VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP859/2014

CATCHWORDS

Application for preliminary hearing to determine a separate question – relevant principles -

APPLICANT	Hotel Renovations & Maintenance Pty Ltd (ACN 007 028 944)
RESPONDENT	Newmarket Tavern Pty Ltd (ACN 070 743 761) (as trustee for the Newmarket Shopping Plaza Unit Trust)
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Directions hearing
DATE OF HEARING	26 November 2015
DATE OF ORDER	18 December 2015
CITATION	Hotel Renovations & Maintenance Pty Ltd v Newmarket Tavern Pty Ltd (Building and Property) [2015] VCAT 2031

ORDER

1. The respondent's application for a preliminary hearing to determine a separate question is refused.

2. **This proceeding is listed for a further directions hearing before Deputy President Aird on 28 January 2016 at 3.15pm at 55 King Street, Melbourne – allow 1 hour.**

3. Liberty to apply.

4. Costs reserved.

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicant	Mr B Reid of Counsel
For Respondents	Mr M Whitten, Senior Counsel

REASONS

1 The applicant builder carried out building works for the respondent owner in Heidelberg between 2010 and 2014. In December 2014, the builder commenced these proceedings claiming payment of $3,347,350.52 pursuant to quantum meruit, alternatively $3,072,501.65 pursuant to contract. The builder contends the contract between the parties was a cost plus contract. The owner contends the contract was a fixed-price contract, and relies on two written contracts dated 25 November 2010 and 14 November 2012.

2 The owner filed an Application for Directions Hearing or Orders ('the application') dated 18 September 2015 seeking orders that the Tribunal determine the following as a separate question:

> What is the contract that applies between the parties for construction work carried out at [the subject property] (**Contract**)
>
> (a) a cost plus contract is contended by the Applicant at paragraph 4 of the Points of Claim; or
>
> (b) a fixed lump sum contract for an amount of $11,166,000 (excluding GST) as contended by the Respondent at paragraph 4(c) of its Points of Defence?

3 The application was accompanied by a supporting affidavit by Peter Woods, the owner's solicitor dated 17 September 2015. In his affidavit Mr Woods deposes that the builder's solicitors have advised that the builder opposes a preliminary hearing.

4 The proceeding was listed for a directions hearing on 7 October 2015 to consider whether the application should be granted, and a preliminary hearing listed. On 6 October 2015 consent orders were made, in chambers, vacating the directions hearing and listing the proceeding for a preliminary hearing on 26 November 2015 to determine the separate question. Directions were made for the filing of affidavit material and submissions by both parties.

5 The owner filed two affidavits: one of Stephen Hay, the architect who administered the project, dated 16 October 2015 which is 52 paragraphs with 10 exhibits and a second by John Booth, director of the owner which is 50 paragraphs with 16 exhibits. The builder relies on an affidavit by its solicitor, Daniel Oldham which is 21 paragraphs with four exhibits each comprised of a number of documents.

6 Following a disagreement between the parties as to whether the owner had, in fact, consented to the preliminary hearing, the proceeding was listed for a directions hearing on 9 November 2015. The builder filed an affidavit by Tim Mulcahy, solicitor, dated 8 November 2015 in which he deposed that the builder had never resiled from its opposition to the preliminary hearing. Further, that the proposed consent orders prepared by him, had been amended by the owner's solicitors, and that he had signed them on behalf of

the builder without appreciating the significance of the amendment. Further that he only became aware that they provided for the preliminary hearing upon briefing counsel on 27 October 2015 to appear at, what he believed, was a directions hearing, on 26 November 2015.

7 At the directions hearing on 9 November 2015, I considered it appropriate to order that the hearing listed for 26 November 2015 would proceed as a directions hearing to determine whether there should be a preliminary hearing.

8 Affidavits and submissions were filed by both parties. Mr Whitten of senior counsel appeared on behalf of the owner, and Mr Reid of counsel appeared on behalf of the builder.

THE PARTIES' POSITIONS

9 The owner submits that it would be convenient and appropriate to hold a preliminary hearing to determine the separate questions because if the owner is right, and the tribunal determines that the contract is a fixed-price contract, it contends this might well lead to a finalisation of the proceeding. Further, if the separate question is not referred to a preliminary hearing the owner will incur significant time and costs in preparing, effectively two cases, for the final hearing: the first based on its defence that the contract is a fixed-price contract and the second, to respond to the builder's claim that the contract is a cost plus contract. Mr Whitten referred to Daniel Oldham's affidavit in which he states that he has spent more than 100 hours going through the documents comprising the builder's discovery and that these fill 60 lever arch folders. Mr Whitten submitted this demonstrated the huge task the owner would face in defending the builder's case as currently pleaded.

10 Insofar as Mr Whitten's oral submissions concerned the merits of the builder's position, I have not referred to or considered them as, in my view, they are irrelevant to my determining whether to refer the separate questions to a preliminary hearing.

11 The builder opposes the separate questions being listed for a preliminary hearing because:

i there is a significant controversy between the parties as to the nature of the contract, and

ii it will be necessary to cross examine the deponents to the affidavits relied on by the parties which may lead to findings as to their credit. This might make it difficult for the same member to conduct the final hearing which could prolong the time taken for the final hearing, and therefore the costs to the parties. (I am not persuaded this is a relevant consideration in circumstances where members in this List frequently heard and determine interlocutory applications but do not preside at the final hearing).

12 Mr Whitten submitted that the determination of the separate questions would be a short task, confined by the Points of Claim and the Points of Defence. Surprisingly, Mr Whitten estimates that two days only would be required for the preliminary hearing – one day to cross examine the deponents to affidavits and another for submissions. However, given that the owner relies on two lengthy affidavits with substantial exhibits, and the builder relies one, also with substantial exhibits, this seems to me to be a very conservative estimate. The builder's estimate of 5 to 7 days seems more realistic.

13 Further, Mr Reid indicated that if, after conducting a preliminary hearing, the tribunal found in favour of the owner, the builder would seek leave to amend its claim. However, he did not foreshadow the nature of any proposed amendment.

WHEN SHOULD A PRELIMINARY HEARING BE ORDERED?

14 In *Murphy v State of Victoria & Anor*[1] Nettle AP, Santamaria and Beach JJA set out, with approval at [28], the trial judge's summary of the principles for determining whether a separate trial of a discrete question should be ordered:

> It is evident from the judge's ruling of 8 August 2014[2] that his Honour was aware of the care which must be exercised before making an order for separate trial of discrete questions. He cited extensively from authority which, as his Honour said correctly, makes clear that:
>
> 1) A separate trial should be ordered under r 47.04 only with great caution and only in a clear case.[3]
>
> 2) The attraction of trials of issues rather than of cases in their totality, 'are often more chimerical than real', so that separate trials should 'only be embarked upon when their utility, economy and fairness to the parties are beyond question'.
>
> 3) The advantages of trying separate questions for one party may unfairly disadvantage another party, including because the questions will be determined without the benefit of all the evidence relevant to the proceeding.[4]
>
> 4) There should be no trial of a separate question on the basis of assumed facts unless the facts are agreed or can readily be determined judicially. Otherwise, the parties remain free to dispute the relevant facts at any later trial.[5]
>
> 5) As a general rule, it is inappropriate to order that a preliminary issue be isolated for determination unless the determination of the issue in favour of the plaintiff or the defendant will put an

---

1 [2014] VSCA 238
2 [2014] VSC 363 ('First Reasons').
3 *Wells Fargo Bank Northwest National Association v Victoria Aircraft Leasing Ltd (No. 2)* [2004] VSC 341 [181].
4 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 533–4.
5 *Jacobson v Ross* [1995] 1 VR 337, 341–2 (Brooking J).

end to the action, or where there is a clear line of demarcation between issues and the determination of one issue in isolation from the other issues in the case is likely to save inconvenience and expense.[6]

6) Factors which tell against making order under r 47.04 include that the separate determination of the question:

a) may give rise to significant contested factual issues both at the time of the hearing of the preliminary question and at the time of trial;

b) may result in significant overlap between the evidence adduced on the hearing of the separate question and at trial; possibly involving the calling of the same witnesses at both stages of the hearing of the proceeding; and

c) may prolong rather than shorten the litigation.[7]

15 In *Murphy* their Honours said at [30-31]

30. Under cover of Grounds 1 to 10 of the appeal, the appellant contends that the judge erred in ordering the trial of the separate questions before discovery of documents relevant to those questions and before resolving the respondents' claims to public interest immunity.

31. We agree. In this case, there were and are seriously disputed questions of fact…

32. In our view, the range and complexity of the disputed facts rendered it inappropriate to proceed on the basis of only those facts which were admitted on the pleadings and, plainly, that was a fundamentally different way of approaching the matter than trying separate questions on the basis of evidence, in the usual way…

16 Further at [39] their Honours said:

> As it is, because of the parties' inability to agree on facts (which, as we have observed, was hardly surprising); the judge's consequent order that the questions should be tried on the basis of the facts admitted on the pleadings; and then the judge's adopting a course of relying also on facts and inferences drawn from the documents, no one could ever be sure of the facts on which the judge was proceeding until the judge published his reasons for judgment, and even now there is still some doubt about it. The consequences of having so proceeded are wholly unsatisfactory.

17 These comments are equally apt here. Considering the current application in light of the principles set out in *Murphy*, I am of the view that the listing of

---

6 *Dunstan v Simmie & Co. Pty Ltd* [1978] VR 669, 671.

7 *Reading Australia Pty Ltd v Australian Mutual Provident Society* [1999] FCA 718, [8], cited in *Village Building Company Limited v Canberra International Airport Pty Limited* [2003] FCA 1195, [8].

the separate question for a preliminary hearing would offend the majority of the principles.

18 I also note that whilst orders have been made, and extended for the filing of lists of documents, neither party has complied with the orders. Although the builder confirmed it has carried out a comprehensive review of its documents, and provided the owner with a preliminary List of Documents, there is no indication that the owner has done likewise. Rather, shortly before the extended date for the filing of lists of documents, the owner filed this application.

19 I agree with Mr Reid's observations that I must have regard to the separate question the owner seeks to have referred to a preliminary hearing – the question, of itself, identifies the controversy between the parties. The question is not simply, for example:

> Is there any legal basis to set aside or not enforce the written contract/s?

DISCUSSION

20 The reality of commercial litigation is that there are frequently disputed questions of fact which are invariably the catalyst for the dispute and the litigation. It is not unusual for a building dispute to include issues about the nature and extent of the contract between the parties.

21 Although Mr Whitten attempted to persuade me that, if a preliminary hearing were ordered the tribunal would simply be required to determine a simple legal question, this is not supported by the extensive affidavit material which has been filed. In my view, the owner, in relying on extensive affidavit material and substantial affidavits which address the pre-contractual negotiations, the 'fixed price contracts' and post contractual conduct of the parties, and the administering architect, confirms the complexity of the factual disputes. In those circumstances I am not persuaded that it is appropriate to list a preliminary hearing.

22 Therefore the application will be refused and the proceeding listed for a directions hearing so that orders can be made for its further conduct. If the owners wishes to amend its claim, it will need to seek leave to do so. Any application for leave to amend should be accompanied by draft Amended Points of Claim.

23 I will reserve the question of costs with liberty to apply.

DEPUTY PRESIDENT C AIRD