QCAT

Queensland **Civil and Administrative Tribunal**

Al-Hakim v Goolburri Regional Housing Company Ltd [2010] QCAT 127

PARTIES:	Mr Latif Al-Hakim v Goolburri Regional Housing Company Limited
APPLICATION NUMBER:	BD037-09
MATTER TYPE:	Building matters
HEARING DATE:	22 April 2009
HEARD AT:	BRISBANE
DECISION OF:	Mr Richard Oliver
DELIVERED ON:	22 April 2010
DELIVERED AT:	BRISBANE
ORDERS MADE:	The hearing of this application shall be limited to paragraphs 1 -2, 13 – 21 and paragraphs 26 -27 inclusive of the Statement of Claim filed in the Tribunal on 19 October 2010. The balance of the Statement of Claim filed on 19 October 2010 is struck out
CATCHWORDS :	Application to strike out pleadings; pleadings based on a compromise agreement; whether the Tribunal has jurisdiction to consider settlement; claim for defective building work subsequent to the compromise agreement permitted.

APPEARANCES and REPRESENTATION (if any):

APPLICANT :	Mr Latif Al-Hakim self represented
RESPONDENT:	MR Griffin QC of Counsel instructed by Hartley-Holl Solicitor

REASONS FOR DECISION

1. On 29 January 2009 the applicant commenced a proceeding in the former Commercial and Consumer Tribunal making a claim against the respondent for, inter alia, damages for breach of contract in the sum of $190,200.00 or alternatively $179,950.00 together with liquidated damages continuing at a rate of $25 per day.

2. The particulars filed in support of the application relate to what has been described as a "variation agreement" entered into between the parties on 29 November 2005. The variation agreement encompasses the terms of settlement in respect of a contractual dispute between the parties. The dispute arose out of a building contract entered into between the parties on 1 July 2004 in respect of the construction a house for the applicant at 18 Samuil Court in Toowoomba.

3. The respondent terminated the variation agreement because the applicant failed to comply with clause 2 of the agreement which provided that:

   "It is a condition of this agreement that within 14 days from the date hereof the owner will obtain from his bank namely Westpac Banking Corporation a letter confirming that the owner has sufficient funds to pay for the balance of the monies owing under the said contract and agreeing to secure the same and pay each instalment without any deduction upon the completion of the various stages set out in Appendix Method B of the said contract as herein after varied."

4. The initial proceeding in the former Tribunal, BD249.05 dismissed Mr Al-Hakim's application as the Tribunal held it did not have jurisdiction because the relief sought was based on a compromise agreement which of course encompassed in the variation agreement.

5. After the initial application was dismissed the applicant then commenced a second proceeding in BD120-08, again before the former Tribunal. An application was made in the proceeding to strike out the claim and the Tribunal ordered on 7 October 2008 that the application be struck out, but the applicant was given leave to re-plead and reapply. It is not for this Tribunal on this application to reconsider or question the orders made in both BD120-08 and BD249-05.

6. As a consequence of the order in BD120-08 the applicant commenced a third proceeding in BD037-09. It is useful to recite the facts relied on in that application to get a better understanding of the basis for this application to dismiss, they are:

   (a) On 29 November 2005, the parties signed a variation agreement purported to solve dispute between them and vary certain items of the original contract signed on 1 July 2004.

(b) The agreement is conditional and deals with issues of costs and remaining stages of the building. It contains no statement related to the existing foundation work performed by the Respondent.

(c) By the Tribunal Orders on 1 December 2005, the Respondent obliged to ask the Tribunal for further directions before conducting any action that affect the existing proceedings before the Tribunal.

(4) On 15 December 2005, the Respondent terminated the variation agreement and the original contract. The Respondent asserted that the variation agreement "now has no effect whatsoever" and gave notice in terms of Clause 22.2 that the Respondent "hereby terminates the contract".

(5) The applicant asserts that the termination of the Contract (variation agreement and the original contract; the varied contract) by the Respondents wrongful.

(6) The Respondent did not ask the Tribunal for further directions and had not given a notice to remedy breach pursuant to Clause 22.1 so the right to terminate pursuant to Clause 22.2 did not arise. Further, as at the date of alleged termination the Respondent was already in substantial breach by its failure to comply with the warranty contained in Clause 10 of the General Conditions in that the existing work (footings/foundations) had not been constructed in accordance with the foundation design specifications.

(7) On 15 January 2007, the Applicant served the Respondent with notice under Clause 22.2 of the Contract General condition. The Respondent did not deny unsuitability of the foundation but asserted that this matter was dealt with in the Tribunal proceedings."

7. The respondent then filed an application in a proceeding to strike out that application/statement of claim, which application was heard by the Tribunal on 22 April 2009. On 10 June 2009 the Tribunal made the following order:

    1. *"The application to strike out the application is allowed in part.*
    2. *The applicant can amend the application so as to only claim in respect to any breach of the variation agreement on or before 4pm on 3 July 2009.*
    3. *Costs reserved"*

10. This order does not sit comfortably with the dismissal of the application in BD249-05 because that dismissal was based on a lack of jurisdiction to make any determination about the variation agreement. In any event, a further order was made by the Tribunal on 9 July 2009 as follows:

    "*The applicant can amend the application so as to only claim in respect of any breach of the variation agreement on or before 4pm on 17 July 2009.*

11. As a consequence of those orders, the applicant then filed an application on 10 July 2009 which had attached to it, "the nature of the orders sought" and "the basis of this application". These two documents are described as attachment A and attachment B. Essentially, the relief sought is that the variation agreement entered into between the parties is invalid. Secondly, the respondent, it is alleged, had no right to terminate the contract, as it admittedly

did, for the failure of the applicant to comply with clause 2 of the variation agreement.

12. Attachment B sets out why it is asserted that the variation agreement is "wrongful" and by paragraph 1, one can immediately discern that the dispute is about the variation agreement, its construction and enforceability. It is also alleged that the respondent is in breach of the variation agreement, the variation agreement varied the original contract and there is no evidence to show that the respondent terminated the varied contract. It then goes on to assert that any right to terminate could only be exercised after the defective work has been remedied in accordance with the variation agreement.

13. What is immediately apparent from the annexures is that the applicants claim is based on the variation agreement, its validity, enforceability and/or application. The claim does not relate to domestic building dispute within the meaning of the *Domestic Building Contracts Act* or the *Queensland Building Services Authority Act*. This issue was addressed by Mr Lohrisch in *Janetvale Pty Ltd v Cameron Platt*[1] in which he cited McGill DCJ in *Anderton v Parks Horticultural Services Pty Ltd*[2] wherein he said, inter alia:

> *"accordingly, in my opinion a dispute between the parties to a settlement agreement about that agreement is not one within para (a) of the definition of "domestic building dispute" merely because the dispute settled by agreement what was within that definition, or because it would be necessary to have regard to matters which occurred in the course of that earlier dispute, or in the performance of domestic building work, in order to resolve the dispute.*

14. Here, the applicant has clearly framed the nature of the dispute in Annexure A and Annexure B not, with respect to any specific allegations of defective building work, but based on the variation agreement.

15. However in an Amended Statement of Claim filed in the Tribunal on 19 October 2010, the applicant did make a claim for defective building work, particularised in paragraph 13, which refers to inadequate footing design. The pleading further particularises the basis of the claim and relies on engineering reports, it seems, from Baker Rossow Consulting Engineers and Reid Construction. This problem with the foundations, became apparent it seems, in 2007 subsequent to the compromise agreement. He also alleges in paragraph 27 that:

> *The costs of now demolishing existing footings, foundations and initial brickwork and to construct the house in accordance with original plans and specifications (but not including any addition engineering or footing redesign that may be found to be necessary after demolition) is the sum of $310,000.00. The applicant therefore claims by way of damages for breach of contract:*

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[1] (2008) QCCTB26
[2] District court 11 October 1996

(a) The sum of $9,250.00 already paid under the contract as mentioned in paragraph 26 above;

(b) The difference between the contract price and the current quotation price for the subject works which is:

$310,200.00 – $162,000.00 = $148,200.00

16. The claim in relation to the foundations was considered by the Member Favell in his decision of 10 June 2009[3] but he had, reasonably, difficulty differentiating that claim from the claim made in respect of the variation agreement. That, it seems to me, is why he gave leave to replead.

17. Pleadings in this jurisdiction do not take on the same importance as they do under the Uniform Civil Procedure Rules because the objects of the QCAT Act are to ensure that amongst other things proceedings *"are conducted in an informal way that minimises costs to parties, and is as quick as is consistent with achieving justice"*. The Act also encourages self representation and with that must come a broad approach by this Tribunal to the manner in which claims or responses are "*pleaded*". What however is essential, is a need for the opposing party to be appraised of the case it has to meet, despite in not having been put in a concise and succinct way that might be expected under the UCPR.

18. Here the applicant has consistently maintained a claim of defective building work in respect of the foundations. That claim arose, prima facie, subsequent to the entry into the variation agreement, I should say that this is not the occasion to make any final determination about when this claim arose. It is sufficient for this application that the applicant says it arose in 2007. This was recognised by Mr Favell and in the orders made by the former Tribunal. The applicant should not be shut out of this claim for want of formality in the manner in which his case is pleaded. The basis of this claim is pleaded in the amended statement of claim and is particularised in reliance on expert reports.

19. In order to narrow the issues I propose to make directions confining the applicant's case to a determination of whether the foundation system constructed by the respondent is defective or incomplete and what if any damages flow from any positive finding in respect of this issue. The balance of the pleaded claims will be struck out.

20. The Tribunal therefore directs as follows:

1. The hearing of this application shall be limited to paragraphs 1 -2, 13 – 21 and paragraphs 26 -27 inclusive of the Statement of Claim filed in the Tribunal on 19 October 2010.

2. The balance of the Statement of Claim filed on 19 October 2010 is struck out

2. The respondent file any response to the Statement of Claim by 28 May 2010.

3. The applicant file and serve any statements of evidence including expert reports by 11 June 2010.

[3] Paragraphs 12 and 25

4. The respondent file and serve any statements of evidence including expert reports by 25 June 2010.

5. The application be listed for a compulsory conference on 30 June 2010.

6. The application be listed for further directions on 8 July 2010.