

SUPREME COURT OF QUEENSLAND

CITATION: *C & E Pty Ltd v. CMC Brisbane Pty Ltd* [2003] QSC 328

PARTIES: **C & E PTY LTD (FORMERLY TERRY SEIRLIS CONSTRUCTIONS PTY LTD)**
ACN 086 482 840
(applicant)
v.
CMC BRISBANE PTY LTD
ACN 069 532 967
(respondent)

FILE NO: 6944 of 2003

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court, Brisbane

DELIVERED ON: 26 September 2003

DELIVERED AT: Brisbane

HEARING DATE: 22 August 2003

JUDGE: Helman J.

CATCHWORDS: CONTRACT – domestic building contracts – whether building contract is a regulated contract under *Domestic Building Contracts Act 2000*

Acts Interpretation Act 1954 s. 32C
Domestic Building Contracts Act 2000 ss. 3, 7-9

COUNSEL: Mr R.N. Wensley Q.C. with Ms R.M. Kelly for the applicant
Mr P. Hackett for the respondent

SOLICITORS: Lees Marshall Warnick for the applicant
Crouch & Lyndon for the respondent

- [1] The applicant seeks a declaration that a building contract dated 21 September 2001 is a regulated contract pursuant to the provisions of the *Domestic Building Contracts Act 2000*. The contract in question is a written contract between the applicant as developer and proprietor of land at 53 Paragon Street, Yeronga and the respondent as builder. It is in the form of the JCC-F 1994 Building Works Contract without quantities and with staged practical completion, in a form issued by the Joint Contracts Committee of the Royal Australian Institute of Architects, the Master Builders Australia Incorporated and the Building Owners and Managers Association of Australia Limited. The respondent undertook the construction of ten separate houses at the site with associated road works, services, and landscaping for \$4,040,000, plus goods and services tax, in accordance with

drawings and specifications. Each of the ten houses is designed as a separate residence to be sold separately and is the subject of a separate certificate of title. Work on the project began in October 2001 and a notice of practical completion was issued on 21 February 2003. Subsequently disputes have arisen between the applicant and the respondent, including a dispute as to whether the contract is a regulated contract pursuant to the provisions of the *Domestic Building Contracts Act*, the applicant asserting that it is, the respondent asserting that it is not.

[2] The *Domestic Building Contracts Act* is an Act to regulate certain domestic building contracts, and for other purposes. Section 3 provides that the purpose of the Act, in regulating domestic building contracts, is:

- (a) to achieve a reasonable balance between the interests of building contractors and building owners; and
- (b) to maintain appropriate standards of conduct in the building industry.

[3] Section 7 defines the meaning of domestic building contract:

7 Meaning of ‘domestic building contract’

- (1) A **‘domestic building contract’** is a contract –
 - (a) to carry out domestic building work; or
 - (b) to manage the carrying out of domestic building work.
- (2) However, a **‘domestic building contract’** does not include –
 - (a) a contract between a building contractor and subcontractor; or
 - (b) a contract under which the building owner is the State, an entity representing the State or a local government.

[4] In s. 8 ‘domestic building work’ is defined. That section, so far as it is relevant, is as follows:

8 Meaning of ‘domestic building work’

- (1) Each of the following is **‘domestic building work’** -
 - (a) the erection or construction of a detached dwelling;
 - (b) the renovation, alteration, extension, improvement or repair of a home;
 - (c) removal or resiting work for a detached dwelling.

...

- (3) **‘Domestic building work’** includes –

- (a) work ('associated work') associated with the erection, construction, removal or resiting of a detached dwelling; and
- (b) work ('associated work') associated with the renovation, alteration, extension, improvement or repair of a home.

(4) Without limiting subsection (3), associated work includes –

- (a) landscaping; and
- (b) paving; and
- (c) the erection or construction of a building or fixture associated with the detached dwelling or home.

[5] Section 9 defines 'regulated contract', and, so far as it is relevant, is as follows:

9 Meaning of 'regulated contract'

- (1) A '**regulated contract**' is a domestic building contract for which the contract price is more than the regulated amount.

The parties were agreed that the contract price of the contract the subject of the application is more than the regulated amount.

[6] The expression 'detached dwelling' is defined in Schedule 2:

'detached dwelling' means –

- (a) a single detached dwelling; or
- (b) a duplex.

[7] Giving the expression 'domestic building contract' its ordinary, natural meaning, one would conclude that the agreement in question is such a contract. It is a contract to carry out domestic building work, and not, e.g., commercial or industrial building work - a contract to erect houses and not an office building or factory. But on behalf of the respondent it was argued that the definition of 'detached dwelling' in Schedule 2 shows that the only domestic building contracts within the purview of these provisions are those concerning the building of only one detached dwelling or, it would seem, only one duplex. That argument rested on the ordinary, natural meaning of the words in the definition.

[8] The Oxford English Dictionary (2nd ed., 1989) volume IV at p. 1129 gives the meaning of the word 'duplex', used as substantive, as '[a] house or other building so divided that it forms two dwelling-places; also, a flat occupying two floors'. In the context of the definition of 'detached dwelling' in Schedule 2 the adjective 'single' could be thought to be used to draw a distinction between such a dwelling-place and one not so divided. It could be thought not to be used to restrict, in the provisions under consideration, the purview of the Act to those contracts concerning only one detached dwelling, whether single or duplex, and to exclude contracts concerning more than one dwelling; the singleness referred to relating to the type of dwelling

and not to the number of such dwellings. Had that construction been intended, however, it might better have been achieved by using the expression ‘detached single dwelling’ rather than ‘single detached dwelling’.

- [9] It may be accepted, as was conceded by Mr Wensley Q.C. on behalf of the applicant, that the definition of ‘detached dwelling’ is ambiguous, it being open to the two constructions contended for. That ambiguity may be resolved, I think, by reference to the explanatory notes to the *Domestic Building Contract Bill* 1999, which contained the provisions under consideration: s. 14B of the *Acts Interpretation Act* 1954. The notes begin by setting out the objective of the legislation:

Objective of the legislation

The legislation is designed to help consumers avoid pitfalls in procuring building services.

For most consumers, signing a large building contract for a new home, extensions or renovations will be something experienced once or twice in a lifetime. For building contractors, it is an everyday occurrence. This disparity in knowledge and understanding of contractual principles between the parties frequently disadvantages consumers. This Bill seeks to address these market inequalities by –

- requiring building contractors to obtain and provide all necessary information about the building work and domestic building contracts generally;
- mandating fair standard contractual provisions;
- implying standard warranties into all domestic building contracts regulated by the Bill;
- outlawing and/or voiding unconscionable contractual provisions; and
- providing a cooling-off period during which a consumer may withdraw from a domestic building contract without significant penalty.

- [10] The stated objective indicates that contracts on the scale of the one in question on this application were not intended to be brought within the purview the provisions of the Act under consideration, and that its object was to protect ‘consumers’, i.e., those who enter into building contracts infrequently and without relevant knowledge or experience of the pitfalls that bedevil such consumers. The way chosen by the legislature to achieve that protection was to use of the simple device of limiting the contracts to which the provisions apply rather than to undertake the difficult task of formulating a definition of the type of consumer to be shielded from the hazards to which I have referred. There may of course be some ‘consumers’ who are well able to negotiate the difficult terrain in question, but the explanatory notes indicate, by

the reference to ‘most consumers’, that it was understood that those who needed protection would constitute the majority of those who engage builders.

- [11] The operation of s. 32C of the *Acts Interpretation Act* in providing that words in the singular include the plural in my view is excluded from application to the provisions of the *Domestic Building Contracts Act* under consideration because the latter provisions must be understood in accordance with the explanatory notes.
- [12] Sections 7 and 8 cannot in my view be construed without reference to the definition of ‘detached dwelling’, as suggested by Mr Wensley. The Act must be read as a whole, bearing in mind the explanatory notes.
- [13] Accordingly I conclude that the applicant is not entitled to the declaration sought. I shall invite further submissions on costs.