

Domaine Homes (Vic) Pty Ltd v Ria Building Pty Ltd [2005] VCC 111

**Catchwords:** Stay application pursuant to s.57(2) of the *Domestic Building Contracts Act 1995* – alternative claims for damages for breach of contract and under the *Building & Construction Industry Security of Payment Act 2002*

**JUDGMENT : His Honour Judge Shelton**, in the County Court of Victoria at Melbourne, 15<sup>th</sup> February 2005.

1 This is a stay application by the defendant brought pursuant to s.57(2) of the *Domestic Building Contracts Act 1995* (“the DBC Act”).

S.57 of the DBC Act provides, so far as relevant :

“(1) *This section applies if a person starts any action arising wholly or predominantly from a domestic building dispute in the Supreme Court, the County Court or the Magistrates’ Court.*

(2) *The Court must stay any such action on the application of a party to the action if —*

(a) *the action could be heard by the Tribunal under this Subdivision;*

and

(b) *the Court has not heard any oral evidence concerning the dispute itself.”*

2 “Tribunal” is defined in s.3(1) of the DBC Act as meaning Victorian Civil and Administrative Tribunal (“VCAT”).

3 By its Statement of Claim, the plaintiff claims against the defendant, damages for breach of contract in the sum of \$178,755, or, alternatively, this sum being a debt due and payable under the ***Building & Construction Industry Security of Payment Act 2002*** (“the BCISP Act”). The claims arise out of construction by the plaintiff of residential units, units 21 to 24 respectively, at Lot 402 Mickleton Grove, Point Cook (“the works”). The works were undertaken pursuant to a contract executed by the plaintiff and the defendant entitled “Sub Contract 402 – Lots 21-24” dated 27 May 2003.

4 A related company of the defendant had purchased Lot 402 Mickleton Grove and then on-sold units 21 to 24 on Lot 402 to four separate parties. These parties then entered into building contracts with the defendant for the construction of new units on their land. The defendant then subcontracted with the plaintiff for the construction of these four units, apart from civil works and concrete slab works, which were to be performed by others.

5 The defendant concedes that by reason of the provisions of s.16(2)(a) of the BCISP Act, the plaintiff’s alternative claim brought pursuant to that Act cannot be heard by VCAT and must be heard in the County Court.

6 S.54 of the DBC Act 1995, provides, so far as relevant :

“(1) A “domestic building dispute” is a dispute or claim arising —

...

(b) *between a builder and —*

...

(iii) *a sub-contractor*

*in relation to a domestic building contract or the carrying out of domestic building work.”*

7 The DBC Act in s.3(1) defines “domestic building contract” as follows : “**Domestic building contract**” means a contract to carry out, or to arrange or manage the carrying out of, domestic building work other than a contract between a builder and a sub-contractor.”

8 It is common ground that the contract between the plaintiff and the defendant dated the 27<sup>th</sup> May 2003, is between a builder and a sub-contractor. It is therefore not a domestic building contract as defined in s.3. The plaintiff concedes, however, that there is a dispute or claim arising between it and the defendant in relation to “the carrying out of domestic building work”. There is therefore, pursuant to s.54(1) of the DBC Act, a domestic building dispute in existence.

9 The issue before me is whether s.57(1) of the DBC Act applies to this domestic building dispute. If it does, I am required, under s.57(2) of the DBC Act, to stay the claim for breach of contract. It is not in issue that paragraphs (a) and (b) of s.57(2) apply if s.57(1) applies.

10 Whether s.57(1) applies depends upon the meaning of the word “action” in this subsection. The defendant contends that “action” in this sub-section means “cause of action” and that therefore I could stay the claim for breach of contract. It was envisaged that the defendant would then make an application to VCAT pursuant to s.57(4) of the DBC Act in respect of the matter, which would be determined there. The claim under the BCISP Act would remain in the County Court.

11 The plaintiff contends that “action” in s.57(1) means “proceeding” and covers both alternative claims. It argues that the claim under the BCISP Act is not arising from a domestic building dispute, but is rather a recovery claim for a debt due. I agree with this description of the claim under the BCISP Act. I further agree with the plaintiff’s submission that if the claim under the BCISP Act is not “a domestic building dispute” then this proceeding is not “arising wholly or predominantly from a domestic building dispute”.

12 I am of the view that “action” in s.57(1) of the DBC Act means “proceeding” rather than “cause of action” for the following reasons.

13 “Action” is not defined in the DBC Act, nor in the *Victorian Civil & Administrative Tribunal Act 1998*, nor in the *Interpretation of Legislation Act 1984*. I note that s.3(1) of the *Limitation of Actions Act 1958* states :

“(1) *In this Act unless inconsistent with the context or subject-matter— “action” includes any proceeding in a court of law”.*

14 Williams, Civil Procedure comments in Volume 2 at paragraph 1607.0 that prior to 1 August 1989 in the County Court Act and the County Court Rules “action” was used to denote a matter in the civil jurisdiction of the Court, and that from that date the County Court Act and the Rules substituted the term “proceeding” for “action”. Similar changes were made in the Supreme Court Act and the Supreme Court Rules from 1 January 1987. Given that the DBC Act was enacted after the change from “action” to “proceeding” in the Supreme Court and County Court, it is perhaps unfortunate that the word “proceeding” instead of the word “action” is not used in s.57(1) of the DBC Act.

15 The use of the word “starts” in s.57(1) of the DBC Act is more appropriate to a proceeding than to a cause of action. To speak of “starting” a cause of action is nonsensical.

- 16 I refer to the discussion in Williams, *op.cit.* at paragraph 120.20 as to the meaning of the word “**action**” and the cases referred to there. They certainly do not support the proposition that the word “**action**” means “**a cause of action**”. Rather, they suggest that “**action**” refers to the issue of a writ. In particular, I note the comment of Lord Simon of Glaisdale in **Herbert Berry Associates Ltd v Inland Revenue Commissioners** [1978] 1 All ER 161, 170 : “*The primary sense of ‘action’ as a term of legal art is the invocation of the jurisdiction of a court by writ.*”
- 17 S.54(1) of the DBC Act, uses the word “**claim**”. This word could easily have been used instead of the word “**action**” in s.57(1) if the legislature had intended the interpretation for which the defendant contends.
- 18 Mr Grahame sought to rely upon s.5 of the Limitation of Actions Act 1958 and the use of the word “**action(s)**” there as supporting his submission as to the meaning of the word “**action**” in s.57(1) of the DBC Act. In my view, a reading of s.5 leads to the conclusion that the word “**action(s)**” means primarily “**proceeding(s)**”, although it may on occasion mean “**cause of action(s)**”. An example would be where a proceeding is brought alternatively in contract and tort arising from the same factual situation and where the cause of action in contract is statute barred but the cause of action in tort is not, due to different dates upon which the cause of action arose. I also note that s.5(1) refers both to “**actions**” and “**the cause of action**”.
- 19 For the above reasons, I uphold the plaintiff’s submission that “**action**” in s.57(1) of the DBC Act means “**proceeding**”. As a consequence, s.57(1) of the DBC Act does not apply.
- 20 The stay application is refused. I note that this has the preferred result of avoiding a duplicity of proceedings.
- 21 I will hear further from the parties on the question of costs and as to further directions which should be made.

For the Plaintiff Mr B Reid Minter Ellison  
For the Defendant Mr S R Grahame Phillips Fox