

**CITATION:** *Carter & Anor v HK Developments Pty Ltd*  
[2015] QCATA 59

**PARTIES:** Nathan Carter  
Damita Carter  
(Applicants/Appellants)  
v  
HK Developments Pty Ltd  
(Respondent)

**APPLICATION NUMBER:** APL345-14

**MATTER TYPE:** Appeals

**HEARING DATE:** On the papers

**HEARD AT:** Brisbane

**DECISION OF:** **Senior Member O'Callaghan**  
**Member Roney**

**DELIVERED ON:** 23 April 2015

**DELIVERED AT:** Brisbane

**ORDERS MADE:**

- 1. The appeal is allowed.**
- 2. The decision is set aside.**
- 3. The matter is returned to the Tribunal for rehearing.**
- 4. HK Developments Pty Ltd pay into the Trust Account of QCAT by 4:00pm on 30 April 2015 the sum of \$79,841.45 pending the rehearing of the matter.**

**CATCHWORDS:** BUILDING – where builder suspended works on the basis of owners failure to pay progress claim and variation – where Tribunal held suspension valid and subsequent termination by owners invalid – whether findings were an error of law

*Domestic Building Contracts Act 2000 (Qld), s 84*  
*Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 142, s 143*

*HK Developments Pty Ltd v Carter* [2014] QCAT 330

## **APPEARANCES:**

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

## **REASONS FOR DECISION**

- [1] On 23 April 2015 the Appeal Tribunal made orders as set out above .These are the reasons for that decision.
- [2] The appellant appeals the decision of QCAT dated 14 July 2014 pursuant to s 142 and s 143 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act').
- [3] The appeal and submissions were filed on 11 August 2014. No response to the appeal was filed by the respondent.
- [4] The Tribunal convened a directions hearing to hear from the respondent on the 15 April 2015 but the respondent did not appear.
- [5] The net position therefore is that the Tribunal has not received any material from the respondent for the purpose of this appeal.

## **Leave to Appeal and Appeal as of Right Issues**

- [6] At QCAT, an appeal as of right is available only in relation to questions of law.
- [7] In the application for leave to appeal and appeal the appellant lists 10 grounds of appeal as follows:
  - 1. The Member has not applied the law in her finding the variations were due at the time of the suspension notice.
  - 2. The Member has made errors in finding of mixed law and fact that the suspension notice adequately identified the breaches.
  - 3. The Member has made errors in finding of fact that the owners were in breach of contract and not permitted to terminate.
  - 4. The Member has not applied the law in not finding that the suspension notice was invalid for not providing the required amount of time under the contract to remedy the breaches in notice of suspension.
  - 5. The Member has made errors in finding of fact in her Schedule A.
  - 6. The Member has made errors in finding of fact in her findings of incomplete and defective works, she has not considered all the evidence made available as she could not have made findings she made if all the evidence was considered.
  - 7. The Member has made errors in finding of fact that the variations were variations.
  - 8. The Member has not applied the law in failing to find it would be unfair for the owners to owe money for the variations.

9. The Member has not considered and made findings on claims of liquidated damages as required to do.
10. The Member has made errors in how she calculated the interest on the decision as the time for payment of variations only materialised upon the making of her order and penalty interest cannot apply from the time the contract was ended.

[8] Some of the aforementioned grounds are stated to be errors in findings of fact. Grounds 1, 2, 3 and 4 whilst not articulated precisely raise a question of law regarding the status at law of the variation agreement<sup>1</sup> and consequently the validity of the suspension notice.

[9] These grounds may be dealt with for convenience together. Leave to appeal is not required in relation to a question of law.

**Did the learned Member make an error of law in her findings regarding the status of the variation agreement and consequently the suspension notice?**

[10] The learned Member held that the respondent builders notice to suspend works dated 4 February 2011, so far as it relates to variations, was valid.<sup>2</sup> She held that the notice was not valid insofar as it related to the practical completion payment because she found that stage had not been reached and accordingly there was no entitlement to payment for the practical completion claim.<sup>3</sup>

[11] In relation to the variation claims she says in her judgment as follows:<sup>4</sup>

[46] The variations signed 14 September 2010 and three further variations signed by Mr Carter on 30 September 2010 form the basis of HK Developments' suspension notice. The notice also lists a variation alleged by the builder as owing because of non-standard tile being supplied by Mr Carter although no written variation has been provided for this item.

[47] I am satisfied that Mr Carter did not remedy this breach within the time required under the notice or under the time requirements of clause 16.3 of the contract.

[48] I am therefore satisfied that Mr Carter was in breach of the contract at the time the suspension notice was issued by HK Developments and that the suspension notice was a valid notice insofar as it relates to the contract variations.

[12] Although the learned Member acknowledges the shortcomings of the variations when she states:<sup>5</sup>

[42] As a valid variation to the contract, this document fulfils most of the requirement of clause 12 – it is written, describes the variations,

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<sup>1</sup> Exhibit 11.

<sup>2</sup> *HK Developments Pty Ltd v Carter* [2014] QCAT 330 at [48].

<sup>3</sup> *Ibid* at [34].

<sup>4</sup> *Ibid* at [46]-[48].

<sup>5</sup> *Ibid* at [42]-[43].

generally identifies the reason for the variations, estimates any delay in the works and is signed by both parties. It does not state any adjustment to the contract price but records that the owner must pay the variation price at the correct stage.

[43] Although there is no final figure, each variation item is generally sufficiently costed throughout the document for the parties to be aware of their obligations.

- [13] There was no dispute between the parties that the variation claim remained unpaid.
- [14] We do not accept the construction of the variation agreement as contended for by the respondent at the hearing and as found by the learned Member in that the formal requirements of the *Domestic Building Contracts Act 2000* (Qld) have not been met and were not otherwise the subject of an order under s 84 of that Act.
- [15] The variation agreement fails to state a date for payment. On its face, there is no clear unambiguous expression of when the variation is to be paid.
- [16] Neither in our view is the amount agreed for the variation apparent.
- [17] The result in our opinion is that there is a lack of clarity about the cost of the variation and the time for payment. There is an uncertainty as to the terms of the variations.
- [18] This leads to the position where on the face of the document there is no concluded agreement between the parties about these critical matters, price and payment. Absent an agreement with respect to these matters, there can no proper variation at law and no breach for a failure to pay an amount by a particular time.
- [19] There is no proper variation for the purpose of the contract and certainly not one such that the failure to pay might ground a valid notice of suspension.
- [20] Put simply the appellant was not in breach because there was no obligation to pay variations, certainly not before the contract had reached practical completion.
- [21] It follows that, as there was no breach of an obligation to pay a variation there was no basis in law to issue the notice to suspend works. A notice to suspend works for non-payment of variations, could not issue in circumstances where there was not a proper claim under the contract for those variations, as we have held above.
- [22] It may well be that the respondents demand for a payment that was not properly due under the contract, was itself unlawful. It may amount to a breach of a contract entitling the appellants to accept the repudiation and provide a notice of intention to terminate as was done.

- [23] Thus the position with respect to termination of the contract and the consequences which flow from that could be entirely reversed from the position as held by the learned Member at first instance.
- [24] In light of our findings the matter should be returned to the Tribunal to rehear and to consider whether:
- a) the giving of the notice to suspend work by the respondent was a repudiation of the contract;
  - b) the appellants lawfully terminated the contract on 16 February 2011;
  - c) the appellants are entitled to damages to be assessed for a breach of contract by the respondent;
  - d) the respondent is entitled to a quantum meruit for the value of work it has performed subject to progress payments already made and the appellants' damages claim.
- [25] The position in relation to grounds 5, 6, 7 and 8 is quite different.

### **Grounds 5, 6, 7 and 8**

- [26] The appellant's submissions on these grounds are variously that the learned Member has missed or has misinterpreted the evidence, that she has failed to consider the evidence before her and that her findings do not reflect the correct value of incomplete or defective work.
- [27] The outcomes in Schedule A to the decision record the Members findings about the evidence, which she heard and accepted about defects and incomplete works and her reasons for doing so.
- [28] The parties provided extensive expert evidence to the Tribunal: the applicant provided reports of Messrs Dixon and Dyer, the respondent provided Mr Ripley. The Tribunal at first instance also had the advantage of joint reports by experts produced after a final conclave.
- [29] The Tribunal had the advantage of reviewing the reports and hearing from the experts in person. The learned Member has considered competing views and reached a decision on the evidence before her.
- [30] The findings of the primary judge of fact are not easily disturbed. Manifest error must be apparent to render the findings incompetent.
- [31] Our view is that the decisions she has reached in relation to each of the items of defective work and rectification are not so unreasonable that they could not have reasonably been made on the evidence before her.
- [32] Accordingly, no error is disclosed.
- [33] It should be noted that some of her findings record agreement between the experts or an acceptance of the majority of expert views in relation to each item, see for example items 1, 3, 4, 16, 20, 21, 30, 39, 41, 42, 43, 44, 45, 47, 52, 63, 68, 78, 81.

- [34] Leave to appeal is required for grounds 5, 6, 6 and 8 and no leave is granted.
- [35] The matter is returned to Tribunal to rehear in light of the findings of this Appeal Tribunal and the issues raised in [24] above.
- [36] The appellants have paid the respondent the amount awarded to it by the Tribunal below.
- [37] It is appropriate in light of the findings of this Appeal Tribunal that the respondent pay the money into the Tribunal's Trust Account pending the rehearing and determination.