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File No: HB 19/35475
Quote in all enquiries
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Application concerning DREW CARROLL & KELLY PHAM - CHESTERFIELD CONSTRUCTIONS PTY LTD

Applicant: Drew Carroll and Kelly Pham
Respondent: Chesterfield Constructions Pty Ltd

On 16-Apr-2020 the following orders were made:

1. The application by Chesterfield Constructions Pty Ltd for costs against Drew Carroll and Kelly Pham in proceedings HB19/09543 is dismissed.
2. The application for preliminary dismissal by Chesterfield Constructions Pty Ltd against Drew Carroll and Kelly Pham in HB19/35475 is dismissed.
3. There is no order for costs.
4. Reasons for decision:
 1. This is an application by the respondent for orders:
 - a. That the applicants pay the respondent's costs of the withdrawn proceedings HB19/09543 between the same parties; and,
 - b. That these proceedings HB19/35475 be dismissed on the basis that the applicants have no entitlement to bring them as they repudiated the home building contract between the parties dated 14 July 2016, such repudiation having been accepted by the respondent.Together called the "Threshold Issues".
 2. On 7 November 2019 the Tribunal directed that the parties file and serve submissions and documents in support and defence of the Threshold Issues and to advise the Tribunal if they consented to the determination of the Threshold Issues being made by the Tribunal on the papers without the need for a hearing .
 3. Both parties have filed and served their respective submission in accordance with the Tribunal Directions and both consent to the Tribunal determining the Threshold Issues on the papers.

Respondent's Costs in HB19/09543

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4. The substantive application was filed on 25 February 2019 ("First Application"). The applicants sought orders that the respondent:
 - a. pay to them the amount of \$90,876.85 by way of damages,
 - b. supply specified services to an approximate value of \$225,200, and
 - c. deliver, return or replace specified goods to the approximate value of \$12,000.
5. The First Application was first listed before the Tribunal on 28 March 2019. The Tribunal made directions for the parties to file and serve the documents they relied upon and for the builder to file a cross application.
6. The applicants' sought and were granted an extension of time for compliance with the directions made on 28 March 2019.
7. On 28 May 2019 the applicants' withdrew their First Application
8. The respondent submits in relation to the costs issue in the First Application:
 - a. The First Application was withdrawn by the applicants without discussion or consent of the respondent;
 - b. The respondent was not invited or given the opportunity to make an application for costs in connection with the withdrawal;
 - c. The respondent incurred costs in connection with the First Application; the respondent acknowledges that an application may withdraw an application before the Tribunal at any time (section 48I(2) of the Home Building Act 1989 ("HBA") and section 55 of the Civil and Administrative Tribunal Act 2013 ("CATA") and that there is nothing preventing the applicants re-initiating the same proceedings after a dismissal.
 - d. The costs in the First Application were "incidental to" as to proceedings before the Tribunal (section 60(5) of CATA) as they are essentially the same proceedings against the respondent;
 - e. Special circumstances warrant costs incurred by the respondent in defending the First Application being awarded;
 - i. The proceedings were discontinued despite case management orders having been made which the applicants' had not complied with and by doing so the applicants' were in breach of the overriding obligations under section 36(3) of the CATA;
 - ii. The respondent incurred costs in attempting resolution of the First Application;
 - iii. The respondent incurred costs in defending the First Application;
 - iv. The First Application was withdrawn without the respondent's consent;
 - v. The First Application concerned a value exceeding \$327,000 which was grossly excessive and misconceived and not based on any sound factual basis;
 - vi. The First Application was complex with expert evidence tendered with the application;
 - vii. The applicants were aware that the respondent was legally represented;
 - viii. The current application has been commenced on the same facts and raising the same issues and claims in excess of \$214,000.
- f. The relevant consideration under section 60(3)(g) allows the Tribunal to have regard to Rule 42.19 and 42.20 of the Uniform Civil Procedure Rules 2005, where a plaintiff discontinues without the consent of the defendant or where the plaintiff's claim is dismissed, the defendant is entitled to costs unless the court otherwise orders. Meaning that there is an onus on the discontinuing party to make an application to be relieved of the obligation to pay costs.

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- g. The applicant should pay the respondent's costs of the First Application as agreed or assessed.
9. The applicant submits:
- a. The respondents application is misconceived;
 - b. No application for or order was made granting leave to be legally represented when the First Application was first before the Tribunal or at all;
 - c. There is no basis for the Tribunal in the current proceedings to order the applicants to pay the respondents costs of the First Application;
 - d. The respondent did not make an application to set aside the order withdrawing the proceedings or make an application for costs at that time;
 - e. There is no basis that the Tribunal can make an order that the current proceedings cannot be conducted on the basis that the Tribunal must first determine the issue of costs in the First Application.
10. The respondent in reply submits:
- a. The Civil and Administrative Tribunal Regulations do not empowering it to set aside an order dismissing the proceedings or reinstating any proceedings on the question of costs.
 - b. There is no time limit for bringing an application for an order such as it now seeks.
 - c. It is irrelevant that no order was made granting leave to be represented;
 - d. The respondent had no notice of the withdrawal of the First Application or that the applicants intended to recommence the proceedings;
 - e. The applicants' have failed to address any criteria under section 60 of the NCAT and therefore the Tribunal must assess the application based on its submission as to special circumstances.
 - f. The applicants have made no submission seeking to be relieved of the obligation to pay the respondent's costs.

Costs Determination

11. The respondent's submissions are that its primary position is that the current application be dismissed, but if the Tribunal permits them to proceed then the applicants' must pay the respondent's costs in the First Application, the Tribunal is not satisfied that the costs application may be brought.
12. Although there is no time limit for bringing a costs application in the First Application, it would reasonably have to have been brought at the time the respondent became aware of the withdrawal of the application or within a reasonable time after that time.
13. The costs issue should have been raised in that First Application, not as a condition that a costs order is made if the Tribunal allows the current application to proceed.
14. There is no such basis to make such an order.
15. The application is misconceived. The Tribunal dismisses the respondent's application for costs in respect of the First Application.

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Respondent's application to dismiss proceedings on basis that the applicant has repudiated the Contract

16. The respondent submits:

- a. By letter dated 5 December 2017 the applicants gave notice to the respondent requiring it to remedy alleged defaults under the Contract ("Rectification Notice"), which the applicants incorrectly described as a "termination notice".
- b. The respondent contends that alleged defaults raised in the Rectification Notice were misconceived, including:
 - i. The entitlement of the respondent to an extension of time to complete the works;
 - ii. The lawfulness of the suspension of works in response to the respondent's suspension of works was without reasonable cause and in breach of the Contract;
 - iii. The rejection of the allegation that the works were abandoned;
 - iv. The basis upon which no entitlement to defect rectification had yet arisen under the Contract.
- c. The respondent challenges the validity of the Rectification Notice.
- d. By letter dated 22 December 2017 the respondent solicitor responded to the Rectification Notice making it clear that any termination of the Contract by the applicants would be treated as repudiation. The applicants' were invited to withdraw their Notice.
- e. By letter dated 22 December 2017 the applicants issued a Notice of Termination and the respondent ceased work on the site accepting the applicants' repudiation of the Contract.
- f. The applicants' sent a further letter of termination on 18 March 2018.
- g. The respondent solicitor on 20 March 2018 maintained to the applicants' solicitor that the respondent maintained there was no legal basis to terminate the contract by its repudiation and that the respondent relied on that repudiation to terminate the Contract.
- h. With repudiation, acceptance and termination the parties are discharged from further obligations to perform the Contract.
- i. The respondent has been discharged from all obligations under the Contract and the applicants have no right to bring the present proceedings.
- j. The proceedings should be dismissed with costs.

17. The applicant submits:

- a. The application is misconceived and must fail;
- b. Whether or not the applicants have terminated or repudiated the Contract is not the basis of entitlement or disentitlement for the applicants to bring an application under the HBA.
- c. If the applicants, as home owners, commence an application under the HBA and the Tribunal is to have jurisdiction, the following must be in place:
 - i. There must be a building claim, which the applicants contend there is;
 - ii. The claim must allege a breach of a statutory warranty (which it does), the claim is brought within the limitation period for breach of statutory warranty, which it does (the applicants purported to terminate the building Contract on 19 March 2018, the proceedings were commenced on 2 August 2019).
 - iii. The claim does not exceed \$500,000;
 - iv. Even on the builder's case that it terminated the Contract on 20 March 2018, the limitation periods have not expired.
- d. The termination/repudiation is not a threshold issue and the rights that flow to a party are to be determined by the Tribunal on the hearing of the merits of the case.

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e. Accrued rights and statutory obligations remain in force despite termination of the Contract.

18. The respondent's submissions in reply:

- a. The respondent's contention is that the applicants' repudiated the Contract and have no entitlement to bring the proceedings.
- b. The basis for asserting that the proceedings now brought should be dismissed on a preliminary issue is that there is no claim for damages arising from the alleged breach of contract if the Tribunal finds that the applicants have repudiated the Contract.
- c. The applicants have not addressed in submissions or by way of evidence the contention that the applicants repudiated the Contract, such omission is fatal to their case;
- d. The applicants have not identified what part of their claim arises from rights said to arise prior to their alleged repudiation;
- e. The right to seek rectification under the Contract for any alleged defects had not arisen at the time of the purported termination;
- f. The Tribunal is entitled to address this issue as a preliminary issue, avoiding the Tribunal's time and resources being wasted and the parties incurring significant costs if the Tribunal ultimately finds repudiation on the part of the applicants and no entitlement to relief.
- g. The applicants' have failed to address the issue of repudiation and failed to make submissions or evidence of their lawful termination of the Contract.
- h. The proceedings should be dismissed with costs.
- i. The respondent intends to bring proceedings for monies owed to it and damages against the applicants.

Preliminary determination

19. Under section 40 of CATA an application may be brought in the Tribunal if it is made in the time and manner prescribed by enabling legislation or the procedural rules. The Tribunal's jurisdiction to hear and determine building claims including a claim arising from a breach of a statutory warranty under the HBA arises under section 48K of the HBA.

20. The issue of repudiation of the Contract is an issue that will need to be determined as part of the merits of the applicants case. The Tribunal has had regard to the submissions of both parties. The issue of repudiation and termination is significant consequence in both the applicants' case and the foreshadowed claim by the builder in the proceedings it proposes. That consideration of the evidence by the ultimate presiding member will dictate the remedy, if any, available to the applicants and the respondent.

21. The applicants are entitled to bring their application under section 40 of CATA and section 48K of the HBA. No points of claim, points of defence or evidence has been filed or served in the proceedings at this stage. Both parties are represented and will be advised as to the future conduct of the proceedings and the evidence they need to adduce.

22. The Tribunal is not satisfied that the issue of repudiation should be determined as a preliminary matter and will be a matter for determination in the substantive proceedings.

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23. The respondent's dismissal application is dismissed.
24. The matter is adjourned for further direction hearing

P Boyce, Senior Member

16/04/20

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