

The Owners – Strata Plan No. 69743 v TRT Constructions Pty Ltd - [2016] NSWSC  
375

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## Supreme Court

### New South Wales

Medium Neutral Citation:	The Owners – Strata Plan No. 69743 v TRT Constructions Pty Ltd [2016] NSWSC 375
Hearing dates:	04/04/2016
Date of orders:	04 April 2016
Decision date:	04 April 2016
Jurisdiction:	Equity - Technology and Construction List
Before:	McDougall J
Decision:	Judgment for defendant with costs.
Catchwords:	BUILDING AND CONSTRUCTION – <a href="#">Home Building Act 1989</a> – statutory warranties – two preliminary issues – whether there was a contract between defendant and the Developer – contract found to be operational - whether plaintiff’s claim statute barred – court held plaintiff’s claim not commenced within time – unnecessary to deal with further issues
Legislation Cited:	<a href="#">Environmental Planning and Assessment Act 1979 (NSW)</a> , <a href="#">Home Building Act 1989 (NSW)</a> .
Cases Cited:	Blatch v Archer (1774) 1 Cowp 63; <a href="#">98 ER 969</a> . Jones v Dunkel (1959) 101 CLR 298.
Category:	Principal judgment
Parties:	The Owners – Strata Plan No. 69743 (Plaintiff) TRT Constructions Pty Ltd (ACN 081 903 791) (Defendant)
Representation:	Counsel: T Davie (Plaintiff) A Rogers (Defendant)  Solicitors: Bannermans Lawyers (Plaintiff) Legal One Services (Defendant)
File Number(s):	2014/237708

### *Judgment (EX TEMPORE – REVISED 05 APRIL 2016)*

- HIS HONOUR:** The plaintiff (the Owners Corporation) is the Owners Corporation of a strata title development at Blacktown. The development was carried out for the former registered proprietor of the land on which the development was carried out, a company known as John & Simon Constructions Pty Ltd (the Developer). The Owners Corporation says that the defendant (TRT Constructions) was the builder who carried out the relevant work for the Developer. The Owners Corporation says, further, that the work carried out was defective in numerous respects, and that it is entitled to recover the cost of rectification from the builder by reason of s [18D](#) of the [Home Building Act 1989 \(NSW\)](#) (the [HB Act](#)).

### *Application for leave to adduce further expert evidence*

2. At the commencement of the hearing, the Owners Corporation made an application for leave to adduce further expert evidence. That application would appear to have reflected the lamentable state of preparation of the Owners Corporation's case: a state of affairs for which, I should make it perfectly clear, neither the present solicitors nor the present counsel representing the interest of the Owners Corporation are responsible. On the contrary, as it seems to me, those legal practitioners have done all that they could, in a very short space of time, to try and bring the matter into line.
3. TRT Constructions opposed the application. Its opposition was based on the woeful inadequacy in the way that the case had been run, first of all in the Tribunal, and then in this Court. For reasons that I will explain, I deferred ruling on the Owners Corporation's application.

#### *Two key issues*

4. It became apparent on reading the outline of submissions that there were two key issues to be decided before one got to the question of defects. The first issue was whether there was any contract at all, to which TRT Constructions was a party, for the performance of the relevant residential building work. The second point was whether the proceedings were out of time, bearing in mind the provisions of 18E of the [HB Act](#). I decided, with the concurrence of the parties, to deal with those issues, and to defer all other issues until I had done so.

#### *Was there a contract?*

5. As to the first question, the evidence fell in a very narrow compass. The Owners Corporations points of claim asserted that there had been a contract made between TRT Constructions and the Developer for the performance of the relevant building work. TRT Constructions' points of defence did not admit that (and other) allegations. There was no denial of the allegation.
6. Mr Davie of counsel, for the Owners Corporation, relied on certificates of insurance issued by an insurer in compliance with s 92 of the [HB Act](#), and on a final occupation certificate dated 28 October 2002. He relied, also, on what he said were admissions contained in an expert report of Mr Dietrich, prepared for and served by TRT Constructions.
7. Before I go to that evidence, I should note that it is common ground that the development described in the certificates of insurance was a development carried out upon the land on which the strata title development has in fact been erected, and that the final occupation certificate relates to that very development. It is also common ground that the Developer was, before registration of the strata plan, the proprietor of the land in question, the applicant for development approval, and the entity to whom the final occupation certificate was addressed.
8. Mr Dietrich's report was said to be relevant both to the issue as to the existence of a contract, and as to the limitation issue. As to the former, it is to be noted that Mr Dietrich described TRT Constructions as "TRT Constructions" in his report. Although the report also refers throughout to

"the Builder", that would appear, from para 1.1.2.4, to be a reference to what I have called the Developer. Thus, as it seems to me, the report prepared by Mr Dietrich, even if it is to be regarded as in some way including admissions against the interests of TRT Constructions, is not of any great assistance on the first question: whether there was in fact a contract.

9. The certificates of insurance that were tendered state on their face that they were relevant to "a contract of insurance complying with s 92 of the [HB Act]". They were issued in respect of "Multi-Unit" (by inference, residential building) work to be carried out at the site in question. They state that the work was to be carried out by TRT Constructions.
10. As Mr Davie submitted, there is a clear inference from the certificates, bearing in mind the common ground to which I have referred, that there was in force between TRT Constructions and the Developer, a contract under which the former undertook to do residential building work for the latter. Mr Rogers of counsel, who appeared for TRT Constructions, did not suggest that such an inference could not be drawn. His submission was, rather, that it could not be inferred that the work related to the construction of the development. He submitted that it might have been plumbing work, or earthmoving work, or some other part of the works that did require the issue of a certificate of insurance.
11. Mr Davie relied on the approach to the assessment of evidence expounded by Lord Mansfield CJ in *Blatch v Archer* (1774) 1 Cowp 63; [98 ER 969](#) at [65](#), [970](#), respectively. Paraphrasing, his Lordship said that when the Court weighs and assesses evidence, it must bear in mind the extent to which it was in the power of one party to produce and in the power of the other to contradict evidence bearing on the fact in issue. In this case, as Mr Davie rightly submitted, it was peculiarly within the power of TRT Constructions to adduce evidence on the question of the existence and terms of whatever the contract was between it and the developer.
12. Mr Rogers did not as I understand it dispute the application in principle of the approach explained by Lord Mansfield. What he said was that in the absence of any further evidence, it simply could not be inferred that the work referred to in the insurance certificates was the work of execution of the development, on which the Owners Corporation sues. Thus, he submitted, there was no basis for drawing a [Jones v Dunkel](#) inference against his client, based on its failure to adduce evidence on the point at issue ( [Jones v Dunkel](#) (1959) 101 CLR 298).
13. I should note that Mr Rogers made an application to call oral evidence from a director of TRT Constructions. Bearing in mind the directions that had been given over many years for the service of evidence in written form, and the undoubted prejudice that it would occasion to the Owners Corporation to permit TRT Constructions belatedly to rely on oral evidence which the Owners Corporation had no opportunity of assessing and investigating, I rejected that application. I add that if the principle in [Jones v Dunkel](#) is otherwise available, I would not regard the belated application to call the director as explaining in any way the failure to advance evidence earlier, or as suggesting that the principle should not be applied.

14. The question is really what can one infer from the certificates of insurance, in light of the various matters that are common ground. As I have said, it is said to relate to "Multi-Unit", presumably residential building, work carried out by TRT Constructions. The certificates in evidence relate to two discrete lots, numbers 1 and 14: apparently, because they were certificates for annexure to the contracts for sale of those lots.
15. In those circumstances, it seems to me that there is an inference available from the form of the certificates that the building work in question, to which undoubtedly the certificates relate, was the work of construction of the strata title development. I say that because the words "Multi-Unit" appear to me to indicate that it was the work of construction of the strata title development, rather than some discrete trade comprised in that work, that was the subject of the statutory insurance.
16. Assessing that evidence in the way recommended by Lord Mansfield, and taking into account that the party who could have adduced evidence on the point did not do so, I am satisfied, on the balance of probabilities, that there was indeed a contract between TRT Constructions and the developer for the performance of the residential building work in question.
17. It follows, in my view, that the Owners Corporation is in principle entitled to rely on s [18D](#) of the [HB Act](#).

#### *The limitation issue*

18. I turn to the limitation issue. It is common ground that to be within time, and bearing in mind the way the [HB Act](#) stood at the relevant time, proceedings had to be commenced within seven years of the completion of residential building work under the contract. The proceedings were commenced (in the Tribunal) on 22 October 2009. It is the case for the Owners Corporation that construction work was completed on 28 October 2002. It is the case for TRT Constructions that work was completed no later than 21 October 2002.
19. Mr Dietrich's evidence on this point appears to me to have been based on the terms of the final occupation certificate. That was confirmed by his oral evidence (which in the first instance was taken on the voir dire, but which, in the absence of any submission to the contrary, I admitted on the hearing).
20. Mr Davie tendered paras 2.1.4 and 2.2.1 of Mr Dietrich's report. The former paragraph said that, "In or about 28 October 2002, the Builder [which, I repeat, refers to the Developer] finished construction works at the site and received the Final Occupation Certificate".
21. The latter paragraph stated that Mr Dietrich had not become aware of anything which controverted the facts and assumptions he expressed (which of course included para 2.1.4).

22. Mr Rogers tendered paras 1.1.2.4 and 8.1. The former paragraph identified, among the documents given to Mr Dietrich, the final occupation certificate which, Mr Dietrich expressly noted, "lists the inspection date of 21/10/2002 for the [certificate]".
23. In para 8.1, Mr Dietrich concluded, based on the form of the final occupation certificate, that construction work had been completed "prior to the inspection date for the final occupation certificate of 21 October 2002".
24. If I may say so, with respect, the question of what appears from the certificate is really a question of fact for the Court to decide, although of course I accept that Mr Dietrich, as one accustomed to viewing such certificates, would be able to give evidence to explain any technicality that might otherwise cause confusion. No one submitted that there was in fact any such confusion.
25. Turning to the certificate itself, it identifies the developer as the applicant and the land in question as the "subject land". It identifies the approval details and the works approved (described as "residential flat building..."). After setting out other matters, the certificate identifies the stages of instruction that were inspected either by the certifier or by someone on his behalf. There were inspections of wet areas, ceilings and again wet areas on 13 June, 10 July and 29 July 2002. There was then, on 21 October 2002, an inspection undertaken by Mr Moy (who signed the certificate) described as "Final OC Completion". The certificate itself was dated 28 October 2002.
26. Mr Davie, again relying on the approach to assessment of evidence commended by Lord Mansfield, submitted that I should draw no more from the certificate than that the residential building work to which it referred was completed by 28 October 2002. Mr Rogers relied on the reference to a final inspection on 21 October 2002 (the matter on which Mr Dietrich relied to found para 8.1 of his report, although I have said, I do not regard his evidence as compelling the conclusion for which he argued).
27. It is certainly correct to say that TRT Constructions could have adduced evidence as to when precisely it completed the building work in question (just as it could have adduced evidence to show what that building work was). However, bearing in mind that Mr Davie was compelled to rely on the certificate for various matters, it seems to me that I must take it at face value to the extent that it is capable of being understood. What is clear is that the certifier, or someone on his behalf, inspected the described "stages of construction" which he found to be completed. It is clear that those inspections, taken together, led to the stated conclusion that "the development is completed in accordance with the approved plans and specifications and Council's Development Consent conditions if applicable". It is equally clear, in the view of the certifier, that those inspections justified the issue of the final occupation certificate pursuant to s [109C](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#).
28. When one looks at the matter in the light of those clear inferences from the form of the document, it seems to me that the inspection described as "Final OC completion" must relate to the final inspection of the works which, as the "Final Report" says, were "completed in accordance with the approved plans and specifications...".

29. In my view, looking at the Final Report in context and not just extracting the one line to which attention was focused, there is an available inference, on the balance of probabilities, that the works had indeed been completed by the date of that final OC completion inspection, which satisfied the certifier that the development had been completed appropriately.
30. On that basis, I conclude that the works were completed, at the latest, by 21 October 2002.
31. It follows, from that conclusion (and Mr Davie did not submit to the contrary) that the proceedings were not commenced within time.

*Conclusion; orders*

32. I dealt with those issues on a preliminary basis so that some use could be made of today. The conclusion to which I have come makes it unnecessary to deal any further with the application on behalf of the Owners Corporation to adduce further expert evidence.
33. The effect of the conclusion to which I have come, is that there must be judgment for the defendant with costs, and I so order.,,

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Decision last updated: 05 April 2016