VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D12/2010

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building – house and land package – foundation information not obtained by Builder – s.30(7) - claim for variation for extra for slab not allowed – claim for fixing stage – stage not reached – s.40(2) claim illegal – failure to make payment of claim not a breach

APPLICANT	Amery Homes Pty Ltd (ACN 007 185 408)
RESPONDENTS	Suzanne Gray and Steven Kenneth Roberts
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	11 October 2010
DATE OF ORDER	1 November 2010
CITATION	Amery Homes Pty Ltd v Gray & Anor (Domestic Building) [2010] VCAT 1810

ORDER

1. The Applicant's claim is dismissed.

2. Order the Applicant to pay to the Respondents $ 3,035.50.

3. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr R.A. Fink of Counsel
For the Respondent	Mr R. G. Squirrell of Counsel

REASONS

Background

1 The Applicant ("the Builder") is a builder. Its director, Mr Amery is and was at all material times a registered builder. The Builder's sales representative is a Miss Ellen Shambrook. Miss Shambrook works on a commission basis and does not act as agent for any other builder.

2 This case concerns a house and land package purchased by the Respondents, Miss Gray and Mr Roberts ("the Owners") through the agency of Miss Shambrook.

3 The total price for the land together with the house to be constructed upon it ("the House") was $261,300. Of that sum $140,000 was paid to the then owner of the land, Mr Watts, who is a building supervisor employed by the Builder and who later supervised the construction of the House. The balance of $121,300 was the contract price set out in a domestic building contract ("the Contract") entered into between the Owners and the Builder.

4 Construction of the House proceeded almost to the fixing stage with payments progressively made by the Owners in accordance with the Contract. There was then a falling out between the parties because the Builder demanded payment for the fixing stage. The Owners contended that the fixing stage had not been reached and refused to make the payment. There was also dispute over some variations; in particular, a claim for an additional $5,500 for the slab.

5 The Builder thereupon ceased work and, after some months, the Owners purported to determine the contract by service of a notice of default followed by a Notice of Termination.

These proceedings

6 These proceedings were issued by the Builder on 7 January 2010 seeking a declaration that the Owners' Notice of Termination was invalid and of no effect, damages of $46,246.66, interest and costs. The Owners have defended the proceedings and counterclaimed for the cost of having the House completed by another Builder.

7 The matter came before me for hearing on 11 October 2010 with 7 days allocated. Mr Fink of Counsel appeared for the Builder and Mr Squirrell of Counsel appeared for the Owners. For the Builder, I heard evidence from Mr Amery and Miss Shambrook. The Owners gave evidence and also called a building expert, Mr Croucher who had provided two expert's reports. They also called a Mr Filippone, the builder who had finished construction of the House.

8 The hearing was completed within the 5 days allocated and I had the benefit of Counsels' submissions which I found helpful.

The witnesses

9 Mr Amery did not seem to have a good recollection of events and was further handicapped by the fact that he had never visited the site or taken any active part in the construction of the House. The construction was supervised by Mr Watts who was not called to give evidence. In terms of the Contract, the critical discussions and negotiations took place between Miss Gray and Miss Shambrook.

10 I was not impressed by Miss Shambrook as a witness. Her file relating to the crucial early dealings between herself and the Owners was not produced until the hearing and there was no adequate explanation for that. Miss Shambrook is authorised to sign letters and other documents on behalf of the Builder and even calculates prices and costs variations on its behalf. She has extensive authority to represent the Builder and there should have been no doubt on the Builder's part that documents on this file were discoverable.

11 The authenticity of a number of documents on the file that Miss Shambrook produced was challenged by Mr Squirrell. In particular, a document that she claimed was a letter dated 31 October 2007 does not have the appearance of a letter and bears little resemblance to other letters that she wrote on the Builder's behalf. It contains a reference to lever door handles which were not agreed upon until much later than the date the document bears. The Owners deny that they ever received it. I am not satisfied that it was ever sent to them.

12 Miss Shambrook also admitted to having sent a variation document to the Owners dated 28 May 2008 claiming variations of $9,088 together with GST of $908.80. She attached two separate notes to the claim, one of which was in the following terms:

> "Ps if you pay Ron <u>CASH</u> you will save ($908.80) GST !!"

13 When asked about this in cross examination she said that Miss Gray asked if she could pay cash. I found this evidence unconvincing. I prefer the evidence of Miss Gray and find that this was an attempt by Miss Shambrook to elicit a cash payment for the Builder. That must affect her credit.

14 In contrast, I found Miss Gray to be a credible witness who supported her account with telephone records and other evidence and was not shaken in cross examination. In any conflict between her evidence and that of Mr Amery or Miss Shambrook I prefer her evidence.

15 Mr Roberts frankly admitted that he had very little knowledge of the dealings having left it all to his wife, Miss Gray. I now turn to the particular issues.

The Claim for a "P Class Slab"

16 According to the specifications the Builder was to supply an "Engineer designed concrete raft slab on level, unfilled ground, design and construction to AS2870.1"

17 According to Miss Gray, on 18 April 2008, the Owners received by post a variation dated 26 February 2008 claiming variations totalling $9,064.80. The major items claimed were as follows:

"Site investigation (soil test report attached) Mitford Engineering – site has been classified as Class P due to existing fill and requires heavier steel extra internal concrete beams. Machinery hire, materials and labour included:	$3,500.00
Site requires cut and fill to provide level building area. The price includes machinery hire, extra concrete for deeper edge beams and labour	$1,500.00"

Ten per cent GST was also claimed on these items as well as on all other items in the variation.

18 Miss Gray rang Mr Amery and was told by him that there was nothing to worry about and that this was "quite normal practice". Later, following advice from a friend, Miss Gray telephoned the engineer who had provided the report, a Miss Holland. She then rang Mr Amery back and queried the variation. Miss Gray ascertained from the Municipal Building Surveyor that all other blocks in the street that had not been classified by Holland Mitford Engineering had been classified as "M" sites. Miss Gray contacted Miss Shambrook to request detailed costs regarding the $5,500.00. She then obtained advice from the BACV and from a solicitor in Mornington. The Owners never paid the $5,500.00.

19 Miss Shambrook said that she warned Miss Gray at the beginning of their negotiations that the site might be a Class "P" site and that there might be an extra $5,000 to $6,000.00 to pay for the slab. She produced her file which contains the alleged letter dated 31 October 2007 with the handwritten note "posted" on it. As previously stated, I am not satisfied that this is a genuine document.

20 Miss Shambrook said that Miss Gray asked that the extra site costs not be included in the Contract because she was not sure that her bank would agree to fund this extra payment. She said that she was to pay it separately. It seems unlikely that, if the bank were willing to lend $121,300.00 for the construction of the House it would not be willing to increase that to $126,800.00 to pay for the extra cost for the slab. Moreover:

(a) on Miss Gray's evidence she did not have $5,500.00 at the time. She said that her savings were "in the hundreds";

(b) the Builder did not seek payment of the $5,500.00 immediately after the slab was laid as one would expect if there had been an agreement to pay it separately. Instead the Builder sought to proceed as if the extra were a variation to the Contract.

Miss Gray denies that this alleged conversation took place and I am not satisfied that it did.

21 Miss Shambrook has also produced a document that she claimed was a variation to the Contract she had prepared. It is dated 28 January 2008. In this document the works described are:

> "Site investigation Mitford Engineering. Site has been classified as Class P due to filling and includes …. $5,000
>
> Total: $5,000.00
>
> Plus GST: $ 500.00
>
> Total owing: $5,500.00

22 This document was not discovered. It surfaced during the hearing. The evidence of Mr Amery was that there were three variations. If this document were really a variation there would have been four variations. The Owners deny ever having received it and I do not believe that it was ever sent to them.

23 As to the merits of the claim for a variation, the photographs tendered show a relatively flat site. The levels appearing on a survey of the land show a fall of approximately 350mm over the building envelope. According to Mr Croucher it was possible that in constructing the slab an extra beam was added but there was no evidence as to how the slab had been constructed. According to Mr Croucher, the mere fact that is was designed by an engineer, does not mean that it was not an "M" Class slab. In his report he says:

> "Amery Homes have built a considerable number of homes in Kathleen Crescent and would be aware of expected soil conditions and site classifications.
>
> It would appear the slab is a conventional M-Class slab with (perhaps) an additional internal beam.
>
> An additional internal beam would cost the Builder approximately $250.00 for 1 metre of concrete and some additional re-enforcement.
>
> I cannot find justification for the charge of $5,000.00 – in total for excavation and "upgrading" the slab."

24 There was no evidence given by the person who poured the slab but it was admitted on behalf of the Owners that it was poured in accordance with the design. There is insufficient evidence for me to be satisfied that, if the Builder did incur any additional cost in regard to this very slight fall in the land, it was as much as $5,000.00.

25 In any event, the Owners rely upon s30(7) of the *Domestic Building Contracts Act* 1995 ("the Act") which provides as follows:

> "After entering into a major domestic building contract, a builder cannot seek from the building owner an amount of money not already provided for in the contract if the additional amount could reasonably have been ascertained had the builder obtained all the foundations data required by this section."

26 It transpired that there was an earlier soil report in existence that had been obtained by Mr Watts. Mr Amery admitted that he was aware of it but said that he did not have a copy of it in his possession at the time the Contract was entered into. His evidence on this point is somewhat vague. If he were aware of the soil

report it seems unlikely that he would not have known what it said. In any event, the Builder had constructed a number of houses in that street and it was the Builder that arranged for the land to be sold to the Owners. All of the houses classified by that engineer in that street had the same classification. The only justification asserted by the Builder for the extra charge was the fall of the land over the building envelope but the Builder was aware of that at the time the Contract was entered into. It is therefore not open to the Builder to make any claim for any extra payment with respect to the slab.

27 For all of these reasons the claim with respect to the slab fails.

The claim for the fixing stage

28 The Contract provided for progress payments to be made to the Builder in accordance with the table set out in the Contract which mirrored the table in s.42(2) of the Act. However there was a further Clause 3.5 in the Contract as follows:

> "Should completion of a progress stage be prevented or delayed by any matter, cause or thing beyond the control of the builder, the builder shall at the time of the prevention or delay be entitled to submit a progress claim based on a fair and reasonable estimate of the value of the building work completed and materials actually used and/or delivered to the building site, since completion of the progress stage, the subject of the previous claim (if any) and such claim shall be dealt with as though it were a progress claim made in accordance with the terms of this building contract".

29 On 13 November 2008 the Owners received a copy of a progress claim for the "fix out" stage, for $30,325.00. At this time the skirting to the family and meals area was not provided, the vanity units and basins were not on site, the kitchen cabinets and sinks were not on site, the garage floor had not been laid and the roller door to the garage been installed.

30 According to the definition on page 25 of the Contract,

> "Fixing stage means the stage when all internal cladding, architraves, skirting, doors, built in shelves, baths, basins, troughs, sinks, cabinets and cupboards of the home are fitted and fixed into position".

This is similar to the definition to be found in s.40(1) of the Act.

31 It was not argued, sensibly, that the House had reached the fixing stage. Instead, reliance was placed on Clause 3.5 of the Contract and on Mr Amery's evidence that, although the cabinet work and other items had not been completed, the value of the painting that had been done exceeded the work necessary to bring the House to the fixing stage. He said that because some of the variations which had not been finalised concerned the kitchen cabinetry and vanities the Builder could not install those items until the variations were signed.

32 If the Builder were entitled to rely on Clause 3.5, it would be necessary for evidence to be led as to a fair and reasonable estimate of the value of the building work completed and the materials actually used and delivered since completion of the previous stage, which was the lock up stage. No such evidence has been

led. Indeed, Mr Croucher's evidence is that, in order to bring the work to the fixing stage would cost $12,669.00. The evidence as to the value of the painting was very imprecise.

33 However the more substantial objection to the progress claim was s.40(2) of the Act which provides:

> "(2) A builder must not demand or recover or retain under a major domestic building contract of a type listed in column 1 of the Table more than the percentage of the contract price listed in column 2 at the completion of a stage referred to in column 3.
>
> Penalty: 50 penalty units. "

The section then sets out a Table of maximum percentages. For a contract to build all stages, the percentages are 10% Base stage, 15% Frame stage, 35% Lock-up stage and 25% Fixing stage.

34 Mr Fink submitted that the consequence of the Builder demanding payment for the fixing stage before completion of that stage contrary to s.40(2) is the imposition of the stated penalty but the value of the claim was not otherwise affected.. He relied upon s133 of the Act which provides:

> "A failure by a Builder to comply with any requirement in this Act in relation to a domestic building contract does not make the contract illegal, void or unenforceable unless the contrary intention appears in this Act".

35 He referred me to a number of authorities concerning illegality in support of his submission. It is unnecessary to set these out. The principles are well established.

36 I accept Mr Fink's submissions as to the principles to be applied in regard to whether and to what extent illegality vitiates or affects a contract but I do not think that the principles stated in the cases to which he has referred me apply to the present case.

37 Section 40(2) specifically states that the Builder must not do the very thing that the Builder did in this case, which was to demand payment of the fixing stage before that stage had been completed. Since the Builder was not entitled to make the demand it must follow that the demand it made was unlawful. Since the demand was unlawful the Owners cannot be said to be in breach of the Contract for having failed to comply with it.

The alleged suspension by the Builder

38. Mr Amery says that, on 20 December 2008, he sent to the Owners a Notice of Suspension. He produced a document during the hearing which he said was a copy of that Notice. The document specifies the breach as being:

> "failure to make progress payment as per clause 3.15 of the building contract dated 7-11-2008 by the due date".

39. Mr Squirrell submitted that I should find that this document is a fabrication since:

(a) the evidence of Miss Gray was that no such document had been received;

(b) it was not referred to in later correspondence from the Builder's solicitor.

40. I am not satisfied that this document was ever sent to the Owners. Further, even if the Builder had purported to suspend work it was not entitled to do so. The ground relied upon in the alleged Notice was the failure to pay the progress claim. Since the Builder was not entitled to claim it, the failure of the Owners to pay it was not a breach of the Contract. The Owners not being in breach, the Builder had no cause to suspend the work.

41. In any case, I accept the Owners' evidence that they never received the notice.

Termination

42. The provisions of the Contract in regard to termination by the Owners are contained in Clause 9. They are poorly drafted and quite confusing. They deal with two distinct bases of termination, one in Clause 9.2, which deals with termination under s.41 of the Act, and the rest of Clause 9, which deals with termination by reason of default of the Builder. If one recognises this distinction then confusion is avoided, as are the strange consequences referred to by Mr Squirrell in his final submissions. Termination in this case was sought to be justified by reason of the Builder's default and so the provisions of Clause 9.2 must be ignored.

43. Clause 9.1.8 of the Contract provides that, if the Builder's default should continue for five business days after notice in writing specifying the same and stating the Owners' intent to terminate the Builder's employment has been given, then the Owners may, without prejudice to their other rights determine the Builder's employment by notice.

44. By Notice of Default dated 2 April 2009 sent to the Builder by the Owners' solicitors, the Owners gave notice to the Builder to complete the work within 5 days, withdraw the claimed variation in regard to the slab and withdraw the claim for the fixing stage. At this stage, no work had been done on the House since September 2008 save for the fitting of a garage door in January 2009.

45. In response to this notice the Builder's solicitors wrote a letter denying the Builder was in breach. There is no mention in this letter that the work had been suspended by the Builder. Nothing further was done by the Builder and the default continued thereafter until 25 May 2009 when a further notice terminating the Contract was served.

46. I accept that the Builder was in breach of the Contract in that it ceased work without due cause in November 2008 because the Owners would not pay its claim for the Fixing Stage, a claim which it was not entitled to make. I do not believe that it suspended work as Mr Amery claimed. Even if it had done so it was not entitled to. By the time the Notice of Default was served by the Owners on 2 April 2009, all that it had done was fit the garage door and that was only done to avoid the supplier having to store the door at its premises.

47. The consequences of such termination are dealt with in Clause 9.3. The Owners were entitled by that Clause to engage another Builder to carry out the building work and, if the reasonable cost of doing so should exceed what would have been

payable to the Builder, then the excess is a debt due and payable to the Owners by the Builder.

The state of the House at termination

48. The House was inspected by Mr Croucher of Buildspect on 8 April 2009. In his first report he said that he found that the House had not reached fixing stage in nine respects. His expert evidence was not contradicted and it is not, sensibly, argued that the House was at fixing stage, either when the fixing stage payment was claimed or when the Builder left the site. Mr Croucher costed the work required to bring the House to fixing stage at $12,669.00.

49. Also in his first report, Mr Croucher listed eight items of defective work. Again, there was no contrary expert evidence and so I accept that these were defects for which the Builder is responsible. He said that he assessed the cost of rectifying these at $2,420.00.

The engagement of another Builder

50. After terminating the Contract, the Owners engaged another Builder who finished the work and rectified the defects. Evidence as to the cost actually incurred by the Owners in this regard was given by the builder who took over the project, Mr Fillipone. A supplementary report was also provided by Mr Croucher.

51. Mr Fillpone provided a quotation for the completion and rectification work amounting to $58,800.00. Mr Croucher considered Mr Fillipone's charges to be fair and reasonable but queried whether some of the items of work charged for were within the Builder's scope of works under the Contract. The Owners acknowledged that additional works were included in the figure and would need to be removed.

Items disallowed or reduced from Mr Fillipone's charges

52. I accept Mr Croucher's evidence that the charge of $600 for the glass splashback. should be disallowed and an amount of $66 substituted, that being the likely cost to install tiles as per the Contract. In regard to the concrete paving I do not agree with Mr Squirrell that this was within the scope of works. I share Mr Croucher's view about this item and accept that the reference in the Specifications to paving to the garage refers to the garage floor, not to a driveway. It is clear the parties did not intend to include a driveway in the scope of works. The amount of $5,280 will therefore be disallowed.

53. Other items not within the scope of works were the garage door remote and the light fittings of $650. The Specifications required wiring to the light points but there was no provision for light fitting s in the Schedule of Fittings. I accept that bayonet fittings could have been provided by the Builder.

54. I accept Mr Fillipone's evidence that an appropriate adjustment can be made for the more expensive timber floor as compared with the carpet allowed for in the Contract by deleting the labour component of $600.00. I also accept his evidence

that the clothes line and letter box figure should be reduced by $200. These reductions bring the reduction to $13,984.00, calculated as follows:

Glass splashback	$ 534.00
Remote for garage	$ 700.00
Labour for floor	$ 600.00
Decking and pergolas	$ 4,070.00
Fencing	$ 1,600.00
Brick pier	$ 350.00
Clothesline	$ 200.00
Driveway	$ 5,280.00
Light fittings	$ 650.00
Total	$13,984.00

Extra claims by the Owners

55. The Owners claim the following further amounts:

(a) Purchase of appliances

The refrigerator and washer and drier were excluded from the Contract but other appliances to be installed are set out in the Schedule in the Specifications. These were not supplied and the Owners had to purchase them themselves t a cost of $1,100.00.

(b) Legal costs before action.

As a result of the Builder's claims in regard to the extra for the slab the Owners had to seek legal advice on two occasions at a cost of $572.00. The amounts paid have been proven. These are not costs in the usual sense because they do not relate to this proceeding. They are expenses to which the Owners have been put by the Builder demanding a payment to which it was not entitled under the Contract. However it was not a term of the Contract that, if the Builder made unjustifiable demands and the Owners sought legal advice the Builder would pay for that advice. It was also not a term of the Contract that the Builder would make no claim for moneys to which it was not entitled. The demand might be unjustified but the mere making of it is not in itself a breach of contract. There is also no cause of action known to the law of making unjustifiable claims. I have considerable sympathy for the Owners in regard to this claim. They were wise to have sought the advice and should not have been required by the conduct of the Builder to do so but the claim must nevertheless fail because there is no legal basis for it. There may be cases where, in a similar situation, an argument could be constructed under the *Fair Trading Act 1999* but it was not put on that basis nor was there evidence in this case to establish such a claim.

(c) Mr Croucher's fees

Mr Croucher's fees are in a different category. He was engaged at a time when the Builder was in breach of the Contract. His advice was required on the critical issues of whether the works had reached the fixing stage and the existence or otherwise of defects. That advice was needed in consequence of the Builder's breach of the Contract. No proceedings had been issued. The amount claimed of $2,209.00 will be allowed.

The variations

56. In its Points of Claim the Builder claims variations totalling $2,395.00. The claim for the extra for the slab was not argued to be a variation but was said to be the subject of a separate agreement. However the claim is put, it fails for the reasons given.

57. As to the other variations claimed, the Owners acknowledged that they would have signed the variations if the claim for the slab had been deleted and so I think I should proceed on the basis that the scope of works was extended to take in these extra items. Mr Squirrell said that it would be uneconomical to argue over $2,395.00 worth of variations and so there was little argument about the amounts claimed, except for those that he submitted had not been supplied. The evidence of that was highly unsatisfactory and it seems likely that, in his charges to rectify and complete the work, Mr Fillipone has charged to do these things. I will therefore allow the amount claimed.

The figures

58. In accordance with Clause 9.3 of the Contract, the appropriate adjustment is as follows:

Contract price (incl GST)				121,300.00
Add	variations	2,395.00		
	GST	239.50		2,634.50
Contract price with variations				123,934.50
Less payments made				78,845.00
Balance of contract sum				45,089.50
Paid to Mr Fillipone			58,800.00	
Less deductions as above			13,984.00	
			44,816.00	
Cost of appliances			1,100.00	
Reasonable cost to rectify and complete			45,916.00	
Add:	Mr Croucher's fees		2,209.00	48,125.00
Balance due to Owners				$ 3,035.50

Orders to be made

59. The Builder's claim will be dismissed because any entitlement of the Builder to payment is taken up in the above calculation. There will be an order on the Counterclaim that the Builder pay to the Owners $3,035.50. Costs will be reserved for further argument.

Rohan Walker

Senior Member