VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D298/2013

BUILDING AND PROPERTY LIST

CATCHWORDS

DOMESTIC BUILDING-lock-up progress claim made by a builder to an owner under a building contract-builder subsequently went into liquidation-liquidator of the builder purported to assign debt to a director of the builder-whether, on a construction of the building contract, the assignee could maintain a claim against the owner

APPLICANT	G J Stanbrook Pty Ltd (ACN 117 548 606) trading as Gardner Homes (In Liquidation)
SECOND APPLICANT	Gregory John Stanbrook
RESPONDENT	Paula Nicole
WHERE HELD	Melbourne
BEFORE	Member A Kincaid
HEARING TYPE	Hearing
DATE OF HEARING	21-22 January 2015
DATE OF ORDER	23 January 2015
DATE OF WRITTEN REASONS	12 March 2015
CITATION	GJ Stanbrook Pty Ltd trading as Gerdner Homes v East (Building and Property) [2015] VCAT 272

ORDERS

1. For the reasons given orally, the proceeding brought by the second applicant is dismissed.
2. By consent, the counterclaim is struck out.
3. Costs reserved.

MEMBER A. KINCAID

APPEARANCES:

For the Applicant:	Mr D.M. Robinson of Counsel
For the Respondent:	Mr M. Settle of Counsel

REASONS

1 I heard this proceeding on 21 and 22 January 2015 and made my decision on 23 January 2015, giving reasons orally. On 5 February 2015, the second applicant sought written reasons, and so I publish those reasons. They are essentially a transcript of the oral reasons, with some minor corrections to syntax.

ISSUE

2 The second applicant is the purported assignee of a debt allegedly owing by the respondent to the first applicant pursuant to a building contract between those parties.

3 The issue for determination is whether the second applicant may now seek to enforce the alleged debt against the respondent.

BACKGROUND

The parties

4 By a building contract dated 29 October 2010 between GJ Stanbrook Pty Ltd trading as GJ Gardner Homes (the "**builder**) and Ms Paula East ("**Ms East**"), the builder agreed to construct a dwelling (the "**works**") for Ms East at Lot 190 Plover Way, Whittlesea for the contract price of $205,913.47 (the **"contract"**).

5 Mr Greg Stanbrook ("**Mr Stanbrook**") was then a director of the builder, and was the registered building practitioner engaged on the works.

6 Clause 5 of the contract provided:

> Either party may assign their rights and duties under this Contract with the written consent of the other

Purported assignment by builder of lock-up claim to EWH South Morang Pty Ltd

7 By progress claim dated 9 February 2012 EWH South Morang Pty Ltd invoiced Ms East for the "Lock Up" stage of the works, in the amount of $72,069.71.

8 Section 40(1) of the *Domestic Building Contracts Act 1995* defines "lock-up stage" as:

> the stage when a home's external wall cladding and roof covering is fixed, the flooring is laid and external doors and external windows are fixed (even if those doors or windows are only temporary).

9 Ms East's solicitors wrote to Mr Stanbrook and the builder by letter dated 22 February 2012, alleging that the lock-up stage had not been reached, because the garage doors had not been installed. The letter also alleged that there were various defects in the construction of the dwelling, by reference

to reports of a Mr Thompson, building consultant, dated 29 November 2011, 17 January 2012 and 10 February 2012.

10 Ms East's solicitors also stated in their letter:

> In later correspondence and invoices, the company EWH South Morang Pty Ltd is referred to as the builder rather than [Mr Stanbrook] or [the builder]. To date we have not sighted any documents establishing that the contract has been assigned or otherwise transferred to EWH South Morang Pty Ltd.
>
> Absent any evidence that an assignment of the contract has taken place pursuant to clause 5 of the contract, we will assume [Mr Stanbrook] or [the builder] is still the builder under the contract.

11 By letter in response dated 27 February 2012, Mr Emmerson, described as Operations Manager of "East West Homes (South Morang)", informed Ms East's solicitors that Mr Stanbrook is the registered building practitioner contracted to build [the] residence for [Ms East], and that:

> there has been a transition period with moving the "building franchise" of GJ Gardner Builders to East West Homes.[1]

Owner's solicitors object to purported assignment of building contract to EWH

12 By letter to Mr Emmerson dated 29 February 2012 in response, Ms East's solicitors wrote:

> It is not clear to us who you say is the current builder under the building contract with our client. Can you please confirm and provide us with a copy of the building permit and home warranty insurance certificate showing the identity of the current builder.
>
> We remind you that the initial claim for the lock-up payment was made by a company to [which] our client is not contracted. The company identified in the contract has not made a claim for the lock-up payment.

13 By Notice of Suspension of Works dated 5 March 2012 the builder purported to suspend the works on account of Ms East's alleged failure to pay the lock-up progress claim, and also claimed an extension of time under the provisions of the contract.

14 By letter dated 1 March 2012, in response to Ms East's solicitors' letters dated 22 and 29 February 2012, solicitors engaged by the builder wrote:

> The builder is [the builder] and [Mr] Stanbrook is the registered building practitioner and a director of that company. The contract makes reference to an Australian company number. The reference to

[1] It appears from this that the builder benefitted from an arrangement with a business called "GJ Gardner Builders" (that is also confirmed by the subsequent liquidator's report), and that East West Homes purchased that business.

> "Greg Stanbrook" as the builder is an error and the reference should be to "GJ Stanbrook Pty Ltd".
>
> EWH South Morang Pty Ltd ("EWH") is plainly not the builder. It is however a new business entity that arises from the amalgamation of the building businesses conducted by [the builder] and [EWH]. EWH is not of course a party to the building contract and in any event a contract cannot be "assigned" to it. There has been no novation of the building contract. However, a party may assign one or more rights under the contract, such as a right to be paid. Please treat this letter as notice that [the builder] hereby assigns to EWH its right to receive payment under the contract.

15 By letter dated 19 March 2012, Ms East's solicitors responded:

> …You claim that [the builder] has assigned its right to be paid under the contract to EWH South Morang Pty Ltd. Absent our client's consent this purported assignment and notice thereof is of no effect.
>
> Clause 5 of the contract provides that:
>
> "Either party may assign their rights and duties under the Contract with the written consent of the other".
>
> Our client has not given any such consent.
>
> As a consequence, GJ Stanbrook Pty Ltd, the builder under the contract has not yet submitted its claim for lock up stage payment.

16 By letter dated 4 March 2013 Ms East purported to terminate the contract on the basis of the builders alleged repudiation , citing defects and incomplete works, ceasing the work without suspending the work in accordance with the contract, alleged wrongful suspension, and the making of the alleged lock up claim without justification.

17 The correspondence I have described makes it plain that Ms East never accepted the purported assignment of the benefit of the lockup progress claim to another party, in this case EWH (South Morang) Pty Ltd. There is no evidence that Ms East consented to that arrangement.

Proceeding started

18 On 7 February 2013, the builder started a proceeding in the Tribunal seeking payment of the lock-up claim. On 19 March 2013 Points of Claim were filed. On 19 June 2013 a Defence and Counterclaim was filed by Ms East.

Builder Goes Into Liquidation

19 In June 2013, the builder was placed under external administration and, on 29 August 2013, it was placed into liquidation.

Purported assignment by liquidator to Mr Stanbrook of the builder's right to receive lock-up payment

20 By undated Deed of Assignment (which, it is conceded, was entered into on 3 October 2013) the liquidator of the builder purported to assign to Mr Stanbrook the debt of $72,069.71 allegedly owed by Ms East in respect of the lock-up claim.

21 No other claims that the builder may have had against Ms East were the subject of the purported assignment.

Ms East denies the entitlement of Mr Stanbrook to take an assignment without her consent

22 Pursuant to orders on 29 April 2014, Mr Stanbrook, as the alleged assignee of the benefit of the purported lock-up claim, was joined as an applicant at his request. Amended Points of Claim were filed on 1 May 2014.

23 By Amended Defence and Counterclaim dated 10 July 2014 Ms East pleaded by way of defence that having regard to the contents of clause 5 of the contract, and the fact that Ms East had not consented to the purported assignment, no assignment had taken place.

24 By Further Amended Points of Claim dated 23 October 2014 Mr Stanbrook appeared to make a claim on a *quantum meruit*. By Further Amended Defence dated 5 November 2014 and Second Further Amended defence dated 11 December 2014 Ms East again denied that an assignment had taken place for lack of her granting consent.

25 I describe these formal matters to demonstrate that the validity of the purported assignment of the benefit of any payment of the lock-up progress claim to Mr Stanbrook, like the earlier purported assignment by the builder to EWH, was at all times put in issue by Ms East. It is conceded by Mr Stanbrook that there is no evidence that Ms East ever consented in writing to the purported assignment to him.

26 By directions made 29 September 2014 this matter was set down for hearing on Tuesday 21 January 2015.

PRELIMINARY POINT

27 At a Compliance Hearing on 19 December 2014 Deputy President Aird ordered that the respondent must file any section 75 application seeking summary dismissal of the proceeding by 19 January 2015. This was not done. It seems from Ms East's solicitors' letter dated 16 December 2014 (intended to be dated 16 January 2015) that the view taken by them was that, contrary to what appears to have been anticipated by Deputy President Aird at the earlier directions hearing, there would be no such application made at the commencement of the hearing. It became apparent during opening submissions on 21 January 2015 that Ms East's legal advisors had taken the view that they would not, until final submissions, argue that the claim by the second respondent was incompetent.

28 Whether there had been an assignment at law of the first applicant's rights under the contract to the second applicant appeared to me to be suitable to be heard as a preliminary point, whatever may have been the forensic reasons for the respondent choosing not to file and serve a section 75 application. I took this view because in the event that the claim by Mr Stambrook was determined not to be competent, the proceeding would be terminated without the need to hear extensive evidence about whether lock-up had been achieved when the lock-up progress claim was made, and to hear from experts concerning the defects the subject of various experts' reports.

29 Mr Stanbrook was self-represented on 21 January 2015. He had had difficulty securing the services of his counsel Mr Stavris, as explained in his affidavit in support of his application then for an adjournment. In the circumstances (one of which was that before Christmas 2014 he became aware that Mr Stavris may not be available at the hearing date, and he had not secured alternative representation in the meantime), I did not grant his request for an adjournment. However, I adjourned the matter later in the morning, to allow him to secure legal representation to address the following preliminary question on 22 January 2015:

> Was there an assignment at law of the first applicant's alleged right to receive payment of the lock up progress claim under the contract to the second applicant?

30 Submissions were made yesterday morning. Mr Settle of counsel appeared for Ms East, and Mr Robinson of Counsel, who was briefed on Wednesday, for Mr Stanbrook.

31 I agreed to provide my decision with reasons this morning.

AUTHORITIES

32 Before I address counsel's arguments, I shall describe relevant aspects of two decisions, which were the subject of submissions by Counsel.

33 The first decision is that of the House of Lords in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd and Ors*[2]. In one of the matters considered by their Lordships (the second is not relevant for present purposes) the lessee of premises entered into a contract with the second defendant to remove asbestos from the premises. Clause 17(1) of the works contract provided as follows:

> The employer shall not without written consent of the contractor assign this contract

34 The second defendant sub-contracted the work to the first defendant. After the work was completed, more asbestos, that should have been removed was found in the building. The lessee contracted on similar terms with the third defendant to remove the asbestos. The lessee issued a writ against the defendants seeking damages for negligence and breach of contract. By a

[2] [1994] 1 AC 85

purported assignment two years later, the lessee assigned all its rights in the proceeding and rights incidental to the leasehold interest in the premises to the plaintiff. The second defendant did not consent to the assignment. On the preliminary issues, directed to be tried in the action, the official referee held that the assignment was ineffective, and that the plaintiff could not recover the cost of removing the asbestos. The Court of Appeal, reversing that decision, held that the assignment was effective and that the plaintiff could recover damages. On appeal, the House of Lords held that on a true construction of the contracts, the wording of clause 17(1) prevented the assignment by the lessee of any chose in action, such as the lessee's claim for damages, without the consent of the second defendant. Their Lordships also found that, properly construed, clause 17(1) prohibited the assignment by the lessee of its right to future performance.[3]

35 The other decision the subject of submissions is *Owners of Strata Plan 5290 v CGS & Co Pty Ltd.*[4] In that case, the builder claimed monies under a building contract with the appellant ("**Strata Plan**"). The builder was subsequently placed into liquidation. The liquidator purported to assign the benefit of the builder's entitlement to the respondent ("**CGS**"). CGS commenced proceedings against Strata Plan seeking to recover the amount that would otherwise have been due to the builder, were it not for the purported assignment.

36 Clause 9.1 of the General Conditions read:

> Neither party shall, without the prior written approval of the other and except on such terms and conditions as are determined in writing by the other, assign the contract or any payment thereunder.

37 The primary Judge held that these words, properly construed, meant that absent written approval, the benefit of receiving monies payable under the contract was not assignable by the liquidator of the builder to CGS. This finding was not in dispute before the Court of Appeal.

38 What was in contention before the Court of Appeal was the further finding by the primary Judge that, notwithstanding that the benefit was not assignable, CGS acquired title to the cause of action against Strata Plan on the grounds that there was a sale or disposal of the cause of action to CGS by the builder's liquidator pursuant to section 477(2) *Corporations Act 2001*.

39 There was, therefore, no need for the Court of Appeal to consider the anterior finding of the primary Judge that the failure to comply with clause 9.1 meant that the chose in action purportedly assigned by the liquidator of the builder "was inherently incapable of being assigned", and that the rights

[3] At pp 102-106
[4] [2011] NSWCA 168; (2011) 81 NSWLR 285

of the builder "did not have any existence on any other basis than they are not assignable"[5].

RESPECTIVE CONTENTIONS

40 Mr Settle on behalf of Ms East submitted that on a proper construction of clause 5 of the contract, the right of the first applicant to receive payment from Ms East is not assignable, save with the written consent of Ms East.

41 He contended that the words of clause 5 are no different, in effect, from the non-assignment clauses in the two decisions to which I have referred.

42 Mr Robinson on behalf of Mr Stanbrook submitted that clause 5 of the contract, on its proper construction, does not prevent the right of the first applicant to receive payment from Ms East being assignable. It simply sets out a procedural requirement imposed on the first applicant as assignor. If as occurred here, an assignment is made by the first applicant without first obtaining Ms East's written consent then, he submits, the assignment remains effective under the contract, but subject to whatever damages Ms East may be entitled to claim from the first applicant arising from the its failure to comply with the requirement. [6]

43 Mr Robinson submitted, therefore, that there is a distinction between the clause under consideration here, and the clauses the subject of the two decisions to which I have referred. The clauses considered in those decisions, he submits, make plain what a party *cannot* do in the absence of written consent of the other. The clauses themselves, he says, are in the language of prohibition. He contended that those clauses are to be contrasted with the wording of clause 5, which does not say that "rights *cannot* be assigned without consent" or that "they may *only* be assigned with consent". Mr Robinson submitted that clause 5, in contrast to those clauses, sets out what a party *may* do.

44 If Mr Robinson's submission is to mean that the use of the word "may" makes the obtaining of Ms East's written consent optional only, I disagree. Whether the obtaining of her consent is required, in order for there to be a valid assignment, is a matter of ascertaining the meaning which clause 5 as a whole would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation they were in at the time of the contract.[7]

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[5] At [27]-[28].

[6] Mr Robinson submits that the proper interpretation of clause 5 is that described in the first of four possible interpretations of an assignment prohibition clause, in a Note on *Helstan Securities Ltd v Hertfordshire County Council* [1978] 3 All ER 553 entitled "Inalienable Rights?" by Professor R M Goode (1979) 42 MLR 553, and considered by the House of Lords in *Linden Gardens* at 104-106.

[7] See *Investors Compensation Scheme Ltd* v *West Bromwich Building Society* [1998] !WLR 896 at 912-3, approved in *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) CLR 181 at [11] and *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at [22].

ANALYSIS AND CONCLUSION

45 It is well known that the burden of a contract cannot be assigned without the consent of the obligee. The purported assignment in this case however was that of a right. The question, therefore, is to what extent does clause 5 of the contract, on its proper construction, restrict rights of assignment that would otherwise exist (in this case, the right to the chose in action represented by the alleged debt owed by Ms East to the builder)?

46 I prefer the construction contended for by Mr Settle. Clause 5 of the contract deals with the assignment of rights and duties under the contract. It states that a party may do either. In regard to assignments of a right (such as the one under consideration here) the clause states, that a right "may" be assigned. In my view, however, it expressly goes on to qualify the way in which an assignment may only occur: it must be "with the written consent of the other".

47 In other words, I do not construe the words "with the written consent of the other" as simply a procedural requirement. They impose words of condition, to be complied with before an assignment can occur at law. Absent written consent, therefore, no purported assignment under the contract can be effective. I construe them as words of condition because they are plainly expressed as an express qualification to the basis upon which either party "may" assign a right. I conclude that reasonable people in the position of the parties, when reading these words, would take them to mean that written consent of the other party must be obtained before an assignment of a right may take place.

48 I think that there is little room for the argument that clause 5 of the contract is ambiguous. To the extent that it is, I consider that the construction I have adopted also makes business common sense.[8] Mr Settle relied on the three reasons expressed by Professor McCormack in *Debts and Non-Assignment Clauses*[9] as to why there may be very good reason to insert a non-assignability clause in a building contract. One of the reasons is that a party to a contract may have a genuine commercial interest in ensuring that he or she has to deal only with the other party to the contract. This was the very concern expressed on behalf of Ms East in the correspondence to which I have referred.

49 It is also difficult to see how, if I had accepted the construction of clause 5 as propounded by Mr Robinson, damages for breach of the so-called procedural requirement calling for written consent, would be an adequate remedy. One of the problems would be the difficulty of assessing what

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[8] In the case of ambiguity, a construction of a contract that yields to business common sense may be adopted: see *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191 at 199 per Lord Diplock; *Pan Foods Co Importers & Distributors Pty Ltd v Australia & New Zealand Banking Group Ltd* (2000) 170 ALR 579 at [24] per Kirby J *and Schencker & Co (Aust) Pty Ltd v Maplas Equipment & Services Pty Ltd* [1990] VR 834 at 848 per McGarvie J.

[9] (2000) J Bus L 422 at 424-425. The reasons were also considered by the Court of Appeal in *Owners of Strata Plan 5290 v CGS & Co Pty Ltd* (supra) at [60]-[67].

damages flow from the fact that Ms East may be required to deal with a party with which she has had no prior commercial relationship. This also disinclines me towards the construction of clause 5 advocated by Mr Robinson.

50 It follows from my reasons that there was not an assignment at law to Mr Stanbrook of the first applicant's right to receive payment of the lock-up progress claim. The answer to the preliminary question is "no". The second applicant's claim for payment of the lock-up progress claim has no standing, and must be dismissed.

OTHER MATTERS

51 Mr Stanbrook also makes a claim in the proceeding for payment on a *quantum meruit*. Given the narrow scope of the Deed of Assignment, this claim may also be unsustainable. I will leave the parties to discuss whether they wish me also to make a determination concerning this point. Subject to that, I propose to dismiss the proceeding.

MEMBER A. KINCAID