

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D881/2009

CATCHWORDS

Domestic Building – termination of contract by owner - work severely defective – builders claiming twice the amount due for base stage and receiving payment - builders claiming frame payment although frame incomplete and not approved by Building Surveyor – Builders proceeding to further stages that would cover up defective work and failing to rectify defects despite requests by Building Surveyor – frame structurally inadequate and dangerous – stop work notice by Building Surveyor - Builders' conduct held to amount to a repudiation of the contract - damages

APPLICANTS	Dharmesh Adeshara and Teljalben Adeshara
RESPONDENTS	Rashid Ismail Mpota and Emerald David Komba Trading as Bora Homes Australia
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	1,2 & 16 July 2010
DATE OF ORDER	6 August 2010
CITATION	Adeshara v Mpota & Anor trading as Bora Homes Australia (Domestic Building) [2010] VCAT 1326

ORDER

1. Order the Respondents to pay to the Applicants \$51,472.98.
2. The counterclaim is dismissed.
3. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	Mr R. Gordon of Counsel
For the Respondents	Mr R. Mpota and Mr E. Komba in person

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D882/2009

DOMESTIC BUILDING LIST

APPLICANTS	Hitesh Adeshara, Anupama Adeshara
FIRST RESPONDENT	Rashid Ismail Mpota trading as Bora Homes Australia
SECOND RESPONDENT	Emerald David Komba trading as Bora Homes Australia
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	1,2 & 16 July 2010
DATE OF ORDER	6 August 2010
CITATION	

ORDER

1. Order the Respondents to pay to the Applicants \$4,093.90.
2. The counterclaim is dismissed.
3. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	Mr R. Gordon of Counsel
For the Respondents	Mr R. Mpota and Mr E. Komba in person

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D883/2009

DOMESTIC BUILDING LIST

APPLICANTS	Paresh Adeshara and Tejalben Adeshara
FIRST RESPONDENT	Rashid Ismail Mpota trading as Bora Homes Australia
SECOND RESPONDENT	Emerald David Komba trading as Bora Homes Australia
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	1,2 & 16 July 2010
DATE OF ORDER	6 August 2010
CITATION	

ORDER

1. Order the Respondents to pay to the Applicants \$61,933.02.
2. The counterclaim is dismissed.
3. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	Mr R. Gordon of Counsel
For the Respondents	Mr R. Mpota and Mr E. Komba in person

REASONS

Background

- 1 Dharmesh and Tejalben Adeshara are the owners of Lot 30 Abbin Court Rowville, which is the subject of proceeding D881/2009. Hitesh Adeshara and Anupama Adeshara are the owners of Lot 29 Abbin Court Rowville, which is the subject of proceeding D882/2009. Paresh and Tejalben Adeshara are the owners of Lot 31 Abbin Court Rowville, which is the subject of proceeding D883/2009. I shall refer to those persons collectively as “the Owners”.
- 2 The Owners are members of the same family and in October 2008 they entered into separate building contracts with the Respondents, Mr Mpota and Mr Komba (“the Builders”) to construct a house on each of the said lots. The lots adjoin one another.
- 3 Mr Mpota was at all material times, but is no longer, a registered builder. Mr Komba has never been a registered builder and has no formal building qualification although he claims to have had some building experience. The Builders formerly carried on business under the name “Bora Homes Australia”.

The contracts

- 4 Each of the contracts was entered into on 17 October 2008. The contract price for the house to be constructed on Lot 29 was \$330,000 inclusive of GST and the price for each of the other houses was \$335,000 inclusive of GST. Each contract was between the Builders on the one hand and the owners of the relevant lot on the other.
- 5 On 19 October 2009 the Owners severally paid the deposits under each of the respective contracts, being \$16,500 with respect to Lot 29 and \$16,750 with respect to each of the other two lots.
- 6 A building permit was issued for each of the three houses by Mr Ronald Goddard of Advanced Building Solutions Pty Ltd. He was the relevant building surveyor for the work to be done under each of the three contracts.

The respective claims

- 7 In each of these proceedings, the Owners each seek damages from the Builders for breach of their respective building contracts, which they claim to have validly terminated. The Builders dispute all three claims, saying that, in each case, the contract was wrongly terminated and that they are and always have been ready and willing to perform their obligations thereunder. They also counterclaim for damages in each case.
- 8 The three proceedings were listed for hearing together before me on 1 July 2010. Mr R. Gordon of Counsel appeared on behalf of the Owners and the Builders appeared in person.

- 9 I heard evidence from one of the Owners, Mr Hitesh Adeshara, from the Building Surveyor, Mr Goddard, from an experienced builder who inspected the houses, Mr Steve Schake and also from Mr Siva Surendran, who was the builder who took over construction of the houses. The Builders gave evidence but they called no other witnesses.

Construction

- 10 The slab for each house was poured in February 2009. The Builders were paid for the slabs the sums of \$66,000 with respect to Lot 29 and \$67,000 with respect to each of Lots 30 and 31. Those figures are exactly double the maximum amounts that should have been payable under the contract for the base stages, according to Schedule 3 of the Contract and also according to s.40(2) of the *Domestic Building Contracts Act 1995*. The Owners were never given a copy of the Contract and apparently paid what the Builders demanded of them. There was no evidence that the contracts were varied in this regard.
- 11 Thereafter, the Builders commenced construction of the frames for the three houses. They were later paid \$47,250.00 with respect to the frames for each of Lots 30 and 31, despite the fact that those frames were never approved by Mr Goddard. That amount of \$47,250.00 is \$3,000 less than the amount provided for in the contract for the frame stage of those houses. I was told that the Builders allowed a reduction of \$3,000 in each payment because the frames were incomplete. Since the frames were incomplete and had not been approved, no payment should have been demanded at all.
- 12 The houses were each two stories high and, according to the evidence of the building surveyor Mr Goddard, it became apparent to him during construction there were many faults with the frames. He said that his inspectors inspected each of the frames at various times and found them all to be defective. The frame for Lot 29 was inspected on 16 April, the frame for Lot 31 was inspected on both 5 and 15 May and the frame for Lot 30 was inspected on 9 July. On each occasion notice of the defects was issued to the Builders.
- 13 Mr Goddard said that after inspecting the frames a number of times his inspectors refused to go back and so he engaged Mr Schake to inspect the work and prepare a report.
- 14 According to Mr Schake's evidence he inspected Lot 31 on 17 July and also looked briefly at the other two lots. He concluded that the defects were so extensive that the only proper way to rectify them was to partially pull the frame down and rebuild it. He took photographs which are in evidence showing numerous defects that he elaborated on in the witness box. Many of these were said to be very basic mistakes reflecting a fundamental lack of building knowledge. Certainly from the photographs produced the work has a very amateurish appearance.

- 15 Mr Schake said that he discussed the numerous defects with Mr Komba, who was on site at the time. He said that Mr Komba asked him if he would carry out the rectification work but he told Mr Komba that he did not have the time.
- 16 After receiving Mr Schake's report Mr Goddard provided copies to the Builders and discussed it with them. He then personally inspected the three lots himself and confirmed the contents of the defect notices by his inspectors and the defects found by Mr Schake. He also found several more defects. Copies of photographs that he took on that occasion were produced. He said that in his discussions with the Builders he suggested that they engage the services of an Australian qualified, certified, registered and experienced builder or carpenter to carry out the rectification of the defects as well as further works. He said that he did this because Mr Komba, whom he believed was supervising the construction, told him that he had no qualifications or experience in constructing timber frames.

The stop work order

- 17 On 21 August 2009 Mr Goddard served upon the Owners a stop work notice under the Building Act in regard to each of the three houses. The Builders dispute that copies of these were ever given to them but I am satisfied that they received copies.
- 18 When the Builders did get a copy of the stop work notices they disputed their validity. According to Mr Hitesh Adeshara, he was unable to reach the Builders by telephone because they would not answer their mobile homes and they had no landline numbers. When the Owners attempted to give the stop work notices to Mr Komba on the same morning they had been given them (Saturday) he refused to accept them.
- 19 The grounds of each of the notices were that Mr Goddard was of the opinion that the building work in each case contravened the Building Act, in that the work was not carried out in accordance with the approved plans, and was a danger to the life, safety or health of any member of the public or any person using the building. In the case of Lot 31 the stop work order required the owners to show cause why the framework of the house should not be demolished.
- 20 The danger referred to in the stop work notices included concerns in regard to a kindergarten next door. The day before the stop work notice was served there were high winds and, according to Mr Komba, he was unable to work on the second storeys of the houses and had to secure the loose material. The evidence is clear that, after the Builders left the site, the structures were found to be defectively built and insufficiently braced. I am satisfied from Mr Goddard's evidence that the structures were dangerous.

Termination

- 21 By a letter dated 25 August 2009 from the Owners' solicitors, the owners of Lot 31 purported to summarily terminate the contract in regard to that Lot.

The letter refers to the issue of the stop work notice, asserts that the Builders are not financially able to proceed with the construction and then states in the penultimate paragraph:

“In the circumstances we are instructed and hereby give you NOTICE, that the contract entered into between our clients and Bora Homes for the construction of the dwelling on Lot 31 Abbin Court Rowville is hereby terminated”.

- 22 Identical letters were written in regard to the other two matters purporting to terminate those contracts also.
- 23 Each of these letters was sent to the Builders by registered mail but was returned, although the address on the registered mail receipt was correct. This occurrence is consistent with the evidence of Mr Goddard, who said that he had great difficulty in contacting the Builders who, he said, did not answer their telephone. The sole means of contact he appeared to have had with them was by email.
- 24 The ground relied upon by the Owners to support the terminations was that the Builders had, by their conduct, repudiated the contract in each case.
- 25 In order to establish their claim that any of the contracts was repudiated the Owners must establish, in regard to the relevant contract, that the Builders had by their conduct evinced an intention no longer to be bound by it. If a builder shows that he is only willing to carry out the contract as or when it suits him, that might amount to a repudiation and a party committing numerous breaches, none in itself sufficiently serious to be regarded as amounting to a repudiation, might nonetheless as a whole be regarded as having repudiated the contract (see *Brooking on Building Contracts* 4th edition para. 12.6).
- 26 In each of the present cases the breaches relied upon relate to the state of the work and the apparent inability, or at least unwillingness, of the Builders to construct the houses in accordance with the respective contracts and to the satisfaction of the relevant Building Surveyor.

The nature and extent of the defects

- 27 On 9 October the site was inspected by the Building Commission. Subsequently arrangements were made for the Builders to collect their tools. A dispute concerning some bricks which the supplier attempted to recover from the site is not relevant to what I have to decide.
- 28 The three houses were inspected by a Mr John LoBartolo, a registered building practitioner, although not a building surveyor, on 15 September 2009. His report which was exhibited to the witness statement of Mr Surendran lists numerous defects with the frame, including walls out of plumb, lack of noggings, improper bracing, deteriorated building elements and a wall out of position. He estimated a total cost of \$33,950 to rectify the defective work.

- 29 The evidence as to defects of Mr Goddard, Mr Schake, Mr Surendran and the report of Mr LoBartolo are accompanied by many photographs supporting their evidence as to the very poor quality of the work. They also show that, even though none of the frames had been passed and notwithstanding all the defects that had been pointed out to them, the Builders had proceeded to put roofs on and bricks had been delivered to the site. This demonstrates that they were pressing on with construction notwithstanding the state of what they had already done and the fact that it had not been approved.
- 30 Mr Goddard said in the course of his evidence that he was told by Mr Komba that he was unable to obtain workmen for the site and so had to do the work himself which is why the work was proceeding so slowly. That is a matter of concern because Mr Komba has no building qualification which might explain the very poor quality of the work. What that evidence demonstrates is that the Builders were intending to proceed with the construction in this way which is not what the contracts required.

The injunction

- 31 On 9 December 2009 this tribunal granted an injunction in proceeding in D882/2009 restraining the Builders from entering upon Lot 29 or taking possession of any goods or chattels on or from that address until the final hearing of this matter. They were also restrained from taking possession of the premises or otherwise interfering with the quiet possession of the applicants in that proceeding.

Was each of the contracts repudiated?

- 32 In order to justify the termination of any of the contracts on the ground of repudiation, which is what was done in this case, it is necessary for the innocent party to prove that the Builders were evincing an intention no longer to be bound by the contract. It is not necessary to show that they refused to carry out the construction. It is sufficient if it is clear that they were insisting upon carrying out the construction in a manner quite inconsistent with their obligations under the contract.
- 33 In this case it is quite clear in each case that, had the contract not been determined, the Builders would have proceeded with construction in the way they had been, which was to ignore the directions the building surveyor had given, and proceed with further stages of construction notwithstanding that the frames were severely defective and that none of had been passed. In the process of doing that, they would have been covering up their defective work. Had they been allowed to continue in this way the end result would have been that the Owners in each case would have received a severely defective and structurally unsound house for which they could not have obtained a certificate of occupancy.
- 34 I think that is sufficient to amount to a repudiation of the contract in each case. Mr Komba does not have any building qualification or training and it

is clear that he was the one who was not only in charge of the site but also the only one who, towards the end, was carrying out any work on it.

Damages

- 35 The evidence of damages is most unsatisfactory, partly because the work had still not been fully rectified by the time of the hearing.
- 36 The frames have been largely pulled down on Lots 30 and 31 and extensive rectification work had to be done on the frame for Lot 29. In effect, the Owners have had to contract with another builder to construct the houses and have lost the benefit of much of what they have paid to the Builders, save for the slabs and what could be used by the replacement builder.
- 37 Mr Gordon invited me to award the amount of the frame payment and deposit in each case, since the contracts were not completed by the Builders and the frames in Lots 30 and 31 that were paid for have had to be largely demolished. I do not believe that I should adopt such a broad brush approach.
- 38 According to the evidence of Mr Surendran the Owners have entered into fresh contracts for completion of the three houses with his company, Instep Designer Homes Pty Ltd as follows:

Lot 29	\$238,150.00
Lot 30	\$219,230.00
Lot 31	\$231,330.00

- 39 In addition to those sums the following rectification work was paid for by the Owners:

For all three Lots

Site clean	\$ 5,280.00
Fence removal	\$ 495.00
Removal of weeds and builder's debris	\$ 220.00 <u>\$5,995.00</u>

For Lot 29

Replace floor	\$ 5,064.90
Rectification works	\$ 6,380.00
One third of common costs as above	\$ 1,999.00 <u>\$13,443.90</u>

For Lot 30

Structural report, Tile removal & flooring	\$ 9,494.98
Remove trusses and frames	\$24,750.00
One third of common costs as above	\$ 1,998.00 <u>\$36,242.98</u>

For Lot 31

Tile removal & flooring	\$ 8,655.02
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Remove trusses and frames	\$23,950.00	
One third of common costs as above	\$ 1,998.00	<u>\$34,603.02</u>

40 On the basis of these figures, damages are fixed as follows:

Lot 29

Cost of completion	\$238,150.00	
Rectification cost	\$ 13,443.90	
Deposit paid to Builders	\$ 16,500.00	
Base stage payment made	<u>\$ 66,000.00</u>	
Total incurred in rectification & completion	\$334,093.90	
Less contract price	<u>\$330,000.00</u>	
Damages suffered		<u>\$ 4,093.90</u>

Lot 30

Cost of completion	\$219,230.00	
Rectification cost	\$ 36,242.98	
Deposit paid to Builders	\$ 16,750.00	
Base stage payment made	\$ 67,000.00	
Frame stage payment made	<u>\$ 47,250.00</u>	
Total incurred in rectification & completion	\$386,472.98	
Less contract price	<u>\$335,000.00</u>	
Damages suffered		<u>\$ 51,472.98</u>

Lot 31

Cost of completion	\$231,330.00	
Rectification cost	\$ 34,603.02	
Deposit paid to Builders	\$ 16,750.00	
Base stage payment made	\$ 67,000.00	
Frame stage payment made	<u>\$ 47,250.00</u>	
Total incurred in rectification & completion	\$396,933.02	
Less contract price	<u>\$335,000.00</u>	
Damages suffered		<u>\$ 61,933.02</u>

The claim for liquidated damages

41 The building contract provided for construction to be completed within 335 days. Construction commenced on 24 December 2008. As a result, at the time of termination, the Builders still had 3 months to finish the construction. Since the frames had not been approved, it would seem that they were behind schedule but I cannot find that it would have been impossible to complete within time.

Counterclaim

42 The Builders' counterclaim was based upon the assertion that the termination of each contract was unlawful. Since I have found that the contract in each case was terminated in the manner described the counterclaim fails in each case and will be dismissed.

Orders to be made

There will be an order in proceeding D881/2009 that the Respondents pay to the Applicants \$51,472.98. There will be an order in proceeding D882/2009 that the Respondents pay to the Applicants \$4,093.90. There will be an order in proceeding D883/2009 that the Respondents pay to the Applicants \$61,933.02. In each case, costs will be reserved.

SENIOR MEMBER R. WALKER