SUPREME COURT OF QUEENSLAND

CITATION:	*Nichols v Earth Spirit Home Pty Ltd* [2015] QCA 219
PARTIES:	**GEORGE NICHOLS** (applicant) **v** **EARTH SPIRIT HOME PTY LTD** ABN 15 103 622 242 (respondent)
FILE NO/S:	Appeal No 9842 of 2014 QCAT No 236 of 2013 QCAT No 235 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Queensland Civil and Administrative Tribunal Act*
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal at Brisbane – [2014] QCATA 259
DELIVERED ON:	6 November 2015
DELIVERED AT:	Brisbane
HEARING DATE:	5 May 2015
JUDGES:	Margaret McMurdo P and Philippides JA and Boddice J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave to appeal be granted.** **2. The appeal be dismissed.** **3. The applicant pay the respondent's costs of the appeal, to be assessed on a standard basis.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – THE CONTRACT – LEGALITY – where the applicant sought leave to appeal against a decision of the Queensland Civil and Administrative Tribunal, in its appellate jurisdiction, upholding a decision at first instance to enforce an entirely oral building contract between the applicant and the respondent – whether a wholly oral building contract is enforceable, having regard to certain provisions of the *Queensland Building and Construction Commission Act* 1991 (Qld) which provided that a person who entered into non-written contracts for building work above a prescribed amount committed an offence, and related public policy considerations – whether the respondent was entitled to recover the judgment sum on a restitutionary basis

Queensland Building and Construction Commission Act 1991 (Qld), s 67G

Fitzgerald v FJ Leonhardt Pty Ltd (1997) 189 CLR 215; [1997] HCA 17, considered
Freedom Homes Pty Ltd v Botros [2000] 2 Qd R 377; [1999] QCA 150, considered
Miller v Miller (2011) 242 CLR 446; [2011] HCA 9, considered
Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd (1978) 139 CLR 410; [1978] HCA 42, applied

COUNSEL: M D Martin QC for the applicant
A B Wallace for the respondent

SOLICITORS: Mills Oakley Lawyers for the applicant
CBP Lawyers for the respondent

[1] **MARGARET McMURDO P:** Leave to appeal should be granted, but the appeal dismissed with costs, for the reasons given by Boddice J.

[2] **PHILIPPIDES JA:** I agree with the orders proposed by Boddice J for the reasons stated by his Honour.

[3] **BODDICE J:** The applicant seeks leave to appeal against a decision of the Queensland Civil and Administrative Tribunal ("QCAT"), in its appellate jurisdiction, upholding a decision at first instance to enforce an entirely oral building contract between the applicant and the respondent. At issue, should leave be granted, is whether a wholly oral building contract is enforceable, having regard to certain provisions of the *Queensland Building and Construction Commission Act* 1991 (Qld) ("the Act") and public policy considerations. If leave were given, the respondent seeks to support the decision appealed against on the basis that it was entitled to recover the judgment sum on a restitutionary basis.

Background

[4] In 2007, the applicant and his family undertook a development project involving the construction of 10 houses by the respondent in a suburb south of Brisbane. Initially, the applicant had a company, Asden Developments Pty Ltd, contract with the respondent for the construction of those houses. However, following disputes with contractors, the parties terminated that arrangement in 2012.

[5] Subsequently, the applicant and the respondent entered into an oral agreement in which it was agreed that the applicant and others would pay the respondent a weekly management fee to complete the project. It was further agreed that to secure such payment, $250,000 would be paid to the Master Builders Association.

[6] Following this agreement, the respondent prepared five separate written contractual documents between it and each of the applicant's children. These contracts were prepared at the request of the applicant or his sister-in-law, on the basis that whilst the construction would be funded by the applicant's entities, for tax purposes, individual contracts were entered into with each of the listed owners.

[7] A dispute arose as to payment of the weekly management fee. That dispute was heard in QCAT. The applicant was found liable to pay the respondent the weekly management fee. It was ordered that the sum of $250,000 held by the Master Builders Association be paid to the respondent. On appeal, QCAT confirmed that decision.

[8] Both at first instance and on appeal, the applicant contended that as section 67G of the Act provides that a building contractor who enters into a building contract that is not in writing commits an offence, the wholly oral building contract was unenforceable. Whilst that argument was not dealt with at first instance, it was substantively considered and rejected on appeal.

Appeal decision

[9] The Appeals Tribunal found that while section 67G of the Act provides that a building contractor who enters into a building contract that is not put in writing commits an offence, it did not prohibit an oral contract and prescribed no other consequences. Further, section 67E of the Act expressly provided that that part of the Act, which included section 67G of the Act, did not have the effect of rendering an oral contract void or voidable.

[10] In reaching this conclusion, the Appeals Tribunal considered whether a wholly oral building contract was inconsistent with a provision of the Act, rendering section 67E(2) of the Act applicable. The Appeals Tribunal concluded that, having regard to the explanatory notes to, and the second reading speech for, the Bill, section 67E(2) ought not to be read so as to defeat the operation of section 67E(1) which was clear in its effect. Accordingly, the contract was not unenforceable as a result of not being put in writing.

[11] The Appeals Tribunal considered other grounds of appeal relevant to questions of fact. However, its findings on these grounds are not the subject of appeal to this Court.

Applicant's submissions

[12] The applicant submits that leave to appeal should be granted as the appeal raises a question of general importance as to the enforceability of an entirely oral building contract in circumstances where it is an offence to undertake building work above a certain cost without a written contract. The determination of this question of public importance is said to be necessary as there is no binding decision at an appellate level in this State on that issue.

[13] The applicant submits the appeal should be allowed because the Appeals Tribunal erred in its interpretation of the Act when it found that a wholly oral building contract was not void or unenforceable. The Appeals Tribunal also erred in failing to consider whether, as a matter of public policy, a wholly oral building contract was enforceable at the suit of a builder who committed an offence by entering into such a contract. Courts, as a matter of principle, should not enforce a contract at the suit of a party who has entered into the contract with the object of committing an illegal act.[1]

[14] The applicant submits the refusal of a Court to enforce a wholly oral building contract is consistent with the specific intention of section 67G of the Act, is based on sound policy grounds, and would cause no unfairness to the respondent. The respondent's conduct was expressly contrary to the legislative scheme. Any obligation created in the wholly oral contract, in breach thereof, is properly not to be enforced by the Courts.[2]

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1 *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 427.
2 *Miller v Miller* (2011) 242 CLR 446 at [24].

Respondent's submissions

[15] The respondent submits leave to appeal should not be granted as the appeal does not have sufficient prospects of success. There is no basis in law to conclude that the wholly oral building contract was illegal, or that public policy required that it ought not be enforceable. The issue on appeal is also not of general importance. In any event, the applicant will not suffer a substantial injustice, because the respondent would be entitled to payment on a restitutionary basis.

[16] The respondent submits a building contract which has not been reduced to writing, is not invalidated, even if the failure to do so constitutes an offence.[3] The contract is also not rendered unenforceable on grounds of public policy; to render the contract unenforceable would result in a substantial detriment to the respondent and a windfall gain to the applicant, in circumstances where the arrangement was entered into at the applicant's express request for taxation purposes.

[17] The respondent further submits that even if section 67G of the Act renders a wholly oral building contract illegal, section 67E(1)(a) of the Act expressly provides that the building contract is not rendered void or voidable. This conclusion is consistent with the contents of the second reading speech and the explanatory notes to the Bill.

[18] In the alternative, the respondent submits that even if the building contract is illegal and unenforceable, the respondent was entitled to the sum in any event based on *quantum meruit* and unjust enrichment.[4] A clear legislative intent is necessary to abrogate or curtail common law rights.[5] Nothing in the objects of the Act, or in the circumstances, prohibits the proper recovery by the respondent of that sum pursuant to a *quantum meruit*.

Leave to Appeal

[19] The discretion of this Court to grant leave to appeal, pursuant to section 150 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) is not fettered but generally, will only be granted where the interests of justice warrant the Court's intervention. The issue raised on the present appeal raises a matter of law as to the proper interpretation of significant statutory provisions that is wider than the interests of the parties. It also involves almost $250,000. In those circumstances, I would grant leave to appeal.

Discussion

[20] The principles applicable to the enforcement of contracts whose making or performance is illegal were summarised in the majority judgment in *Miller v Miller*:[6]

> "[24] It has long been established that a contract whose making or performance is illegal will not be enforced. Often enough, however, the statute in question does not expressly prohibit the making of the relevant contract and does not expressly prohibit its performance. Whether such a statute 'prohibits contracts is always a question of construction turning on the particular provisions, the scope and purpose of the statute'. *Yango Pastoral Co Pty*

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3 *Freedom Homes Pty Ltd v Botros* [2000] 2 Qd R 377 at [12]-[14].

4 *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at [25]; [34]; *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at [256]-[257]; [262]-[263].

5 *CMF Projects Pty Ltd v Riggall and Anor* [2014] QCA 318 at [34].

6 *Miller v Miller* (2011) 242 CLR 446 at [24] – [26].

Ltd v First Chicago Australia Ltd identifies considerations of the kind that are engaged in the task of statutory construction.

[25] But in addition to, and distinct from, cases where a statute expressly or impliedly prohibits the making or performance of a contract, are cases 'where the policy of the law renders contractual arrangements ineffective or void even in the absence of breach of a norm of conduct or other requirement expressed or necessarily implicit in the statutory text'. In cases of the latter kind the refusal to enforce the contract has been held to stem

'not from express or implied legislative prohibition but from the policy of the law, commonly called public policy. Regard is to be had primarily to the scope and purpose of the statute to consider whether the legislative purpose will be fulfilled without regarding the contract as void and unenforceable'.

[26] The same kinds of question have been identified as arising in relation to allegations of illegality in the constitution or performance of a trust. In *Nelson v Nelson*, Deane and Gummow JJ said that authorities in contract law (including *Yango*) suggest drawing distinctions between three cases:

'(i) an express statutory provision against the making of a contract or creation or implication of a trust by fastening upon some act which is essential to its formation, whether or not the prohibition be absolute or subject to some qualification such as the issue of a licence; (ii) an express statutory prohibition, not of the formation of a contract or creation or implication of a trust, but of the doing of a particular act; an agreement that the act be done is treated as impliedly prohibited by the statute and illegal; and (iii) contracts and trusts not directly contrary to the provisions of the statute by reason of any express or implied prohibition in the statute but which are "associated with or in furtherance of illegal purposes". The phrase is that of Jacobs J in *Yango*'.

Deane and Gummow JJ said that, in the last of these three kinds of cases, 'the courts act not in response to a direct legislative prohibition but, as it is said, from "the policy of the law"'. (Citations omitted)

[21] In the present case, there is no contention that the making and performance of the contract was made expressly illegal by the Act. However, the applicant contends the Act impliedly prohibits the making and the performance of a wholly oral building contract.[7]

[22] In considering this contention, it is significant that section 67G of the Act, whilst providing that a builder who enters into a contract which is not in writing commits an offence, does not provide for any other consequences of a failure to comply with that section. This may be contrasted with sections 67U and 67W of the Act, which specifically make particular contractual provisions void.

[23] A provision in similar terms to section 67G was considered in *Freedom Homes Pty Ltd v Botros*.[8] McPherson JA (with whom Thomas JA and Moynihan J agreed) said:[9]

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7 *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 425 per Mason J.

8 [2000] 2 Qd R 377.

9 At [14].

> "… there is nothing in … the legislation that provides that a registered builder who contravenes its terms is disentitled from recovering payment for the work carried out. That … is 'in stark contrast' with the provisions … which expressly precludes recovery by an unlicensed person of monetary or other consideration from carrying out building work in contravention of [the Act]…. Having regard to that notable difference, and also to the somewhat troubled legislative history of these provisions in general, I do not consider that [the provision] should be interpreted as invalidating a contract or as rendering it illegal, or unenforceable by the building contractor by reason only of failure to comply with the requirement imposed … that the contract must be signed by the consumer or as, in this instance, by both consumers." (Citations omitted)

[24] The absence in the Act of any other consequences for a failure to reduce the contract to writing strongly supports a conclusion that neither the statutory provision nor consideration of the scope and purpose of the statute favours a finding that the Act impliedly prohibits enforcement of a wholly oral building contract. There is no other purported illegality, and no other immoral transaction. The cases of *Fitzgerald v FJ Leonhardt Pty Ltd*,[10] *Gollan v Nugent*[11] and *Miller v Miller*[12] are unhelpful.

[25] The conclusion that section 67G of the Act does not impliedly render the contract unenforceable is supported by a consideration of the terms of section 67E of the Act. Section 67E(1) expressly provides that if by entering into the building contract a party to that contract commits an offence against this part of the Act, that fact does not have the effect of making the contract void or voidable. The explanatory notes to the Bill said, in relation to section 67E:

> "S67E removes doubt that this Part only makes void any conditions of contract expressly made void by this Part and that it applies to all contracts even if in entering into the contract an offence is committed or the contract is entered into outside Queensland. The Part also has effect despite anything contained in a building contract. Contractual provisions that conflict with the provisions of this Part are invalid to the extent of the inconsistency."

[26] Similarly, in the second reading speech, the Minister, in introducing the Bill said:

> "… Provisions are structured so that, where inconsistencies arise between the legislation and contractual provisions, contractual provisions are void only to the extent of the inconsistency. All other existing contractual rights are preserved.
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> Injustices occur where contracts are not committed to writing. The legislation therefore makes it mandatory to put contracts in writing and set out basic contractual terms. Failure to do so constitutes an offence for all parties to the contract who are building contractors. However, the unwritten contract is not rendered void by the legislation."

[27] A consideration of section 67E(2) also does not support a conclusion that the wholly oral building contract was unenforceable. Section 67E(2) which provides that if a building contract or a provision of a building contract is inconsistent with a provision of the

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10 (1997) 187 CLR 215.
11 (1988) 166 CLR 18.
12 (2011) 242 CLR 446.

Act, the building contract has effect only to the extent it is not inconsistent with the Act provision, is directed to inconsistences in the nature or contents of a building contract with a provision of the Act. The section is not directed to the form in which a building contract should be evidenced by the parties. To find otherwise is contrary to the proper construction of sections 67E and 67G, in the context of the scope and purpose of the legislative scheme.

[28] The applicant further submitted that even if the statutory provision did not expressly or impliedly prohibit the making or performance of the present contract, principles of public policy rendered the contract unenforceable because it was contrary to public policy to allow the builder, who had committed an offence against the Act by not reducing the contract to writing, to enforce that wholly oral building contract.

[29] In considering questions of public policy, it is appropriate for the Court to consider not only the legislative provision and its scope and purpose, but also the relevant circumstances of the case. As Kirby J observed in *Fitzgerald v FJ Leonhardt Pty Ltd*:[13]

> "… public policy is not to be viewed as a 'blunt, inflexible instrument'. Nor is the concept static. The decision of this Court in *Yango* rejects the proposition that any prohibited conduct, involved directly or indirectly in the performance of a contract sued upon, denies to the parties the facility of the process of the courts. Whatever may be the position in England following the decision of the House of Lords in *Tinsley v Milligan*, in Australia it must be accepted, from decisions of this Court, that the rule against enforcement is not inflexible.
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> Clearly it should not be so. It would be absurd if a trivial breach of a statutory provision constituting illegality, connected in some way with a contract or contracting parties, could be held to justify the total withdrawal of the facilities of the courts. It would be doubly absurd if the courts closed their doors to a party seeking to enforce its contractual rights without having regard to the degree of that party's transgression, the deliberateness or otherwise of its breach of the law and its state of mind generally relevant to the illegality. Similarly, it would be absurd if a court were permitted, or required, to consider the refusal of relief without careful regard to the relationship between the prohibited conduct and the impugned contract. Thus, different considerations may exist where the contractual rights being enforced arise directly from the illegality, as distinct from those which arise only incidentally or peripherally. It is one thing for courts to respond with understandable disfavour and reluctance to attempts to involve them and their processes in an inappropriate and unseemly way effectively in the advancement of illegality and wrong-doing. It is another to invoke a broad rule of so-called 'public policy' which slams the doors of the court in the face of a person whose illegality may be minor, technical, innocent, lacking in seriousness and wholly incidental or peripheral to a contract which that person is seeking to enforce." (Citations omitted)

[30] Those observations are apposite in the present case. The relevant building contract arose in circumstances where previous contractual arrangements had been terminated and the arrangement the subject of the wholly oral building contract was entered into

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13 (1997) 189 CLR 215 at 248-249.

at the express request of the applicant or his agent and in circumstances where separate written contracts with each of the applicant's children were prepared for taxation purposes only. There was no deliberate attempt by the respondent to circumvent the statutory scheme established by the Act.

[31] There is nothing in the conduct of the respondent which justifies a conclusion, having regard to the legislative provisions, the nature and scope of the legislative scheme and all of the circumstances of the particular case, that principles of public policy favour a finding that the wholly oral building contract is unenforceable.

Conclusions

[32] The Appellate Tribunal correctly found that the fact that the respondent had committed an offence, by entering into a building contract which was not reduced to writing, did not render the wholly oral contract between the respondent and the applicant unenforceable. The Appeal Tribunal also correctly found that nothing in section 67E(2) of the Act required a finding that the wholly oral building contract was unenforceable. There are also no good reasons of public policy to support a conclusion that the wholly oral building contract was unenforceable.

[33] This conclusion renders unnecessary any consideration of the alternate claims raised by the respondent's notice of contention for recovery on the basis of a *quantum meruit* or unjust enrichment.

[34] I would order:

1. Leave to appeal be granted.

2. The appeal be dismissed.

3. The applicant pay the respondent's costs of the appeal, to be assessed on a standard basis.