v Harmonious Blend Building Corporation Pty Ltd* [2016] VCAT 1556
        - Provides a detailed factual example of the principles in *Masters v Cameron* as to whether a binding settlement has been reached;
        - Examines the principles of accord and satisfaction, and relevant case law, and the principle of election.

    ii. *Australian Dream Homes Pty Ltd v Stojanovski* [2016] VSCA 133
        - Substantial breach giving rise to a right to issue a default notice is not determined by reference to the stage of the contract at which the Notice was issued and the question of whether there is sufficient time to remedy the breach is irrelevant.

- Whether there is substantial breach is assessed at the date of the default notice being issued.
- Whether a party acted reasonably in terminating the contract is not decided by reference to whether the default notice was reasonable, or specified a reasonable time to rectify the breach. The focus must be on the reasonableness of the act of terminating. Conduct of the parties leading up to termination is relevant.

iii. *Imerva Corporation Pty Ltd v Kuna [2016] VSC 461*

- The regulations relating to exclusion of the limitations on progress payments in s40 of the DBC Act are applied strictly. Strict adherence to the mandatory pre-conditions in reg 12 of the DBC Regulations is required for an effective ouster of the s40 limitations.
- In the context of the strict legislative scheme, estoppel is not available to a builder to argue that the owner cannot insist upon strict compliance with the s40 limitations.

3. Two further cases provide detailed factual examples of the operation of specific principles in relation to building cases.

i. *Bestawaros v Sorace* [2016] VCAT 1005

- Highlights the complexities arising when settlement is reached with one party but not another in an apportionable claim.

ii. *Strong v Milanovic* [2016] VCAT 1225

- Applies the principles relating to the assessment of damages following abandonment of the contract.
- General principles:
  - The contract is not rescinded *ab initio*
  - Any right of a party which had crystallised prior to the abandonment can be enforced;
  - A party can claim damages in respect of a breach of any crystallised right; and
  - Each party is excused from further performance of the contract.

SUBSTANTIAL BREACH AND TERMINATION

4. In *Australian Dream Homes Pty Ltd v Stojanovski* [2016] VSCA 133, the Court of Appeal handed down a decision providing guidance on the interpretation of the Victorian Master Builders Association New Homes Contract, a standard contract used by the building industry. Specifically, the Court looked at the circumstances where a builder might be in "substantial breach" of the contract thus giving rise to a right to terminate on the part of the owner.

5. Standard clause 20.1 of the contract provides that the owner can serve a default notice on the builder if the builder:

    (a) fails to proceed with the works with due diligence or competence

    (b) unreasonably suspends the works

    (c) refuses or persistently neglects to remedy defects so that the works are adversely affected

    (d) is in substantial breach of the contract

    (e) and in a number of other situations.

6. The default notice must state the breach or breaches by the builder and state the owner's intention to terminate the contract unless the builder remedies the breach or breaches within 14 days after receipt of the notice.

Facts

7. The facts were that the owner had served the breach notice. The builder responded and the parties entered into correspondence, including the builder indicating that an expert building consultant had been engaged and seeking access for a site inspection on 11 May 2012. The builder also made demands for a significant progress payment (the "Lock-up Stage payment") which the owner refused on the basis that Lock-up Stage had not been completed.

8. On 4 May 2012, a week before the date requested by the builder for a site inspection by their expert, the owner served a Notice of Termination on the builder and

terminated on the basis that the breaches had not been remedied within the 14 day period set out in clause 20.1.

Was the builder in substantial breach of the contract?

9. At the hearing of the matter in VCAT, it was common ground between experts for both parties that the defects in brick works were so significant that the most economical and efficient remedy was to completely demolish the brick work and re-build it. The Tribunal found that the brickwork constituted a "significant defect".

10. Nevertheless, the member found that the builder was not in substantial breach of the contract as alleged in the termination notice because significant time remained under the contract for the builder to remedy the defective works, and the correspondence between the parties showed that the builder had not indicated an unwillingness to rectify the defects.

11. Dixon J on appeal held that the defects did constitute a substantial breach – whether the time for completion had arrived or not, the substantial defect in the brickworks constituted a substantial breach of the warranty to carry out works in a proper and workmanlike manner.

12. The Court of Appeal agreed with the judge in relation to the question of substantial breach. The question of whether the builder was in substantial breach of the contract was to be evaluated at the date of the default notice. Whether or not the breach may be remedied after the notice, the fact was that the builder was in substantial breach when the notice was served.

Did the owner act reasonably in terminating the contract?

13. As to whether the owner had acted reasonably in terminating the contract, the Tribunal concluded that the owner had not. The experts on both sides agreed the works to rectify the defects would take 6 to 8 weeks to complete. Therefore it was physically impossible for the builder to comply with the 14 days provided in the default notice. The Tribunal held the 14 day period was a minimum period but did not prescribe the upper limit.

14. Dixon J disagreed. His Honour stated that the issue was not whether the owner had specified a reasonable time in the notice, but whether the owner had acted

unreasonably in serving the termination notice when they did. An examination of the correspondence between the parties was appropriate, but the Tribunal had failed to take into account that the builder was asserting its claim for the progress payment and threatening to terminate the contract for non-payment of that claim at the same time as stating it would investigate the alleged defects. Consequently, the owner had not acted unreasonably in serving the Notice of Termination. The Court of Appeal agreed.

EXCLUDING S40 PROGRESS PAYMENT LIMITATIONS

15. In *Imerva Corporation Pty Ltd v Kuna* [2016] VSC 461, McDonald J considered whether progress payment limitations in s40 of the *Domestic Building Contracts Act* 1995 had been excluded and replaced in a major domestic building contract, and whether the owner was estopped from relying on the provisions of s40.

16. If the owner was able to rely on the s40 limitations, monies due under the contract at each stage would be reduced which would affect the assessment of damages, and some progress payments would not be claimable at all.

17. Section 40 of the DBC Act creates criminal offences for builders who demand recover or retain amounts greater than the limitations provided for in the Act. But, the s40 limitations do not apply if the parties to the building contract agree that they do not apply and do so in the manner set out in the regulations. Regulation 12 of the *Domestic Building Contracts Regulations* 2007 specifies a standard clause and a form of warning that must be signed by the building owner before execution of the contract.

Was a valid agreement reached to exclude the provisions of s40?

18. The contract included the standard clause and form of warning but the warning was not signed by the owners. They merely initialled the bottom right corner of the page as they had done on each other page of the contract.

19. After hearing evidence on the issue of how the contract came to be signed, the Tribunal concluded that the owners had not turned their mind to the schedule of progress payments at the time they signed the contract, nevertheless they had

subsequently paid the builder in accordance with the schedule and had been content to do so. Nevertheless, the owners had not signed their acknowledgement in the space provided indicating they have read and agreed to the wording. The Tribunal therefore found the owner was entitled to rely on the s40 limitations.

20. His Honour agreed. In the context of a statutory regime which provides for a prescribed warning to be given in accordance with a Form incorporated into the Regulations, and provides for criminal penalties for non-compliance with the limitations sought to be excluded, the requirements for exclusion are applied strictly.

    The fact that non-compliance with s40(2) exposes a builder to potential criminal sanction strongly supports the conclusion that in order to avoid the operation of s40(2), there must be strict compliance with s40(4). [24]

21. The owners had not signed in the space provided in the form and had therefore had not acknowledged the prescribed warning in the manner set out in the Regulations. Initialling each page of the contract simply amounted to an acknowledgement that each page was part of the contract. Consequently, the purported exclusion of the s40 limitations was ineffective.

Was the owner estopped from relying on the provisions of s40?

22. The hearing in the Tribunal had also been argued on the basis that the owners were estopped by their conduct from relying on the s40 limitations. The owners accepted that estoppel could apply, but argued it was not made out.

23. McDonald J held that the parties had proceeded on the erroneous assumption that estoppel was available. In the circumstances of the statutory provisions, their context and purpose, estoppel was not available to qualify the rights conferred upon the owners by s40 of the DBC Act and reg 12 of the DBC Regulations. The purpose of the provisions is to provide consumer protection by preventing builders “front loading” progress payments under the contract. Criminal sanctions are imposed if the limitations are not complied with or excluded. The operation of the s40 limitations can only be excluded where there is strict compliance with the legislative provisions.

24. These factors leave no room for a builder to argue that the owner is estopped from insisting upon compliance with s40.

WAS THERE A BINDING SETTLEMENT AGREEMENT?

25. *Macdonald v Harmonious Blend Building Corporation Pty Ltd* [2016] VCAT 1556 examined whether the parties had entered into a binding settlement agreement.

26. The owner claimed it had served a default notice on the builder, then terminated the contract. The builder claimed that there was no breach and the contract was ended by mutual agreement of the parties which involved payment of $127,500 by the owner in full and final settlement of any claim they may have had against each other. The builder relied upon various documents to corroborate the existence of the settlement but there was no executed document verifying the settlement.

27. A number of conversations and meetings were held whereby agreement was reached but the parties then could not agree on the terms of a Deed of Settlement. In these circumstances, the court or tribunal will look to the evidence and the words of the parties to determine whether there is a binding agreement in the context of three categories described in in *Masters v Cameron* (1954) 91 CLR 353:

    (a) The parties have agreed on all the terms of their bargain and intend to be immediately bound to the performance of those terms, but propose to have the terms restated in a form which will be fuller or more precise but not different in effect (there is a binding agreement);

    (b) The parties have completely agreed upon all the terms of their bargain and intend no changes to them, but have made performance of one or more of the terms conditional upon the execution of a formal document (there is a binding agreement);

    (c) The parties intend not to make a concluded bargain at all unless and until they execute a formal contract (there is no binding agreement).

28. Ultimately, the Tribunal found there was no binding agreement. The case describes the evidence in detail, including transcript of recorded conversations between the

parties, and further case law relevant to determining which *Masters* category the facts fell within.

29. Of particular interest is a payment of $127,500 made following the failed negotiations on the Deed of Settlement by the owner to the builder. The owner made the payment and expressly stated that it was a progress payment under the contract. However, the builder receipted it as payment in performance of the settlement agreement. At the hearing, the builder argued that the payment constituted satisfaction of the accord previously reached between the parties.

30. The Tribunal held that in accepting the payment which was stated by the owner to be made under the contract, the builder had accepted the progress payment. Alternatively, the builder could have returned the cheque. Further, the builder's conduct after the failed negotiations in sending letters of demand relating to other aspects of the contract demonstrated it had elected to affirm the contract and abandon the settlement. In this respect, the case provides a good demonstration of the principles of accord and satisfaction, and election.

APPORTIONABLE CLAIMS AND SETTLEMENT WITH ONE CONCURRENT WRONGDOER

31. *Bestawaros v Sorace* [2016] VCAT 1005 involved owner-builders and the relevant warranties provided to subsequent purchasers under the *Building Act* 1993.

32. A year after purchasing a dwelling from the respondent owner-builders, the applicant owners noticed cracking in the external walls and consequent internal damage, and a number of other defects. The builders argued that the damage was not the result of defective workmanship but caused by trees planted by the local Council on the outside of the boundary fence. Council was joined as a respondent and an alternative claim bought by the owner in nuisance.

33. The owner and Council reached a settlement and the claim against Council was struck out but Council remained a party for the purpose of any apportionment pursuant to Part IVAA of the *Wrongs Act* 1958.

34. The proportionate liability regime operates to limit recovery by the claimant against each concurrent wrongdoer to an amount reflecting the proportion of the loss or damage the court or tribunal considers just having regard to the defendant's responsibility for the loss or damage.

35. The Tribunal held that the builder was liable for a proportion of the amount claimed, but not liable for the damage caused by the trees. The amount of the settlement with Council was taken into account to determine that there was no "double recovery".

36. As to the question of when the terms of a settlement with a party in an apportionable claim are required to be disclosed see: *McAskell v Cavendish Properties Ltd* [2008] VSC 328.

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