

SUPREME COURT OF QUEENSLAND

CITATION: *PJS Development Pty Ltd v Tong* [2003] QSC 337

PARTIES: **PJS DEVELOPMENT PTY LTD SCN 061 924 007**
(plaintiff)
v
PAULINE MARJORIE TONG
(defendant)

FILE NO/S: SC No 5933 of 2002

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 9 October 2003

DELIVERED AT: Brisbane

HEARING DATE: 23 September 2003

JUDGE: McMurdo J

ORDER: **1. Defendant's application for summary judgment is dismissed**
2. Defendant to pay the plaintiff's costs of and incidental to that application to be assessed

CATCHWORDS: PRACTICE – SUMMARY JUDGMENT - where application for summary judgment – where case concerns dispute over deposit paid under contract to purchase an apartment in a building to be constructed – where contract provided plaintiff would carry out building work - where plaintiff contends defendant repudiated contract entitling it to forfeit deposit - where defendant contends plaintiff disentitled to the deposit by s 42 *Queensland Building Services Authority Act* – whether s 42 extends to landowners causing building work to be performed – whether application for summary judgment should be dismissed

Queensland Building Services Authority Act 1991 (Qld), s 42, s 42(1), s 42(2)(a), s 42(3), s 44
Scaffolding and Lifts Act 1912 (NSW), r 73

Buckman & Son Pty Ltd v Flanagan (1974) 133 CLR 422, considered

COUNSEL: S J Lynch for the plaintiff
C M Hall (Solicitor) for the defendant

SOLICITORS: Geoff Lyons Solicitors for the plaintiff
Winchester Young & Maddem Solicitors for the defendant

- [1] **McMURDO J:** This proceeding concerns the true entitlement to an amount of \$13,750. It is the deposit paid by the defendant under her contract to purchase an apartment in a building to be constructed at Caloundra. The plaintiff says that she repudiated the contract entitling it to forfeit the deposit. On a number of grounds the defendant says that the deposit is hers. On one of those grounds the defendant applies for summary judgment.
- [2] The defendant argues that because the plaintiff was and is not a holder of a contractor's licence under the *Queensland Building Services Authority Act 1991* (Qld), the plaintiff is disentitled to the deposit by s 42 of that Act. Section 42 relevantly provides as follows:

“42 Unlawful carrying out of building work

- (1) A person must not carry out, or undertake to carry out, building work unless that person holds a contractor's licence of the appropriate class under this Act.
 - (2) For the purposes of this section –
 - (a) a person carries out building work whether that person carries out it out personally, or directly or indirectly causes it to be carried out; and
 - (b) a person is taken to carry out building work if that person provides advisory services, administration services, management services or supervisory services in relation to the building work; and
 - (c) a person undertakes to carry out building work if that person enters into a contract to carry it out or submits a tender or makes an offer to carry it out.
 - (3) Subject to subsection (4), a person who carries out building work in contravention of this section is not entitled to any monetary or other consideration for doing so.”
- [3] The contract is of the commonplace kind providing for the sale and purchase of an apartment in a building yet to be constructed. It requires the construction of the relevant buildings and the establishment of a community titles scheme comprising a number of lots, one of which is to be then conveyed by the vendor to the purchaser. As would be expected, it contains numerous terms which refer to the required building construction. Recital B says that the “Seller intends ... to construct or have constructed upon” the relevant land a certain building with specified finishes and chattels. Clause 14.1 contains a covenant by the plaintiff as “the Seller” with the defendant as the “Buyer” that this building “will be finally completed within a reasonable time after practicable completion thereof” and that any defects shall be “made good by the Seller at its own cost”. It further provides that the Seller's obligation to rectify defects is subject to the Buyer allowing it “suitable access to the Lot and the Building ... in order that the Seller is able to carry out the necessary work to rectify any defect.”. The defendant's submissions emphasise the words “carry out” in this provision. Clause 47 provides that if the Seller does not enter into sufficient contracts for the sale of lots to enable finance to be obtained “to enable the Seller to construct the building” then the Seller might terminate the contract. Again, the defendant relies upon this reference to the plaintiff's

“constructing the building”. In the special conditions in Schedule 10, which refer to “additional works”, reference is made to the circumstance that the buyer might request additional works to be “carried out” and again the defendant emphasises those words. There are other references in the contract of a similar kind and it is unnecessary to comprehensively list them here.

- [4] The defendant’s submission is that the contract is one by which the plaintiff has undertaken to carry out building work, thereby contravening s 42(1). It is further submitted that the construction of this building has involved a contravention by the plaintiff in carrying out the building work and that by s 42(3), the plaintiff is not entitled to the deposit because it is not entitled “to any monetary or other consideration” for carrying out that building work. The plaintiff was and is not the holder of a contractor’s licence; but there is no suggestion that the plaintiff had this building constructed by an unlicensed builder.
- [5] The argument therefore involves questions of the proper interpretation of the contract and of s 42. In particular, it involves the interpretation of the term “carry out” in both contract and the section, and a consideration of whether the term has the same meaning in each case. In my view the expression “carry out” when used in the contract to refer to building work, means ‘perform or cause to be performed’ the work. As I interpret the contract, it requires the building to be built, but it does not require the builder to be the plaintiff. Instead, the relevant obligations of construction could be performed by the plaintiff’s causing that construction to be effected. In theory, parties could agree, even in the context of a relatively large commercial and residential development such as this, in terms which required the seller to be the actual builder. If such agreements are made, this is not one of them. To the extent that any term, taken alone, might indicate that it is, that indication is overtaken by a reading of the contract as a whole commencing with the recital that the plaintiff intends “to construct or have constructed” upon its land the relevant development.
- [6] According to my interpretation of the contract, has the plaintiff then undertaken to carry out the building work, contrary to s 42(1)? The expression “carry out building work” has a meaning derived from the Act as a whole, and having regard to the objects of the statute. Where a person is not an actual builder, but is simply engaging a builder to build, it seems curious that the Act would require that person to be the holder of a contractor’s licence. In such a case, the builder must be a licensed contractor, so that the objects of the Act are apparently served.
- [7] But defendant relies upon s 42(2)(a) which provides that for the purposes of this section:
- “(a) a person carries out building work whether that person carries it out personally, or directly or indirectly causes it to be carried out”.

The submission is that on the contract as I interpret it, the plaintiff is still causing building work to be carried out, and that the effect of s 42 (2)(a) is that if a party causes building work to be carried out, that party carries it out. That is a submission which, if accepted, would have a wide and profound impact, in ways going well beyond the present context of the sale of apartments to be constructed. Its ultimate consequence would be that any landowner who has engaged a licensed builder to carry out building work upon his or her land would contravene s 42

when the building work was performed, because the owner would “carry out” the building work by the act of causing it to be carried out by the making and enforcement of the building contract. I have concluded that the submission should be rejected. As I interpret s 42(2)(a), the reference to causing building work to be carried out is to a context where the person is nevertheless carrying out building work. The paragraph makes it clear that a person could carry out building work by causing it to be carried out; but that is not to say that wherever a person causes work to be carried out, that person must be deemed to be carrying it out. The paragraph would appear to be designed to overcome disputes such as that on which different views were reached in *Buckman & Son Pty Ltd v Flanagan* (1974) 133 CLR 422, concerning the interpretation of reg 73 of regulations made under the *Scaffolding and Lifts Act 1912* (NSW) which imposed duties upon “any person who directly or by his servants or agents carries out any building work”. The majority¹ read that as a reference to persons actually carrying out building work whether personally or by servants or persons whose acts were in law their acts but not imposing obligations on persons who had subcontracted the work to independent contractors. The result in that case suggests an apparent purpose for the words “carries it out personally, or directly or indirectly causes it to be carried out” in s 42. Where a building contractor delegates work to a subcontractor, s 42(2)(a) makes it clear that the head contractor is still to be treated as carrying out the work. There must be, however, something done by the relevant person which can be characterised as the carrying out of building work in the sense that a building contractor does. The purpose of s 42 in requiring the relevant person to hold a contractor’s licence shows the sense in which the term “carrying out” is used. In the case of a landowner who causes a builder to build upon the land, the landowner does not in any sense which is relevant for this legislation have the carriage of the work.

- [8] Section 42 must be interpreted in the context of the Act as a whole and with regard to the expressed objects of the Act which are set out in s 3:

“3. Objects of Act

The objects of this Act are –

- (a) to regulate the building industry –
 - (i) to ensure the maintenance of proper standards in the industry; and
 - (ii) to achieve a reasonable balance between the interests of building contractors and consumers; and
- (b) to provide remedies for defective building work; and
- (c) to provide support, education and advice for those who undertake building work and consumers.”

The interpretation I place upon s 42 does not affect the achievement of those objects. The defendant’s submission does not at all advance them. The defendant’s submission also seems at odds with the Act’s provision for ‘owner-builders’, under which a permit can be granted to an owner ‘to carry out on the land’ certain building work, if the owner has completed a specified course of instruction: s 44.

¹ Barwick CJ, McTiernan and Stephen JJ

- [9] It follows that although the plaintiff has caused this development to be built upon its land it is not shown to have itself carried out the building work in the relevant sense. It further follows that the plaintiff is not a person who has carried out building work for the purposes of s 42 (3) and it is not disentitled to any monetary or other consideration for doing so. In any case, it is at least doubtful that the plaintiff's present claim to forfeit the deposit is a claim for money as consideration for the carrying out of building work. Although the contract requires a building to be built, so that separate lots can issue, in essence it is a contract for the sale of land. The price payable is the price for a conveyance of real property, and the deposit is a part payment of that price and a security for payment of the balance. Under this contract, if the "Seller" has the building built, but does nothing more, it is entitled to nothing. It does not seem to me that the plaintiff is seeking to recover money as the consideration for the carrying out of building work. It is unnecessary to explore that further, however, given my conclusion that the plaintiff is not shown to have contravened s 42.
- [10] The defendant's application for summary judgment is dismissed and the defendant will be ordered to pay the plaintiff's costs of and incidental to that application to be assessed.