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E-Alert: Are Oral Building Contracts enforcable?

By ,

*In Nichols v Earth Spirit Homes Pty Ltd [2015] QCA 219 (**Nichols**), the Queensland Court of Appeal held that a contract for 'building work'**[1]** which did not comply with section 67G of the QBCC Act was, nonetheless, enforceable.*

Rider

Generally we do not start these e-alerts with a disclaimer, but, on this occasion, it is necessary to make it clear that we are not suggesting that oral contracts for 'domestic building work'[2] are enforceable. That is clearly not the case [3].

Facts

In 2007, Mr Nichols entered into a contract with Earth Spirit Homes Pty Ltd (**Earth Spirit**) for the construction of 10 houses. However, the parties terminated that contract in 2012. Subsequently, Mr Nichols and Earth Spirit entered into an oral agreement. It was a term of that agreement that Mr Nichols would pay Earth Spirit a weekly 'management fee' to complete the project. A dispute arose as to the payment of the management fee. At first instance (before the Queensland Civil and Administrative Tribunal (**QCAT**)) Mr Nichols was found liable to pay the management fee. That decision was confirmed by the QCAT Appeal Tribunal. Mr Nichols then appealed to the Queensland Court of Appeal.

The Queensland Court Appeal

Before the Queensland Court of Appeal, Mr Nichols advanced two arguments:

- Section 67G of the QBCC Act rendered the contract with Earth Spirit unenforceable because the contract was not in writing; and
- On public policy grounds, the Court should not enforce a contract entered into in breach of section 67G of the QBCC Act.

The Court rejected both arguments.
Section 67G of the QBCC Act relevantly provided that:

67G Building contracts to be in writing

1. *A building contractor commits an offence if—*

   (a) the building contractor enters into a building contract whether as the contracting party or the contracted party for the contract; an

   (b) the building contract is not put into writing—

(i) if the reasonable cost of the building work the subject of the contract is more than $10,000—before carrying out the building work is started; or

(ii) if the reasonable cost of the building work the subject of the contract is $10,000 orless—before carrying out the building work is finished.

Maximum penalty—80 penalty units

As to the first point of Mr Nichols' argument, the Court held that, although a breach section 67G was an offence:

> *[24] The absence in the Act of any other consequences for a failure to reduce the contract to writing strongly supports a conclusion that neither the statutory provision nor consideration of the scope and purpose of the statute favours a finding that the Act impliedly prohibits enforcement of a wholly oral building contract….*

The Court found support for this view in section 67E(1) of the QBCC Act which:

> *[25] …provides that if by entering into the building contract a party to that contract commits an offence against this part of the Act, that fact does not have the effect of making the contract void or voidable.*

and section 67E(2) of the QBCC Act which:

> *[27] … provides that if a building contract or a provision of a building contract is inconsistent with a provision of the Act, the building contract has effect only to the extent it is not inconsistent with the Act provision, is directed to inconsistences in the nature or contents of a building contract with a provision of the Act. The section is not directed to the form in which a building contract should be evidenced by the parties. To find otherwise is contrary to the proper construction of sections 67E and 67G, in the context of the scope and purpose of the legislative scheme.*

As to the second point of Mr Nichols' argument, the Court held that the contract was entered into in circumstances where previous contractual arrangements had been terminated and where the wholly oral building contract was entered into at the express request of Mr Nichols (or his agent) and there was no deliberate attempt by Earth Spirit to circumvent the Act.

Take home points

Frankly, Nichols confirmed what the building industry already thought was the case. That said, it does bring some issues into focus:

- First, whilst it would appear that Mr Nichols' first argument was soundly rejected, it is difficult to say what impact Mr Nichols' conscious request to enter into an oral contract played in the rejection of his second argument by the Court. Whilst we think it is the better view that an oral contract of the type dealt within in this case is enforceable (regardless of the background circumstances), it remains arguable (though, perhaps, not strongly arguable) that an oral contract entered into in different circumstances could be successfully challenged on public policy grounds;
- Second, by entering into the oral contract, Earth Spirit breached section 67G of the QBCC Act. Although the contract was enforceable, Earth Spirit did expose itself to a fine and (potentially more seriously) suspension or cancellation of its licence by the Queensland Building and Construction Commission[4];
- Third, although the Court accepted that the oral contract was (in this case enforceable), we cannot overemphasise the fact that having a written contract between the parties makes sense from both a legal and a practical point of view. From a legal standpoint, enforcing a well drafted written contract is generally a much simpler (and cost effective) exercise, when attempting to enforce an oral agreement. From a practical point of view, having a written contract also allows the parties to clearly understand their rights and obligations and to obtain legal advice where necessary, which (hopefully) will lead to fewer disputes;
- Fourth, even if the Court had accepted that the contract was unenforceable, a builder such as Earth Spirit may have had other rights of recovery, for example[5]:
    - A claim in restitution based on unjust enrichment[6]; and

- To the extent that such a claim remains distinct from a claim of the type dealt with in *Pavey & Matthews,*a claim in debt[7].

As such, principals should remember that having a construction contract declared unenforceable may not completely disentitle a contractor to payment.

[1] Defined in Schedule 2 to the *Queensland Building and Construction Commission Act 1991*(Qld) (**QBCC Act**)
[2] Defined in section 4 of Schedule 1B to the QBCC Act
[3] See sections 13(5) and 14(2) of Schedule 1B to the QBCC Act
[4] See section 48(f) of the QBCC Act
[5] Cf section 42(3) of the QBCC Act; see *Sutton v Zullo Enterprises Pty Ltd*[2000] 2 Qd R 196
[6] Based on *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 (**Pavey & Matthews**), this issue was argued but not dealt with in the Judgment as the Court accepted that the contract was enforceable
[7] The proper name for the claim is a claim for *indebitatus assumpsit* ; *Gino D'Alessandro Constructions Pty Ltd v Powis* [1987] 2 Qd R 40

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[4] See section 48(f) of the QBCC Act
[5] Cf section 42(3) of the QBCC Act; see *Sutton v Zullo Enterprises Pty Ltd*[2000] 2 Qd R 196
[6] Based on *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 (**Pavey & Matthews**), this issue was argued but not dealt with in the Judgment as the Court accepted that the contract was enforceable
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Should you wish to discuss any matters arising out of this article, please contact the author:

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