

IN THE COUNTY COURT OF VICTORIA

Revised
Not Restricted

AT MELBOURNE
CIVIL DIVISION
COMMERCIAL LIST - BUILDING CASES DIVISION

Case No. CI-09-00418

DARREN MUNNICH

First Plaintiff

and

BYRON 14 PTY LTD
(ACN 128 960 323)

Second Plaintiff

v

CORSELLO BYRON BAY PTY LTD
(ACN 108 946 149)

First Defendant

and

LEVIN BYRON BAY PTY LTD
(ACN 108 946 158)

Second Defendant

JUDGE: HIS HONOUR JUDGE SHELTON
WHERE HELD: Melbourne
DATE OF HEARING: 2 April 2009
DATE OF JUDGMENT: 2 April 2009
DATE OF PUBLICATION OF REASONS: 7 May 2009
CASE MAY BE CITED AS: Munnich & Byron 14 Pty Ltd v Corsello Byron Bay Pty Ltd & Levin Byron Bay Pty Ltd
MEDIUM NEUTRAL CITATION: [2009] VCC 0556

PUBLICATION OF REASONS

Catchwords: BUILDING CONTRACT – Application for mandatory injunction requiring deposit of retention monies in trust account – General Conditions of Contract (AS 2124 – 1992) – whether Victoria inappropriate forum – whether *Domestic Building Contracts Act 1995* has extra territorial effect.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiffs	Mr R Andrew	Noble Lawyers
For the Defendants	Mr M H Whitten	Wollan & Associates Pty Ltd

HIS HONOUR:

Introduction

- 1 On 2 April 2009, I heard an application by the defendants for an order that the proceeding be permanently stayed. After several hours of argument, I indicated that I refused the defendants' application and that I would provide reasons for so ordering at a later date.
- 2 On 8 April 2009, I was advised that the proceeding had been resolved and I made Consent Orders. The plaintiffs' solicitor on that occasion told me that there was no necessity for me to provide reasons for the order I made on 2 April 2009. Recently, however, the defendants' solicitor sought such reasons, and these are those reasons.

The Facts

- 3 On or about 21 December 2007, one or other of the plaintiffs entered into a contract with the defendants to construct a residential and commercial complex at Byron Bay, in the State of New South Wales, comprising fourteen apartments and five shops for a contract price of \$6,914,050.00 ("the Contract"). There is dispute as to which of the plaintiffs is the appropriate contracting party. Nothing turns upon this, however, for the purposes of this application.
- 4 The standard General Conditions of Contract, AS 2124 - 1992 ("AS 2124") were incorporated into the Contract. By the Endorsement on the Writ issued in this proceeding on 5 February 2009, the plaintiffs sought an order that the sum of \$157,138.00 cash retention retained by the defendants be paid into a trust account to be held on trust for the plaintiffs in accordance with the provisions of AS 2124.
- 5 Mr Whitten, who appeared on behalf of the defendants, based his application

for a permanent stay of proceedings on three grounds. Firstly, he submitted that Victoria was an inappropriate forum; secondly, he submitted that a condition precedent to litigation contained in AS 2124 had not been fulfilled; thirdly, he relied upon s.57 of the *Domestic Building Contracts Act 1995* (“the *DBC Act*”).

6 I consider each of these grounds in turn.

Inappropriate Forum

7 In support of this ground, Mr Whitten referred to the Contract, which stated that the applicable law was that of New South Wales, the building works the subject of the Contract being in New South Wales and the dispute resolution provisions of the Contract providing that the parties would first submit their disputes to mediation to be conducted in Sydney prior to the commencement of proceedings. He submitted that no “material part of the cause of action arose within Victoria” as required by the first limb of s.37 of the *County Court Act 1958*.

8 While it may be that no material part of the cause of action arose within Victoria, the second limb of s.36 gives this Court jurisdiction even where the whole of the cause of action arose outside Victoria where the defendant resides within Victoria. Mr Whitten conceded that all the parties “reside” within Victoria.

9 Thus, I conclude that the County Court has jurisdiction to hear this matter.

10 Alternatively, Mr Whitten relied upon s.20 of the *Service and Execution of Process Act (Cth) 1992*, which gives this Court discretion to stay a proceeding “if it is satisfied that a court of another State has jurisdiction to determine all the matters in issue between the parties is the appropriate court to determine those matters”: (sub.s.(3)). Sub.s.(4) provides a non-exhaustive list of matters the Court is to take into account.

11 Relevant matters are set out in paragraph 7 above. Other considerations are that the retention monies the subject of the action may well be in Victoria given that all parties reside in Victoria. The resolution of the matter before me does not require the calling of witnesses in New South Wales nor an inspection of the site. It is a matter which can readily be determined upon affidavit material and examination of documentation. S.48L of the *Home Building Act* 1989 (NSW) is in similar terms to s.57 of the *DBC Act* and there would be no great difficulty in applying the provisions of the New South Wales Act if necessary.

12 In the circumstances, I decline to exercise my discretion to stay this proceeding under s.20 of the *Services and Execution of Process Act* 1992.

13 I conclude that Victoria is not an inappropriate forum to hear this proceeding.

Condition Precedent to Litigation Not Fulfilled

14 In support of this ground, the defendants rely upon Special Condition 47.5 of AS 2124 which provides:

“The parties must comply with the provisions of Clauses 47.1 - 47.4 in respect of any issues to which Clause 47.1 apply as a condition precedent to commencing court proceedings (other than proceedings for injunctive relief).”

15 Clauses 47.1 to 47.4 of AS 2124 require that any dispute or difference between the parties to the Contract arising out of or in connection with the Contract be first the subject of a notice of dispute and then submitted to mediation. The plaintiffs rely upon the words bracketed. Mr Andrew, who appeared for the plaintiffs, submitted that here the plaintiffs were applying for injunctive relief in the form of a mandatory injunction. Mr Whitten submitted that the relief sought by the plaintiffs as endorsed on the Writ was rather in the nature of specific performance, and that in any event the bracketed words were clearly designed for the purposes of allowing a party to obtain urgent relief. Mr Whitten submitted that here the plaintiffs were not seeking urgent

relief. I do not agree, given that the Summons seeking such relief was issued on 10 February 2009, five days after the issue of the Writ. This Summons was originally made returnable on 25 February 2009.

16 I note that Kellam J, in *R V Walpole Pty Ltd v Rangeville Manor Pty Ltd*, a judgment dated 21 March 2000, where he was sitting as President of VCAT, characterised an application such as here as being for a mandatory injunction and obtained an undertaking as to damages as is normal with an interlocutory injunction application.

17 I adopt this approach and conclude that the relief sought in the Endorsement on the Writ in this proceeding is in the nature of a mandatory injunction and not specific performance. I conclude that the plaintiffs then are entitled to rely upon the bracketed words in Special Condition 47.5.

Section 57 of the *DBC Act*

18 In *Glenrich Builders Pty Ltd v 1-5 Grantham Street Pty Ltd* [2008] VCC 1170, I held that the *DBC Act* did not apply to “owner-developers”. Mr Whitten went to considerable lengths to convince me that I should re-visit that decision. He urged me to do so and then stay the proceeding pursuant to s.57(2) of the *DBC Act*.

19 Mr Andrew submitted that the *DBC Act* did not have any extra-territorial operation and therefore did not apply to the works here being performed in New South Wales. He relied on the fact that the *DBC Act* does not state that it has extra territorial effect as does, for example, the *Fair Trading Act* 1999 (s.6). He submitted that in fact it would be nonsensical for the *DBC Act* to have extra territorial effect. Works in New South Wales are covered by the *Home Building Act* 1989 (NSW) and it would be quite inappropriate that they be covered by the Victorian Act as well which would subject the builder to two statutory regimes. The *DBC Act* has penal provisions, for example, s.19(1),

- 22 and 23. It would be totally inappropriate if such provisions applied to builders in other states.
- 20 Part 5, Division 2 of the *DBC Act* provides for the hearing of domestic building disputes by the Victorian Civil and Administrative Tribunal. Again, it is nonsense to suggest that a builder operating outside Victoria would be subject to the jurisdiction of such a tribunal.
- 21 I accept Mr Andrew’s submission and refuse to grant a stay under s.57 of the *DBC Act*.
- 22 Having so concluded, it is not necessary for me to consider whether *Glenrich* was properly decided. Mr Whitten, however, urged me to do so in light of very comprehensive submissions he made on the matter. In the circumstances, I think it inappropriate for me to do so, particularly given that in the Court of Appeal in *1-5 Grantham Street Pty Ltd v Glenrich Builders Pty Ltd* [2008] VSCA 228, the “owner-developer” ground of appeal was abandoned and the Court of Appeal commented, at paragraph 9, that this was done “quite properly”.
- 23 As Mr Andrew commented in his written submission, at paragraph 14(g):
“It is axiomatic that good points are seldom abandoned”
- 24 For the above reasons, I rejected the defendants’ application.

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