

Mirvac (Docklands) P/L v Peter Evan Philp No. 4963 of 2004
Mirvac (Docklands) P/L v Victorian Civil & Administrative Tribunal No. 5213 of 2004

CATCHWORDS : ADMINISTRATIVE LAW – Domestic Building Contract – contract of sale of apartment "off the plan" – whether Domestic Building Contract – whether contract to arrange or manage the carrying out of domestic building work whether Victorian Civil and Administrative Tribunal has jurisdiction to determine dispute.

JUDGMENT : HIS HONOUR BYRNE J : Supreme Court of Victoria at Melbourne. Common Law Division. 30th August 2004

1 These proceedings raise important questions as to the jurisdiction of the Victorian Civil and Administrative Tribunal with respect to domestic building disputes arising out of sales of apartments off the plan.

Background

2 By contract of sale of real estate dated 26 May 2000 entered into between Mirvac (Docklands) Pty Ltd ("Docklands") and Peter Evan Philp, Mr Philp agreed to purchase from Docklands the land and improvements described in the particulars of sale as Lot 347 on stage 5 of an unregistered Plan of Sub-division PS428541D for \$950,000. The subject matter of the sale did not then exist. It was an area on the eleventh floor of the west tower of Building 2, Yarra's Edge at Docklands. Work on the construction of this tower had not commenced. It was a sale "off the plan".

3 The plans annexed to or referred to in the contract were of extreme generality. The area which is the subject of the contract described as an apartment "generally described in the Building Plans and Specifications and identified by the address set out in the Particulars of Sale". The plans referred to are 26 drawings which appear from their description to be little more than floor plans for the various levels, two sections and four elevations. Included in the contract are two undimensioned floor plans showing alternative general layouts of the apartment. Each is endorsed with the caveat:

"The information on this floor plan is believed to be correct but is not guaranteed. Dimensions and specifications are subject to changes without notice. Prospective purchasers must rely on their own enquiries".

The specifications are in fact only three pages setting out nothing more than a list of fixtures, fittings and finishes without any detail as to type or quality.

4 The particulars of sale disclose that, of the price, \$872,989 is attributed to the construction component. By special condition 8.1(b) this amount is agreed between Docklands and the purchaser to "represent the component of the Price which relates to the construction works in relation to the Apartment to be carried out after the Day of Sale". It does not appear how this amount, which is a little less than 92% of the price, is arrived at. It may be supposed that the allocation is intended to assist the calculation of stamp duty on the land component for the benefit of the purchaser[1].

5 Pursuant to the Particulars of Sale, the price is to be paid by a deposit of 10% payable on or within five days of the day of sale and the balance on the later of five business days after the plan of sub-division is registered and the vendor's architect certifies the completion of the apartment. The deposit, or part of it, may be paid by the provision of a bank guarantee in lieu of cash[2].

6 The contract of sale contemplates that the construction of the apartment and, presumably, the building and services on, below and above level 11, will be carried out by a builder[3] which is defined as "Mirvac Constructions (Vic) Pty Ltd ("Constructions") or such other builder as [Docklands] may nominate from time to time"[4]. The west tower within which the apartment is to be situated is a substantial building, comprising 31 levels inclusive of five carpark levels and containing 127 apartments[5].

7 Having entered into this sub-contract on 26 May 2000, Mr Philp paid \$10,000 in cash and provided the balance of the deposit by a bank guarantee for \$85,000. The guarantee in place in 2004 was a deposit bond dated 11 September 2001, granted by American Reinsurance Company, expiring on 11 March 2004.

8 Plan of Subdivision PS428541D was registered on 29 January 2004 and Certificate of Title Vol 10779 Folio 968 was allocated to Lot 347. An Occupancy Permit was issued on 2 February 2004. There is, I think, no evidence before me of a certificate of completion issued by the vendor's architect.

9 On 11 February 2002, the solicitors for Mr Philp wrote to the solicitors for Docklands asserting that the contract of sale was in breach of the *Domestic Building Contracts Act 1995* and advising that he elected to avoid the contract pursuant to s. 11(3) for breach of s. 11(1). In this judgment I shall simply refer to this statute as "the Act". Section 11.1 of the Act makes it an offence for a builder to demand or receive a deposit under a domestic building contract of more than 5% of the contract price before starting any work under the contract.

10 Docklands responded on 23 February 2004 by giving to Mr Philp a notice of rescission for his failure to pay \$855,000, the balance of the price, on 20 February 2004.

11 On 3 March 2004, Docklands made a demand upon the guarantor for payment of the balance of the deposit, \$85,000.

12 On 5 March 2004, Mr Philp filed application No. D142/2004 with VCAT seeking declaratory relief to the effect that the contract of sale had been avoided, that Docklands' notice of rescission was unlawful and seeking injunctive orders restraining Docklands from calling upon the guarantee. On that date the tribunal, after hearing argument on behalf of the parties, granted the injunction sought and stood the matter over to 10 March. On the adjourned date, notwithstanding the opposition of Docklands, the injunction was continued by the tribunal pending the hearing and determination of the proceeding before it. On each occasion the tribunal accepted an undertaking as to damages offered on behalf of Mr Philp.

13 In his points of claim filed at VCAT, Mr Philp alleged that:

- (1) the contract of sale was avoided pursuant to s. 11(3) of the Act for breach of s. 11(1), as mentioned above;
- (2) Docklands was in breach of s. 42 of the Act by demanding final payment under a major domestic building contract before the building work was completed and before the purchaser had been given a copy of the occupancy permit issued under the *Building Act 1993* or a certificate of final inspection. No details of the incomplete works were provided;
- (3) Docklands, in breach of s. 17 of the *Fair Trading Act 1999*, had, in trade or commerce, engaged in unconscionable conduct. No details of this conduct were provided.

14 Docklands has therefore brought two proceedings in this Court.

- (1) By originating motion in proceeding No. 4963 of 2004 filed on 11 March 2004, it seeks a declaration that VCAT acted beyond jurisdiction in making the injunctive orders on 10 March 2004 and seeking to appeal against those orders.
- (2) By originating motion in proceeding No. 5213 of 2004 filed on 23 March 2004 it seeks a prerogative relief against VCAT prohibiting it from hearing or determining the proceeding before it.
- 15 On 19 May 2004, I gave directions that these matters be heard before me together on 23 August and this was done. I should add that the points raised by Mr Philp as to the application of the Act have also been raised in a number of other proceedings brought in this Court by other purchasers and these have been stood over pending the determination of this proceeding.
- 16 Finally, I record that Parliament has intervened by passing the *Domestic Building Contracts (Amendment) Act 2004* removing from the definition of domestic building contract in the Act, contracts of sale off the plan, effective from 1 May 1996, this amending legislation, however, does not affect such a contract which is subject to a proceeding commenced before 16 March 2004. The contract of sale in this case, therefore, is not affected by the legislation.

The Issues

- 17 The questions before the Court may be summarised as follows:
- (1) Is the contract of sale between Docklands and Mr Philp a domestic building contract within the meaning of s. 3 of the Act?
- (2) Are the disputed allegations made by Mr Philp, that Docklands is in breach of s. 11(1) and s. 42 of the Act, domestic building disputes within the meaning of s. 54 of the Act?
- (3) Does VCAT have jurisdiction to hear and determine proceeding No. D142 of 2004?
- (4) Is Docklands entitled to the relief it seeks?

Domestic Building Contract

- 18 Central to the operation of the Act is the concept of a domestic building contract. So far as is here relevant, it is defined in s. 3 to mean –
- "A contract to carry out, or to arrange or manage the carrying out of, domestic building work..."*
- A major domestic building contract is defined as a domestic building contract where the contract price for the carrying out of the domestic building work is more than \$5,000.
- 19 It was not disputed that the work of constructing the apartment, the subject of the contract of sale, was domestic building work as defined in s. 5 of the Act.
- 20 The point in issue, therefore, was whether the contract of sale was a contract –
- to carry out such work; or
 - to arrange the carrying out of such work; or
 - to manage the carrying out of such work.
- 21 On behalf of Docklands it was contended that, under the contract of sale, it undertook no obligation to any of these things. Indeed, it seems clear enough from special condition 6.1 that the contract of sale has been carefully drawn to avoid such a conclusion. The question for determination is whether it has achieved this objective.
- 22 Nowhere in the contract of sale is it provided, in terms, that Docklands would carry out building work. Its obligation is to deliver on settlement a completed apartment. In the event that the building work is not completed by the end of the construction period, either party may terminate the contract of sale upon written notice[6]. The rights of a purchaser, such as Mr Philp, in such an event are only to the return of moneys paid and of any guarantee provided; he is not entitled to compensation for losses, costs, fees or other expenses paid or incurred by him in relation to the contract of sale[7].
- 23 The contract contemplates that the building work is to be carried out by a builder which is to be Constructions or such other company as is nominated by Docklands. It is important to note that, on 26 May 2000, when the contract of sale was entered into, there was in existence no building contract with Constructions or any other builder. The major domestic building work contract in evidence pursuant to which the tower was constructed is dated 3 April 2001.
- 24 The provisions in the contract of sale with respect to the building work are expressed to create an expectation that building work will be done, but with no obligation by the contracting party to do it. This is achieved by the use of the passive voice in special conditions such as: *"Settlement of the Contract is conditional on the construction of the Apartment under a Major Domestic Building Contract generally in accordance with the Building Plans and Specifications before the end of the Construction Period"*[8]; *"If the Apartment is not constructed..."*[9]; *"If the Apartment is likely to be delayed..."*[10]; *"Construction of the Apartment will be completed..."*[11].
- 25 Special conditions 6.1 and 6.2 are important in this regard and I set them out in full.
- "6.1 The Purchaser acknowledges that, although:*
- (a) part of the Price includes an amount in respect of the construction of the Apartment on the Land; and*
 - (b) this Contract provides for the Apartment to be constructed under a Major Domestic Building contract, nothing in this Contract will be construed as imposing on the Vendor any obligation in relation to construction, which will make this Contract a Major Domestic Building Contract.*
- 6.2 The Vendor represents to and the Purchaser acknowledges that:*
- (a) the Apartment and the Building will be constructed by the Builder under a Major Domestic Building Contract and the construction work will be covered by the insurance required under the Building Act 1993;*
 - (b) subject to special condition 6.3, the Apartment will be completed generally in accordance with the Building Plans and Specifications by the Settlement Date;*
 - (c) on completing the purchase of the Property and Chattels under this Contract, the Purchaser will have (as the Vendor's successor in title) the benefit of the warranties by the Builder concerning construction of the Apartment specified in section 8 of the Domestic Building Contracts Act 1995; and*
 - (d) any defects and other faults in the construction of the Apartment (excluding minor shrinkage and settlement cracks) due to faulty materials or poor workmanship, of which the Purchaser has given the Vendor written notice within 12 weeks*

from the Settlement Date, will be repaired in a proper and workmanlike manner by the Builder at the Builder's expense as soon as practicable after written notice is given."

- 26 The thrust of the submission put on behalf of Mr Philp is that Docklands assumed under the contract of sale, an obligation to arrange or manage the carrying out of the building work by the builder. The submission is expressed in this way because the question is not whether Docklands did these things, or even whether it was entitled for some reason to do these things; the statutory definition requires that the contract between Docklands and Mr Philp is a contract to do one or other of these things. The response on behalf of Docklands was that it did not have under the contract of sale a contractual obligation to do either of these things. It did not, under the contract of sale, have the right or the duty to exercise control or direction over the building work undertaken by Constructors; it simply commissioned Constructors to do this. I note in passing the slide between "arrange or manage" in the statute, to "control or direction" in the submission.
- 27 In my opinion this question must be addressed as at the date on which the contract of sale was entered into and having regard to the provisions of that contract, including those provisions which are to be implied in the contract in accordance with orthodox principles of construction. The Act, in Parts 2 and 3, abounds with restrictions and requirements as to the content and form of a domestic building contract and as to what must or must not be contained in it. Moreover, in many cases, non-compliance is a criminal offence. In these circumstances, the status of the contract, the statutory rights of the parties in respect of it and the criminality of the builder for suggested breach of these provisions cannot be affected by events after the making of the contract or by the manner in which the builder chooses to give effect to the contract. The requirements of s. 11(1) of the Act are but an example of this.
- 28 It is clear, to my mind, that, as at that date, Docklands was, under the terms of the contract of sale, to arrange and manage the carrying out of the building work. It is Docklands which is to select the builder; it is Docklands which is responsible for the associated work including the landscaping. In this regard it will be appreciated that Mr Philp did not purchase an apartment suspended as it were in space far above the ground; it is part of a large and doubtless sophisticated structure.
- 29 Docklands also may order variations and alterations to the work[12]. This last power is a very significant one in the case of a contract such as the present where the specifications are of such generality. It may be supposed that, as developer, Docklands would direct the builder upon the many details necessary to transform the concept which is represented by the contract drawings and specifications into the apartment which Mr Philp has agreed to purchase. Special condition 6.4 requires Docklands to inform the purchaser of a variation or alteration to the Building Plans and Specifications which, "in the vendor's opinion materially and detrimentally affects the purchaser". This entitles the purchaser to terminate the contract.
- 30 Docklands also has, under special condition 1.4, the important power to extend the registration period and the construction period for specified causes. This, too, is a significant incident of the management of the construction work.
- 31 I return at this point to special condition 6.2. The terminology adopted in the drafting is that Docklands represents and the purchaser acknowledges a number of matters in parts (a), (b) and (d) with respect to the construction work. The use of the word "representation" in the context of these matters to be performed in the future strongly suggests that the word is to carry a promissory connotation. And what is the purchaser acknowledging in response to this? Is he merely noting the representation or is he accepting the promissory statement? To my mind it is an acceptance, so that what is here contained is a series of warranties made by Docklands which impose upon it contractual obligations. The obligations which Docklands here assumes affect the identity of the builder, the form of the building contract, the provision of statutory insurance, the requirement that the work conform generally to the plans and specifications,[13] that the work will be completed by settlement date[14] and that defects and shrinkages will be attended to by the builder. These may be properly described as aspects of either the arranging for the carrying out of the building work or for managing it.
- 32 I conclude, therefore, that the contract of sale entered into between Docklands and Mr Philp dated 26 May 2000 is a domestic building contract within the meaning of s. 3 of the Act.

Domestic Building Dispute

- 33 Domestic building dispute is defined in s. 54 of the Act, so far as is here relevant, as follows:
"(1) A 'domestic building dispute' is a dispute or claim arising –
(a) between a building owner and –
(i) a builder; or...
in relation to a domestic building contract or the carrying out of domestic building work;..."
- 34 This is a significant concept for my present purposes because the jurisdiction conferred on VCAT is expressed in s. 53 in terms of the resolution of such disputes. Put another way, VCAT has no jurisdiction over the present controversy under the Act unless it is a domestic building dispute. I put to one side for the moment Mr Philp's alternative claim in VCAT for contravention of the *Fair Trading Act 1999*.
- 35 The points taken by Docklands before me were that the present dispute falls outside the statutory definition because:
(a) The contract of sale is not a domestic building contract within the meaning of the Act.
(b) Docklands is not a builder within the meaning of that term in s. 3 of the Act.
(c) Docklands does not have any obligations in respect of Domestic Building work within the meaning of s. 5 of the Act.
- 36 I have determined the first point in favour Mr Philp.
- 37 In s. 3 "builder" is defined to mean:
"... a person who, or partnership which –
(a) carries out domestic building work; or
(b) manages or arranges the carrying out of domestic building work; or
(c) intends to carry out, or to manage or arrange the carrying out of, domestic building work;"
- 38 It was submitted, and I accept, that there is nothing in the material to show that Docklands is a person who carries out domestic building work or manages or arranges the carrying out of such work. The enquiry here is not whether Docklands is obliged under the contract of sale with Mr Philp or another contract to do these things. It satisfies the statutory definition if Docklands does them. Presumably, this, too, will be determined for present purposes as at the date of contract. I know nothing of the activities of Docklands at this time.

- 39 Part (b) of the definition invites an enquiry as to the intention of Docklands at the relevant time. I have found that, at that time, it entered into a contract with Mr Philp to do those things. Plainly, it is open to the Tribunal to conclude that it then intended to do what it was obliged to do.
- 40 I conclude, therefore, that Docklands was, on 25 May 2000, a builder within the meaning of the Act.
- 41 The third point taken on behalf of Docklands is that it does not have any obligations in respect of domestic building work. In fact, the statute requires a decision as to whether the claim between the building owner, Mr Philp, and a builder, Docklands, is one "in relation to a domestic building contract or the carrying out of domestic building work".
- 42 So expressed, the answer is obvious. The dispute between Mr Philp and Docklands in this case clearly is one in relation to the contract of sale, which I have found to be a domestic building contract. It may be, too, that his complaint of non-compliance with s. 42 of the Act may properly be described as a dispute in relation to the carrying out of domestic building work. It is sufficient that I conclude, as I do, that the disputed claim before VCAT under the Act is a domestic building dispute.

The Jurisdiction of the Tribunal

- 43 The Tribunal has jurisdiction to resolve a domestic building dispute. The conclusions which I have reached carry with them the affirmative answer to the third issue. The Victorian Civil and Administrative Tribunal, therefore, has jurisdiction to determine proceeding D142/2004 which is before it. The fourth issue therefore does not arise.
- 44 I propose therefore the following orders:
- Proceeding No 4963 of 2004
- a. The application is dismissed.
 - b. The appeal is dismissed.
 - c. The plaintiff pay the costs of the firstnamed defendant including any reserved costs.
- Proceeding No 5213 of 2004
- a. The application is dismissed.
 - b. The plaintiff pay the costs of the defendant including any reserved costs.

FOOTNOTE

- [1] Special condition 8.2
- [2] Special condition 14.1.
- [3] Special condition 6.2
- [4] Special condition 27.1.
- [5] Special condition 27.1.
- [6] Special condition 1.3
- [7] Special condition 1.5
- [8] Clause 1.1(b)
- [9] Special condition 1.3
- [10] Special condition 1.4
- [11] Special condition 1.6
- [12] Special condition 6.3
- [13] Given the generality of these, this may not be an onerous obligation.
- [14] Given the definition of settlement date in the particulars of sale, this is not likely to be burdensome.

For the Plaintiff Mr J.G Bolton instructed by Jerrard & Stuk Lawyers
For the firstnamed Defendant Mr AC Archibald QC with Mr JB Davis instructed by Arnold Bloch Leibler
For the secondnamed Defendant No Appearance