

Denis McFadden v Daniel John Turnbull [2011] NSWSC 1294

FACTS

In 2009, Hickory Hill Pty Ltd and Denis McFadden entered into a tripartite building contract with Daniel John Turnbull to build a new home on the property of Hickory Hill.

The registered proprietor of the property is Hickory Hill, which is a trustee of a family trust. Mr McFadden is associated with this family trust, as well as occasionally residing in a farmhouse located on the Hickory Hill property.

Mr Turnbull made an application under the Building and Construction Industry Security of Payment Act 1999 (NSW). This resulted in a determination that Mr Turnbull was owed an amount of \$222,619.35, because the adjudicator determined not to apply s 7(2)(b) of the Act which operates to exclude residential building work where "the party for whom the work is carried out resides in or proposes to reside in".

ISSUE

Does s 7(2)(b) apply to exclude tripartite contracts where only one party proposes to reside in the premises?

FINDING

Justice Brereton found that despite Hickory Hill Pty Ltd being the landowner, the residential building work was performed for the resident and owner, Mr McFadden.

QUOTE

Bereton J at [14]:

"... I conclude that the construction contract was one for the carrying out of residential building work on premises in which Mr McFadden, being one of the parties for whom the work was carried out, proposed to reside. Consistently with McDougall J's decision in Levadetes, that was the consequence that s 7(2)(b) is engaged and the construction contract is therefore one to which the Act does not apply."

IMPACT

For the Act to apply, no party to the contract must reside or propose to reside in the premises. Builders are best to contract only with a company to have the protection of the Act.