

TAN HUNG NGUYEN & ANOR V LUXURY DESIGN HOMES PTY LTD & 2 ORS [2004] NSWCA 178

Supreme Court of New South Wales – 11 June 2004

FACTS

Tan Hung Nguyen (‘Tan’), a registered proprietor of land in Burraneer, and Luxury Design Homes Pty Ltd (‘Luxury’), a licensed builder, entered into a building contract for the design and construction of a house. The building contract was a standard form Department of Fair Trading home building agreement which provided for payment by progress instalments at the completion of specified stages of work. At the expected date for practical completion the work was only 45% completed.

A dispute arose as to defective and unfinished work and Tan refused to pay a progress claim. The building contract contained two relevant clauses. Clause 11 of the building contract provided for the payment of a progress claim to be “...merely a payment on account”. Clause 24 of the building contract expressly dealt with the circumstances in which the contract might be ended by the owner due to identified default of the contractor.

Tan submitted that the building contract was an “entire contract” notwithstanding the fact that the contract provides for progress payments. An “entire contract” is one in which the consideration for the payment of money or for the rendering of some other counter-performance is entire and indivisible. The result being, that Luxury would not be able to recover anything because the work was not completed according to its terms.

ISSUE

Was the building contract an “entire contract”?

FINDING

Hodgson JA and Einstein J held that the correct conclusion is that the contract was not an entire contract because, by its very terms, it contemplated an entitlement on the builder’s part to receive payment despite failure to substantially complete the works. Clause 24 made express provision for the rights of the parties in the event that the contract was determined prior to completion. The inclusion of Clause 24 in the Contract meant that the parties did not intend it to be an entire contract.

McColl JA restated the general principles holding that if a contract or obligation is to be found to be entire notwithstanding that the contract or obligation provides for payment by instalments, the contract on its proper construction must indicate that the instalments are nonetheless conditional upon complete performance of the contract or obligation.

QUOTE

Einstein J at paragraph 75 and 76 stated:

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“There are no words in the building contract expressly making entire performance a condition precedent.

In Hoenig v Isaacs [1952] 2 All ER 176, Lord Denning made the point that it was always open to the parties by express words to make entire performance a condition precedent.”

IMPACT

This case stands for the proposition that a contract will only constitute an “entire contract” if payment is made conditional upon complete performance of the contract.

In that case, the contractor will be entitled to payment only if the work is completed according to the terms of the contract.

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