

Stepanoski v Aslan [2018] NSWSC 1160

FACTS

On 14 October 2014, Mr and Mrs Stepanoski (**the Plaintiffs/the Owners**) entered into a contract titled, “Head Contract Cost Plus (Residential) (**the Cost-Plus Contract**) with Mr Jamal Aslan (**the Defendant/the Builder**). Sometime after 14 October 2014, the Plaintiffs and the Defendant signed another contract described as a Home Building Contract for work over \$5,000 (**the Lump Sum Contract**) and backdated it to the date in which the Cost-Plus Contract was signed, with the Plaintiff’s as the Owners and the Defendant as the Contractor.

The plaintiffs claimed damages from the defendant for alleged breaches of a building contract for the construction of two residences on land owned by the Plaintiffs.

The parties had requested that the Court reach a conclusion as to the terms of the Building Contract, however as there were two contracts, the question posed to the Court was whether the Lump Sum contract was intended to replace the Cost-plus contract.

It was contended that the Lump Sum Contract was brought into existence in order to obtain funding for a loan with Macquarie Pty Ltd (Macquarie Bank) as the Plaintiffs mortgage broker informed the Defendant that the Cost-Plus Contract is not being recognised by the bank as it will only recognise a lump sum contract, and for the funds to be released, the Lump Sum contract needs to be backdated.

ISSUES

- i. Whether the parties are bound by the first contract signed, a Cost-Plus contract, or whether the Lump Sum contract, which was signed later but backdated to the date of the Cost-Plus Contract overrides the first contract.

FINDING

Emmett AJA, in assessing the parties’ intentions, began by construing the evidence and found that “it is not possible to find any agreement that the Cost-Plus Contract was to remain binding on any party in any way” and despite the dissatisfaction from the builder, “the arrangements were changed in a critical respect by signing the lump sum contract”.

Emmett AJA construed the oral evidence given by the Plaintiffs and found that the evidence was not reliable, and “the resolution of the question as to the terms of the contract must depend to a great extent upon the contemporaneous material”.

Emmett AJA assessed the material, which included, the proposed building documents, such as architectural drawings, and a building quote. In addition, the court assessed the deposit that was paid and the home warranty insurance.

The Lump Sum contract, as assessed included the same contract price, the same home warranty insurance and the same construction drawings.

Emmett AJA found that ‘despite minor inconsistencies in the contemporaneous material, the majority of documents pointed to the party’s intention as being bound by the Lump Sum Contract.

QUOTE

Their honours held that:

[69] There are some minor inconsistencies in the contemporaneous material. However apart from such inconsistencies, the parties regarded themselves as bound by the Lump Sum Contract. There is no basis for concluding that the Cost-Plus Contract continued to bind the parties after the Lump Sum Contract was signed. It may be that the Lump Sum Contract was not signed until January 2015, although, as indicated above, the contemporaneous documents of November and December 2014 point towards the existence of the Lump Sum Contract

IMPACT

This case highlights the Courts approach in investigating the existence of two construction contracts and determining which one binds the parties’. In reaching a determination, the court will assess the material to ascertain whether the parties’ original intentions have changed so that the later contract replaces the earlier.

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Jim Doyle
1800 888 783

jdoyle@doylesconstructionlawyers.com
www.doylesconstructionlawyers.com.au