

CITATION: Tomkins v Emmetlow Pty Ltd
[2014] QCAT 086

PARTIES: John Gilbert Tomkins
(Applicant)
v
Emmetlow Pty Ltd
(Respondent)

APPLICATION NUMBER: OCL048-13

MATTER TYPE: Other civil dispute matters

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: **Member Deane**

DELIVERED ON: 7 March 2014

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. John Gilbert Tomkins' application is dismissed.**
- 2. John Gilbert Tomkins is to pay Emmetlow Pty Ltd \$1,100 (incl GST) by 4.00pm 17 March 2014.**

CATCHWORDS: MANUFACTURED HOMES DISPUTE –
application to vary site agreement

Manufactured Homes (Residential Parks) Act
2003 (Qld) ss 18, 19, 22, 29, 95, 99A, 140

Gant and Anor v Emmetlow Pty Ltd [2013]
QCAT 62

APPEARANCES and REPRESENTATION (if any):

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (QCAT Act).

REASONS FOR DECISION

Background

- [1] Mr Tomkins is a home owner in the Colonial Village, a mixed use park and manufactured home village, located at Beams Road, Taigum. Emmetlow Pty Ltd is the park owner. Mr Tomkins and Emmetlow are parties to a site agreement in respect of lot 102 which was entered into in January 2013. The precise day Mr Tomkins signed the site agreement is in dispute.
- [2] The order originally sought by Mr Tomkins was that *'the costs levied against me by Emmetlow Pty Ltd be set aside permanently'*.
- [3] Prior to Mr Tomkins commencing this proceeding Emmetlow commenced proceedings against Mr Tomkins in the Minor Civil Disputes jurisdiction of the Tribunal¹ seeking payment of the amount of \$1,600 under the terms of the site agreement together with \$98 for filing fee. The amount claimed is comprised of a capital replacement contribution fee in the sum of \$1,100 and an 'establishment fee' in the sum of \$500. In September 2013 the Minor Civil Disputes proceeding was consolidated with this application².
- [4] In this light the order sought by Mr Tomkins is in the nature of an application to vary the special terms of the site agreement by deleting the provisions which impose the obligations to pay capital replacement contribution fees and an establishment fee³.
- [5] Mr Tomkins in his statement of evidence⁴ seeks to draw a distinction between seeking a variation to an existing site agreement and his situation where he contends that he was denied the opportunity to negotiate the terms of the site agreement.
- [6] The Tribunal has power to make an order it considers appropriate about the proposed variation⁵ and an order it considers appropriate to resolve the site agreement dispute.⁶
- [7] The basis for the application to vary the special terms is that Mr Tomkins contends that the park owner:
- a) did not comply with its obligations to give disclosure documents⁷;
 - b) coerced him into signing the site agreement;
 - c) failed to permit him the opportunity to read the site agreement prior to requiring it be signed;
 - d) failed to permit him the opportunity to seek legal advice;

¹ MCD0766-13.

² OCL048-13.

³ *Manufactured Homes (Residential Parks) Act 2003 (Qld)* s 22.

⁴ dated 10 January 2014, filed 13 January 2014 page 4 paragraph 13(a) 8.

⁵ *Ibid*, s 22(4).

⁶ *Ibid*, s 140.

⁷ *Ibid*, s 29.

- e) failed to permit him the opportunity to make proper enquiries of the terms and conditions of other manufactured home villages;
 - f) denied him the opportunity to negotiate the terms of the site agreement.
- [8] As the Tribunal has previously observed:
- a) the *Manufactured Homes (Residential Parks) Act 2003 (Qld)* (the Act) provides no guidance as to the criteria to be used when exercising the power to vary a site agreement.
 - b) it would be appropriate to vary a term if it was inconsistent with the Act but an obligation to pay a capital contribution is not inconsistent with the Act.
 - c) conduct of the park owner which suggests maintaining the special terms would be unfair might include the park owner coercing the home owner into signing the site agreement, denying the home owner the opportunity to seek independent advice and denying the home owner the opportunity to make proper enquiries as to the terms and conditions of other similar manufactured home villages prior to entering into the site agreement.⁸
- [9] Neither Mr Tomkins nor Emmetlow highlighted to the Tribunal which clause of the site agreement imposes the obligation on Mr Tomkins to pay an establishment fee. I have been unable to locate such a provision. Accordingly I cannot be satisfied that any such provision is contrary to the Act or that any amount is owing.
- [10] Mr Tomkins also seeks an order varying the site agreement to delete the service or access fee on utility charges as it is contrary to section 99A of the Act. Mr Tomkins has not highlighted to the Tribunal which clause of the site agreement he contends imposes this charge. I have been unable to locate such a provision. Part 1 – Schedule Section 6 refers to costs for utilities and services and states in relation to electricity ‘*as per Rate Sheet*’. The Rate Sheet has not been produced to the Tribunal. Special Term 3 relates to utilities charges but does not appear to provide for the type of charge to which Mr Tomkins refers.
- [11] As I have been unable to locate such a provision I cannot be satisfied that any such provision is contrary to section 99A of the Act.
- [12] There is evidence before the Tribunal which I accept that:
- a) the park owner was not the selling agent for the manufactured home purchased by Mr Tomkins;
 - b) Mr Tomkins received copies of Form 7, Notice of Proposed sale and assignment dated 29 October 2012 and Form 8, Form of assignment

⁸ *Gant and Anor v Emmetlow Pty Ltd* [2013] QCAT 62.

(transfer) also dated 29 October 2012⁹. Both of these documents contained a warning to seek legal advice;

- c) Mr Tomkins entered into the contract of sale on 30 October 2012. The contract of sale was conditional on the settlement of the contract to sell Mr Tomkins' residence and upon Mr Tomkins '*applying for and being granted residential status of the Colonial Motor Village*'.¹⁰ Mr Tomkins did not apply until 11 January 2013;
- d) Mr Tomkins moved his furniture and possessions into the home on 16 January 2013¹¹ and paid the balance owing under the contract of sale on 17 January 2013¹²;
- e) the park owner's manager, Marika Thauer, '*sat down*' with Mr Tomkins '*to go through the site agreement*' with him.¹³

[13] It is not disputed that the vendor ought to have notified the park owner of the proposed transaction. Mr Tomkins contends that the park owner failed to provide the required information pack in response to receiving the Form 7 and 8. I am not satisfied that the park owner failed to provide the information pack in response to receiving these documents.

[14] There is no evidence before the Tribunal as to when or if the vendor did notify the park owner and there is no evidence that the park owner received the documents. There is no statement of evidence from the selling agent or the vendor. Ms Thauer gave evidence that the park was not aware of the proposed purchase until January. I accept Ms Thauer's evidence on this point.

[15] Her evidence is consistent with Mr Tomkins' evidence that prior to moving in he spent some time at the home painting and had a conversation about his proposed purchase with '*Bondy*' who identified that he was the park owner. Mr Tomkins evidence is not specific as to when in January 2013 this conversation occurred.

[16] Ms Thauer denies that she coerced or pressured Mr Tomkins into signing the site agreement and contends that:

- a) Mr Tomkins was provided with the information required under section 29 of the Act which includes copies of the site agreement¹⁴, park rules and home owner disclosure information document¹⁵ prior

⁹ Attachment JT9 to statement of evidence of John Gilbert Tomkins dated 10 January 2014, filed 13 January 2014.

¹⁰ Attachment JT4 to statement of evidence of John Gilbert Tomkins dated 10 January 2014, filed 13 January 2014.

¹¹ Attachment JT5 to statement of evidence of John Gilbert Tomkins dated 10 January 2014, filed 13 January 2014.

¹² Attachment JT6 to statement of evidence of John Gilbert Tomkins dated 10 January 2014, filed 13 January 2014.

¹³ Attachment JT11 to statement of evidence of John Gilbert Tomkins dated 10 January 2014, filed 13 January 2014.

¹⁴ *Manufactured Homes (Residential Parks) Act 2003 (Qld)*, s 19.

¹⁵ *Ibid*, s 18.

to Mr Tomkins signing the site agreement and prior to Mr Tomkins furniture and possessions being delivered to the home;

- b) she spoke to Mr Tomkins at length about the site agreement prior to the settlement date under the contract of sale (Settlement Date);
- c) she stressed to him the legally binding nature of the site agreement;
- d) she suggested that he may wish to delay the Settlement Date;
- e) she did not insist he sign the site agreement prior to reading it;
- f) she suggested to him he should seek legal advice.

[17] Mr Tomkins denies these matters.

[18] I am not satisfied that the park owner has acted in a way which suggests maintaining the special terms would be unfair.

[19] Mr Tomkins is the applicant in this matter and is required to satisfy the Tribunal of his entitlement to the orders sought.

[20] Mr Tomkins contends he was provided with a copy of the site agreement on 21 January 2013 and required to sign it within a few minutes.

[21] The dates on the site agreement indicate that Mr Tomkins and Ms Thauer signed the site agreement on 16 January 2013. Mr Langdon witnessed the signatures and gave evidence¹⁶ that it was signed on 16 January 2013. Mr Langdon also gave evidence that he was present when Ms Thauer suggested Mr Tomkins delay settlement so that he could get independent advice. Mr Tomkins admits Mr Langdon witnessed the signatures but denies he was present on other occasions when he spoke with Ms Thauer.

[22] Ms Thauer produced to the Tribunal:

- a) a copy of a letter to '*the Real Estate Agent*' dated 10 January 2013 enclosing '*the Information Pack for any prospective purchasers for the relocatable home situated at Site 102 at the Colonial Village*';
- b) extracts from a diary for 9, 10 and 11 January 2013. The extracts for 9 and 10 January 2013 are consistent with Ms Thauer's evidence that upon becoming aware of a proposed sale she contacted the selling agent. An entry on 11 January 2013 indicates that Mr Tomkins '*came in with info pack....he said he will speak to solicitor*';
- c) a copy of Mr Tomkins completed Proposed Permanent Resident application dated 11 January 2013. Ms Thauer gave evidence that this document forms part of the Home Owner's Information Pack.

¹⁶ Attachment JT18 to statement of evidence of John Gilbert Tomkins dated 10 January 2014, filed 13 January 2014.

- d) a phone call log which indicates that a call was placed to Mr Tomkins' mobile phone number on 15 January 2013 at 5.13pm and the call duration was in excess of 15 minutes.
- [23] I find on the balance of probabilities that Mr Tomkins was provided with the documents required under section 29 of the Act on or before 11 January 2013 and signed the site agreement on 16 January 2013.
- [24] Mr Tomkins complains in his letter of 23 February 2013 that he did not receive sufficient information prior to entering into the contract of sale. The complaint was not expressly in terms of not receiving sufficient information prior to entering into the site agreement.
- [25] I find that Mr Tomkins had an opportunity to seek advice, to read the documents and make other enquiries. I find that the limited opportunity to do these tasks and to seek to negotiate the terms of the site agreement was not brought about by any failure on Emmetlow's behalf but was brought about by:
- a) the vendor's failure to inform Emmetlow of the proposed transaction;
 - b) Mr Tomkins' failure to make enquiries prior to signing the contract of sale;
 - c) Mr Tomkins' failure to take steps to satisfy the condition of the contract of sale which related to applying for and being granted residential status of the Colonial Motor Village prior to 11 January 2013.
- [26] Mr Tomkins contends that because he was not provided with the disclosure documents he was not made aware of the park owners' intentions to transition out of providing site agreements for manufactured homes¹⁷. Mr Tomkins claims a breach of section 95 of the Act.
- [27] Consequently Mr Tomkins sought a further order due to alleged fraudulent conduct by the park owner that the park operator purchase the home for \$95,000 plus costs incurred for repairs to the home.
- [28] I am not satisfied that this claim is made out as set out earlier in these reasons I have found that Mr Tomkins received the required disclosure information on or before 11 January 2013 and signed the site agreement on 16 January 2013. I accept Ms Thauer's evidence that the disclosure documents contain information about the transition.
- [29] Emmetlow seeks orders that Mr Tomkins:
- a) be bound by the terms and conditions of the site agreement;
 - b) pay all outstanding monies within 7 days.
- [30] Mr Tomkins' application to vary the special terms has not succeeded. Mr Tomkins signed the site agreement and is bound by its terms.

¹⁷ Attachment JT19 to statement of evidence of John Gilbert Tomkins dated 10 January 2014, filed 13 January 2014.

- [31] Special Term 1 c) – e) sets out obligations in respect of Capital Replacement Contributions. Schedule 1 Item 6 provides that the Capital Replacement Contribution at the Commencement Date is \$1,000 plus GST. Emmetlow has made demand for \$1,100 and it remains unpaid.
- [32] I find that the amount of \$1,100 (incl GST) is payable by Mr Tomkins in respect of Capital Replacement Contributions.