

18/77

SUPREME COURT OF VICTORIA

DILLON v COLLINS

Harris J

1 March 1977 — [1977] VicRp 40; [1977] VR 330

STATUTORY INTERPRETATION – BUILDING CONTRACT – INTERPRETATION OF S3 OF ACT - STIPULATIONS TO BE READ CONJUNCTIVELY OR DISJUNCTIVELY: *BUILDING CONTRACTS (DEPOSITS) ACT 1962, S3.*

Three informations for breach of s3 *Building Contracts (Deposits) Act* ('Act'). In each case the builder gave a quote for addition to premises being a written quote with a requirement for a deposit, and indicating that he would commence building at a specified future time. Deposits were paid to him which he paid not into a special purpose account as required by the section, but he had utilized the money in the running of the business. In one information, the contract was found to relate to shops and not dwelling houses and failed on that ground. Argued that for s3 to apply to a contract, that the contract must satisfy all the requirements of (a), (b) and (c) of s3(1) because the three paragraphs must be read together – if so, the informations should fail because in each case there was a date specified for the commencement of work, and thus the contracts were not voidable. All charges were dismissed. Upon Order Nisi to review—

HELD: Order discharged in respect of one charge. Order absolute in respect of the others.

1. **What the Act deals with are contracts for the construction of dwelling-houses or appurtenances to dwelling-houses and with contracts for alterations or additions to dwelling-houses or appurtenances to dwelling-houses, where the owner pays or agrees to pay to the builder under or in pursuance of the contract any sum of money before the work is commenced.**
2. **The first thing the Act does with respect to such contracts is to give the owner a right to avoid the contract in the circumstances which are stipulated in s3(1)(c). If the contract does not contain a provision that the work is to be commenced within a time stated in the contract and if the contract does not contain a provision that any sum paid under or in pursuance of the contract before the work is commenced is to be paid by the builder into a special purpose account in a bank in Victoria to be nominated by the builder in the joint names of the owner and the builder, then the owner is given a statutory right to avoid the contract at any time before the work is commenced (see s3(1)).**
3. **The Magistrate was in error in dismissing the information in Order to Review No. 7329 for the reason he gave. The evidence in support of the information otherwise made out the necessary elements for the information and the Magistrate ought to have held that there was a case for the defendant to answer.**
4. **The evidence in relation to the contract that was for work to a building of a kind to which the Act did not apply and as such was a fatal defect in the informant's case.**

HARRIS J: On 3 June 1976, the Magistrates' Court at Cheltenham, constituted by Mr RW Smith, Stipendiary Magistrate, dismissed three informations which were brought under the *Building Contracts (Deposits) Act 1962* and in which the informant was Kevin Marshall Dillon and the defendant was Trevor Clyde Collins.

On 17 August 1976, the informant obtained three orders to review the dismissal of the informations. The grounds in relation to the orders nisi were as follows:—

- (1). That on the evidence the Stipendiary Magistrate should have found that the contract between the respondent and the other party to the contract was a voidable contract and accordingly a contract such as is referred to in subs(1) of s3 of Act No. 6973.
- (2). That on the evidence the Stipendiary Magistrate should have held that as the contract was a contract between the respondent and the other party to alter or add to a dwelling-house, it was a contract such as is referred to in subs(1) of s3 of the said Act.

(3). That the Stipendiary Magistrate was in error in ruling that as there was a time stated in the said contract within which the work was to be commenced within the meaning of paragraph (c)(i) of s3(1) of the Act, the contract was not one which attracted the provisions of subs(2) of s3 of the said Act.

(4). That the Stipendiary Magistrate was wrong in law in dismissing the said information.

(5). That on the evidence the Stipendiary Magistrate should have convicted the respondent on the said information."

In the case of one of the Orders to Review, (O/R.7328), there was an additional ground which was that on the evidence the Stipendiary Magistrate was not entitled to find that the contract provided a time within which additions were to be commenced.

The relevant provisions of the Act are contained in s3. Subs(1), subs(2) and subs(3) of that section are in these terms:

"(1). If—

(a) any contract is made which provides that some person (hereinafter in this section referred to as 'the builder') contracts to construct, alter or add to a dwelling-house or any building, structure or fence which is appurtenant to a dwelling-house for some other person (hereinafter in this section referred to as 'the owner'); and

(b) under or in pursuance of the contract the owner pays or agrees to pay any sum of money to the builder before the construction, alteration or addition, as the case may be, is commenced; and

(c) the contract does not provide—

(i) that the construction, alteration or addition, as the case may be, is to be commenced within a time stated in the contract; and

(ii) that any sum paid as aforesaid is to be paid by the builder into a special purpose account in a bank in Victoria to be nominated by the builder in the joint names of the owner and the builder-- the contract shall be voidable at the option of the owner at any time before the construction, alteration or addition, as the case may be, is commenced.

(2). Whether or not any contract such as is referred to in subs(1) provides for the payment of the money aforesaid to a special purpose account, the builder shall, within seven days after its receipt by him, pay into a special purpose account in a bank in Victoria to be nominated by the builder in the joint names of the owner and the builder any sum of money which is, before the construction, alteration or addition, as the case may be, is commenced, paid to him by the owner in pursuance of the contract.

(3). If any builder fails to pay any money aforesaid into a special purpose account as provided by this section, he shall be guilty of an offence and liable for a first offence to a penalty not exceeding \$200 or to imprisonment for any term not exceeding six months and for a second or subsequent offence to a penalty not exceeding \$500 or to imprisonment for any term not exceeding twelve months."

In my opinion, what the Act deals with are contracts for the construction of dwelling-houses or appurtenances to dwelling-houses and with contracts for alterations or additions to dwelling-houses or appurtenances to dwelling-houses, where the owner pays or agrees to pay to the builder under or in pursuance of the contract any sum of money before the work is commenced.

The first thing the Act does with respect to such contracts is to give the owner a right to avoid the contract in the circumstances which are stipulated in s3(1)(c). If the contract does not contain a provision that the work is to be commenced within a time stated in the contract and if the contract does not contain a provision that any sum paid under or in pursuance of the contract before the work is commenced is to be paid by the builder into a special purpose account in a bank in Victoria to be nominated by the builder in the joint names of the owner and the builder, then the owner is given a statutory right to avoid the contract at any time before the work is commenced (see s3(1)).

The next thing the Act does is to impose a statutory obligation on the builder to pay into a bank any sum of money which is paid to him by the owner in pursuance of the contract before the work is commenced (see s3(2)). This statutory obligation applies whether or not there is any contractual obligation to the same effect (see the opening words of s3(2)). Thus, one of the cases to which s3(2) can apply is the case of a contract for the construction of a dwelling (or for other work which comes within s3(1)(a)) under which the owner has paid a sum of money to the builder before the commencement of the work and which also contains an express provision to the effect of s3(1)(c) (ii). Such a contract could not be avoided by the owner under s3(1), as one of the conditions giving

rise to the right to avoid the contract is the absence of any such provision. Hence, the operation of s3(2) cannot be limited to contracts which the owner is entitled to avoid under s3(1). It is true that s3(2) refers to "any contract such as is referred to in subs(1)" and at first glance this might be thought to be a reference to a contract which contains all the elements which are referred to in subs(1). In my opinion, the consideration I have referred to shows that this cannot be correct.

Furthermore, in my opinion, to construe s3(2) as applying only to contracts which were voidable under s3(1) would destroy the pattern of the provisions of the Act. In my opinion, the Act displays a pattern of protecting certain owners and it would be quite out of harmony with that pattern to restrict the right to have paid into a bank money paid before any work was done to cases where the owner, who had paid the money, had a right to avoid the contract under s3(1). Thus subs(4), subs(5) and subs(8) all deal with the application of the money in a special purpose account and, primarily, they make provision for the disbursement of such money in cases where the contract proceeds to completion. (See especially subs(5)).

Once the conclusion is reached that the operation of subs(2) is not restricted to money paid under contracts which are voidable under subs(1), it must follow that a contract which contains a provision providing that the construction, alteration or addition is to be commenced within a time stated in the contract is not excluded from the operation of s3(2) of the Act. In my opinion, the presence or absence of such a provision is not relevant to the applicability of s3(2). It may be observed that, in my opinion, s3(2) can apply to a contract which is voidable under s3(1) as well as to one which is not voidable and that in the case of a voidable contract s3(2) applies, whether or not the contract is avoided under s3(1).

This brings me to s3(3), which contains the third thing which the Act does. It was under this sub-section that the defendant was charged. This sub-section applies "If any builder fails to pay any money aforesaid into a special purpose account as provided by this section...". It follows from what I have said with respect to s3(1) and s3(2) that s3(3) comes into operation if the contract is one within the description of the contracts described in s3(1)(a) and if the owner has paid to the builder under or in pursuance of the contract a sum of money before the work is commenced and if the builder has not paid that money into a special purpose account in a bank in the manner prescribed in s3(2).

On the return of these orders nisi, Mr RK Davis of counsel has appeared for the informant to move the orders nisi absolute. There has been no appearance for the defendant, although he was represented by counsel at the hearing in the Magistrates' Court. Mr Davis has presented a detailed argument to me in which the wording of the Act was fully discussed and he referred to several authorities on the interpretation of statutes. I do not find it necessary to refer to these authorities for the purpose of my decision. I am able to reach a conclusion as to the construction of the Act on the words of the Act itself.

I will now apply the Act, as I have construed it, to the facts of the three cases before me. I take first Order to Review No. 7329. In that case the evidence was that a man named Harold Reginald Ronalds had decided in November 1975 to have some additions done to his house at 73 Avonhurst Drive, Glen Waverley. With a view to getting the work done, he contacted the defendant. The evidence was that on 24 November 1975 the defendant inspected the site of the proposed work and wrote out a quote for the work for the sum of \$4800 and stated that he wanted a deposit of \$1500 and that he would commence to work in the middle of January 1976. A written quotation was put in evidence. That was a quotation on a printed form but with appropriate words inserted in the handwriting of the defendant. The works were described as being "Additions to existing B/V building at above address". Then it set out the specifications for the work to be done. The price is stated to be \$4800. The proposed commencement is stated to be 20 January 1975, which must in fact be an error because the document itself is dated 28 November 1975. I suppose it is meant to be a reference to 20 January 1976.

The evidence was that the defendant came to Mr Ronalds' home again on 28 November 1975, and that it was on that occasion that he wrote out a complete quotation for the work. The quotation made express provision for the payment of a deposit of \$1500 with the order. The evidence was that the defendant insisted on a deposit of \$1500. The money was not in fact paid on that date, but it was paid on 8 December 1975. Some work was done by way of pouring the foundations but the work was not completed and Mr Ronalds' evidence was that the \$1500 had been debited

to his bank account. The informant, who was a sergeant of police, gave evidence of an interview that he had had with the defendant. He gave evidence of admissions which had been made by the defendant. These were to the same effect as the evidence of Mr Ronalds. In addition, the defendant admitted that he had not paid the \$1500 into a special purpose bank account as the section required and, indeed, he stated that the money had been utilized in the running of his own business.

What happened in the Magistrates' Court was that the three informations were heard together. At the conclusion of the evidence-in-chief of the informant, counsel for the defendant made a submission that there was no case to answer. I take it from this that counsel did not desire to cross-examine the informant and that this submission was made at what was actually the close of the informant's case. He made a submission that the three paragraphs of subs(1) of s3 of the Act should be read in conjunction with each other and that on that reading of the section there was no case to answer on any of the informations for breach of the provisions of s3 because, said counsel, in order for the section to apply to a contract, the contract must satisfy all the requirements of paragraphs (a), (b) and (c) of subs(1) of s3 and that in each of the cases, the contract did not satisfy the requirements of sub-paragraph (i) of paragraph (c) on the basis that there was a date specified for the commencement of work. The Detective Senior Sergeant who prosecuted the case replied to this submission. The Magistrate considered the matter. The Magistrate then stated that "because the contract specified a date for commencement of the work and reading the whole section in conjunction, the requirements of s3(1) in relation to the contract were not satisfied because the requirement specified in sub-paragraph (i) of paragraph (c) of subs(1) of s3 of the Act was not satisfied." The Stipendiary Magistrate thereupon dismissed each of the informations.

For the reasons which I have given with respect to the construction of the Act I hold that the Stipendiary Magistrate was in error in dismissing the information in Order to Review No. 7329 for the reason he gave. The evidence in support of the information otherwise made out the necessary elements for the information and the Stipendiary Magistrate ought to have held that there was a case for the defendant to answer.

I have read out the grounds of the order nisi at an earlier stage of these reasons. These grounds do not raise very satisfactorily the points to which the Stipendiary Magistrate's decision gives rise. It would be misleading and therefore improper to make the order nisi absolute on either ground (1) or ground (2).

It could not be made absolute on ground (5) as it is not yet known whether the Stipendiary Magistrate has heard all the evidence. Ground (4) is too general. That leaves ground (3). Ground (3) is directed to the particular basis upon which the Magistrate dismissed the information. The order nisi can be made absolute on this ground though the reasons I have given indicate that the Stipendiary Magistrate's decision really raised a wider question than the specific one in ground (3). The order nisi will be made absolute on that ground but the information will have to be remitted to the Magistrate's Court for further hearing.

In Order to Review No. 7330 the evidence was that in October 1975 a man named David Clifford Cobbin decided to have a room added to the rear of the house that he and his wife own. In the course of taking steps to have this done he got into contact with the defendant. Mr Cobbin gave evidence of having received a written quotation from the defendant on 20 October 1975 for \$8826. There was then some further discussion about additional work and a fresh quotation was given on 27 November 1975 for \$9814 for all the work which was proposed. Mr Cobbin's evidence was that the quotation was drawn up by the defendant at the time of this visit and that he signed an acceptance of the quotation on the same day. The quotation was put in evidence. It too is on a printed form with additions in the handwriting of the defendant. It describes the work as being "Additions and B/V. skin to existing W/B. at above address". It gives the proposed commencement date as "15/1/75", which again is presumably a mistake for "15/1/76", and it provided for payment of \$3000 with the order. Mr Cobbin's evidence was that on 4 December 1975 he left a cheque for \$3000 with the defendant's wife and that on the same evening the defendant came to his home and gave him a receipt for \$3000. He said the cheque was cleared through his father's account because it was his father's cheque that was used for the purpose. Again, the informant gave evidence of admissions made to him by the defendant. They were to the same effect as Mr Cobbin's evidence and they also contained an admission that the defendant did not pay the money into a special purpose account.

Here again the evidence discloses facts which establish the prosecution's case and, for the reasons which I have already stated, I hold that the Stipendiary Magistrate was in error in acceding to the submission that there was no case to answer with respect to this information and that he was therefore in error in dismissing the information. The grounds are the same as in Order to Review No. 7329. This order nisi will also be made absolute on ground (3).

That leaves Order to Review No. 7328. The evidence in this case is that there was a contract with the defendant and that money was paid to him and that no work was done and that the money was not paid into a special purpose account. However, the work is described in the contract as "Extensions to existing pair of shops in solid brick at 269-271 Waverley Road, Malvern". The owner referred to the work as additions to be placed at the back of his two shops. The defendant in his admissions to the informant referred to the premises as "shops". The hearing in the Magistrates' Court was conducted without reference to the fact that it was a necessary part of the informant's case to establish that the contract related to a dwelling-house or to an appurtenance to a dwelling-house. In my opinion, on the evidence before me, the evidence is that the contract was for work to a building of a kind to which the Act does not apply. Hence, although in my opinion the Stipendiary Magistrate misconstrued the Act in dealing with this information, I do not consider that the order nisi should be made absolute as there is on the evidence a fatal defect in the evidence for the informant. In the circumstances, I do not see how this could be rectified and I will therefore discharge the order nisi in Order to Review No. 7328.

I add that in the course of his argument Mr Davis dealt with the expression which is to be found in s3(1)(c)(i), namely, "within a time stated in the contract". It is not necessary for me to express any view on the submissions that he put to me about the meaning of that expression in view of the construction that I have placed upon the section, and I do not propose to make any observations with regard to that expression.

For the reasons which I have stated I now make the following orders as orders of the Court.

In Order to Review No. 7328 the order is: order nisi discharged.

In Order to Review No. 7329 the order is: order nisi made absolute on ground (3). Order below set aside. Order that the information be remitted to the Magistrates' Court for further hearing in accordance with law. Order that the defendant pay the informant the sum of \$200 costs.

In Order to Review No. 7330 the order is: order nisi made absolute on ground (3). Order below set aside. Order that the information be remitted to the Magistrates' Court for further hearing in accordance with law. Order that the defendant pay the informant the sum of \$200 costs.

Orders accordingly.

Solicitor for the informant: EL Lane, Crown Solicitor.
