

JUDGMENT : HIS HONOUR JUDGE ANDERSON : County Court of Victoria at Melbourne Business List – Commercial Div.
18th December 2007

- 1 The defendant was engaged by a developer to construct a number of residential dwellings on individual allotments on the Westbourne Manor Estate at Truganina. The defendant engaged the plaintiff to carry out the works pursuant to two contracts, the first dated 22 November 2006 for 15 dwellings with a contract price of \$2,090,000 and the second dated 22 April 2007 for 9 further dwellings with a contract price of \$1,111,050.
- 2 Between November 2006 and May 2007 the plaintiff submitted 43 invoices to the defendant totalling \$1,243,550. The defendant says that up until 9 May 2007 he had paid \$1,135,500 and has, since that date, paid a further \$123,095, making total payments of \$1,258,595.
- 3 The defendant made four payments totalling \$193,420 by personal cheques which were dishonoured upon presentation:
\$18,595 dated 28 December 2006
\$70,000 dated 16 March 2007
\$54,825 dated 28 March 2007
\$50,000 dated 26 April 2007
- 4 The plaintiff issued this proceeding claiming the amount of the cheques, pursuant to the summary procedure set out in Part 1 of the Instruments Act 1958.
- 5 The defendant obtained leave to defend the proceeding by ex parte application in the Practice Court before His Honour Judge Holt on 1 November 2007. Having obtained that order the defendant now asserts that the action should be stayed pursuant to s.57(2) of the Domestic Building Contracts Act 1995 as the action arises “wholly or predominantly from a domestic building dispute” and “the action could be heard by the [Victorian Civil & Administrative] Tribunal”.
- 6 The issues for determination in this application are:
 - (a) whether the proceeding arises wholly or predominantly from a “domestic building dispute” being, it is alleged, a dispute between a builder and a sub-contractor in relation to the carrying out of “domestic building work”;
 - (b) whether the action could be heard by the Victorian Civil & Administrative Tribunal.
- 7 The plaintiff also commenced proceedings at VCAT against the defendant on 29 August 2007. The plaintiff claims, in those proceedings, the sum of \$607,770 less \$225,432 in respect of amounts said to be the subject of dishonoured cheques. There is a discrepancy between this figure and the total of the cheques sued upon in this proceeding.
- 8 The plaintiff’s Counsel was unable to explain the discrepancy, but what the plaintiff apparently intended in the VCAT proceeding was to claim the amounts alleged to be owing by the defendant to the plaintiff pursuant to the contracts to carry out the construction work in relation to the residential dwellings at Truganina but not so as to include the amounts of the dishonoured cheques.
- 9 The term “domestic building dispute” is defined in s.54 of the Domestic Building Contracts Act and includes a dispute or claim arising between a builder and a sub-contractor “in relation to a domestic building contract or the carrying out of domestic building work”.
- 10 The competing contentions were as follows:
 - (a) *the plaintiff submitted that the present proceeding relates to dishonoured cheques and not the carrying out of “domestic building work”;*
 - (b) *on the other hand the defendant contended that the cheques were provided as payment for the construction of the residential dwellings for the plaintiff at Truganina and therefore the claim is a “domestic building dispute”.*
- 11 In the present proceeding three matters were raised in the affidavit material before His Honour Judge Holt:
 - (a) when the cheques were provided by the defendant, the defendant said there was an agreement that the plaintiff would not bank the cheques until it was instructed to do so by the defendant;
 - (b) even though the cheques were dishonoured, in relation to the three larger cheques, replacement cheques were provided within a matter of days and therefore any liability has been discharged;
 - (c) the defendant alleges it has a set-off or counterclaim relating to what it says was the delay in completing the contract works which led the defendant to terminate the contracts for the construction of the residential dwellings.
- 12 The first two matters may constitute defences if the defendant can satisfy the onus of establishing the relevant facts. In the affidavit in support of the defendant’s application for leave to defend sworn by the defendant on 26 October 2007, the relevant arrangement was referred to in paragraph 10 as follows, “On other occasions I gave cheques to Jim to be held by him pending instructions from me as to when they could be banked. I told Jim that the cheques would not be honoured until I had received funds from the developer”.
- 13 Insofar as the defendant alleges that the plaintiff agreed to defer payment until the defendant had received payment from the developer it would appear to offend the provisions of s.13 of the Building and Construction Industry Security of Payment Act 2002. In the affidavit the defendant asserts that in respect of the three larger cheques replacement cheques were provided by the defendant soon after the initial cheques were dishonoured

and that the defendant has paid the plaintiff an amount totalling more than the total of the 43 invoices rendered by the plaintiff.

- 14 The suggested set-off or counterclaim would not afford a defence to claims on bills of exchange: see **Mobil Oil Australia Ltd v. Caulfield Tyre Service Pty Ltd** [1984] VR 440. The defendant would therefore be restricted in the issues that could be disputed at trial.
- 15 In these circumstances, it is my view that the issues raised in the pleading do not constitute a “*domestic building dispute*” as that term is defined in s.54 of the Domestic Building Contracts Act and that, accordingly, the Court is not obliged to stay the action upon the defendant’s application. Further, it is not appropriate for the present claim to be heard at VCAT if the effect of doing so would be to deprive the plaintiff of its right to have the claims on the bills of exchange determined without a consideration of any set-off or counterclaim asserted by the defendant. It could not be the intention of s.57 of the Domestic Building Contracts Act to permit such defences to be raised.
- 16 The VCAT proceeding was set down for a compulsory conference on 13 December 2007. It is likely that a trial date will be given in early 2008.
- 17 As for the present dispute, the matter should be tried without further interlocutory steps. The sole issues in dispute will be:
 - (a) whether there was an agreement by the plaintiff to defer presentation of any of the cheques (provided that such an agreement does not offend s.13 of the Building and Construction Industry Security of Payment Act);
 - (b) whether replacement cheques were provided by the defendant following the dishonour of the original cheques and, accordingly, whether any amount remains owing in respect of the original cheques.
- 18 The Instruments Act provides a summary procedure to ensure that disputes of this nature are determined at the earliest opportunity and without the parties incurring unnecessary expense.
- 19 The Court will make orders in accordance with the following minutes:
 - (1) the proceeding is set down for trial as a cause before a Judge sitting alone with an estimate of one to two days in February 2008;
 - (2) payment of the setting down fee by 20 December 2007;
 - (3) the usual Orders in relation to Court Books;
 - (4) by 21 January 2008 the defendant must, upon request by the plaintiff, provide copies of any replacement cheques or documents evidencing the alleged agreement to defer presentation of the cheques by the plaintiff until further notified by the defendant;
 - (5) reserve costs;
 - (6) reserve liberty to apply.

For the Plaintiff : Mr. E. Riegler instructed by Davis Zucco Lawyers
For the Defendant : Mr. B. Hutchinson instructed by Wainwright Ryan Eid