

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP2109/2019

### CATCHWORDS

Domestic Building – application for an injunction requiring the respondent owners to pay the applicant builder’s final claim plus interest – in reality an application for summary judgement — certificate of conciliation issued by Domestic Building Disputes Resolution Victoria required for the matter to proceed in the Tribunal – ss44, 53 and 56 of the *Domestic Building Contracts Act 1995*.

<b>APPLICANT</b>	Angele Homes Pty Ltd (ACN 125 159 275)
<b>RESPONDENTS</b>	Pauline and Pamela Barbara
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Deputy President C Aird
<b>HEARING TYPE</b>	Injunction Hearing
<b>DATE OF HEARING</b>	14 November 2019
<b>DATE OF ORDER</b>	20 November 2019
<b>CITATION</b>	Angele Homes Pty Ltd v Barbara (Building and Property) [2019] VCAT 1825

### ORDERS

1. The application for an injunction requiring the respondents to pay the applicant’s Final Claim is dismissed.
2. The proceeding is stayed until a certificate of conciliation issued by Domestic Building Disputes Resolution Victoria is lodged.
3. If a certificate of conciliation is not lodged by 16 December 2019 the proceeding will be struck out with a right of reinstatement upon a certificate of conciliation being lodged.
4. Liberty to apply.

5. Costs reserved with liberty to apply. **I direct the principal registrar to refer any applications for costs to Deputy President Aird so that orders may be made for the filing of submissions so that it may be determined in chambers, unless a party requests it be listed for hearing.**

**DEPUTY PRESIDENT C AIRD**

**APPEARANCES:**

For Applicant	Mr J Gray, Solicitor
For Respondents	Mr N Bazy, Solicitor

## REASONS

- 1 The applicant builder ('the Builder') lodged an application for an injunction dated 1 November 2019 by email on 6 November 2019 (the first application lodged on 1 November 2019 was blank) seeking an order pursuant to s53(2)(ba) of the *Domestic Building Contracts Act 1995* ('the DBCA') for final payment. In the application form the Builder sets out the following reasons for seeking an urgent injunction hearing:

The owners have taken possession of the houses, and the works are completed, but the owners are refusing to pay the builder the final claim of \$97,000.

Because the owners are refusing to make the final payment the builder is now at risk of financial collapse and cannot enter new building contracts.

- 2 The Builder relies on an affidavit by its director, Najeeb Sulaqa, sworn 29 October 2019. The Owners oppose the application, contending that it is no more than an application for summary judgement. Further, they contend the works are not yet complete. The Owners rely on an affidavit by Pamela Louise Barbara, the second respondent, sworn 14 November 2019. Mr Gray, solicitor appeared on behalf the Builder, and Mr Bazy, solicitor, appeared on behalf of the Owners.
- 3 For the Reasons which follow I am not satisfied that the application can be properly described as an application in the nature of an injunction, and accordingly a certificate of conciliation issued by Domestic Building Disputes Resolution Victoria ('DBDRV') is required by s56 of the DBCA for the application to proceed in the Tribunal.

## BACKGROUND

- 4 In 11 November 2016 the Owners, who are sisters, entered into a building contract with the Builder for the construction of two townhouses in Airport West. The building period in Schedule 1, Item 1 of the Contract was 559 calendar days from commencement of the works. The Building Permit is dated 5 April 2017<sup>1</sup> and the Occupancy Permit is dated 25 March 2019.
- 5 The Builder contends the works were completed on 29 March 2019, apart from the final landscaping and installation of the hot water services which Mr Sulaqa states the Owners agreed would be installed on the day they moved into the townhouses. The final claim of \$87,708.59 was provided to the Owners on 29 March 2019, and the Builder contends payment was due on 12 April 2019.
- 6 The Owners arranged for their expert to inspect the townhouses and their expert report by Mr Johnson of BSS Group was provided to the Builder on

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<sup>1</sup> Exhibit NS2 to the affidavit of Najeeb Sulaqa dated 29 October 2019.

or about 31 May 2019.<sup>2</sup> Mr Johnson identified 98 items of defective and incomplete works: 52 in unit 1 and 46 in unit 2. During the following months the Builder returned to site and carried out various works.

- 7 On 27 August 2019 the Owners provided the Builder with a further BSS report dated 19 August 2019, together with a Notice to Remedy Breaches referring to the contents of that report. In the report Mr Johnson makes the following comment:

In the following list, where lined through, the building defects have been rectified satisfactorily. Otherwise the rectification has not been attempted, or the result is unsatisfactory.

Of the 34 defects initially identified in unit 1, Mr Johnson reports that 10 have been rectified and identifies a new defect: 'gutter to first floor roof holding water'. Of the 29 defects initially identified in unit 2, he reports that 8 items have been rectified and identifies a new defect: 'downpipe at south-west corner scratched'. Of the 18 items of incomplete works initially identified in unit 1, Mr Johnson reports that 8 have been completed. Of the 17 items of incomplete works initially identified in unit 2, he reports that 8 have been completed. In relation to both units he notes that the roof is 'now scratched'.

- 8 The Builder asserts that it, together with some of its sub-contractors, attended to rectification of all defects and alleged defects between 28 August and 8 September 2019. On 8 September 2019 the Builder sent the Owners a schedule of works it says it had completed except for the landscaping and the installation of the HWS, and some items which it contends are minor. The Owners take issue with the Builder's position.
- 9 Ms Barbara states at paragraph 15 of her affidavit that having given the Builder many chances to rectify she had *lost all faith and instructed Mr Bazy to terminate the Building Contract*.
- 10 On 11 September 2019 the Owners served a Notice of Termination on the Builder and took possession of the units by changing the locks. The Builder contends that in taking possession and excluding the Builder from site the owners were in breach of the contract at the time they purported to terminate the contract (I make no finding about this as it is not relevant to the issue before me). The Owners subsequently moved into the units in early October.
- 11 Mr Johnson carried out a further inspection of the units on 26 September 2019 and has indicated to the Owners' solicitors that his report, which will include estimates of the cost of rectification and completion, should be available by 2 December 2019.

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<sup>2</sup> In the report, Mr Johnson refers to the townhouses as unit 1 and unit 2, and I will adopt that description.

## THE BUILDER'S POSITION

- 12 The Builder relies on a report from its plumber, Summit Roof Plumbing, dated 5 September 2019 and from Caleb Karvountzis of Inspectvic which is undated, although it refers to an inspection carried out on 30 September 2019. Mr Karvountzis identifies a number of outstanding items which he describes as being minor. Unfortunately, he does not use the same numbering as Mr Johnson used, and the report is not directly responsive to Mr Johnson's two reports, so it is difficult to reconcile them.
- 13 The Builder contends that its claim for an order for payment under s53(2)(ba) of the DBCA is an application in the nature of an injunction. Surprisingly, Mr Gray submitted that any order for payment would be in the nature of an interlocutory order as the rights of the Owners to bring any claims concerning alleged defects and incomplete works would not be affected.
- 14 The Builder says that its financial position is precarious and that as a result of the failure of the Owners to make the final payment it is unable to enter into other building contracts. I note that no evidence supporting this assertion is provided.

## THE FINAL CLAIM

- 15 The final claim, Tax Invoice No 10719 for \$87,708.59 includes:

Progress claim for Completion Stage (I understand this to be the balance of the contract price)	\$61,926.70
Variation VO219 – Rain water tank relocation (although it is not clear from the invoice whether this is a signed variation)	\$2,010
Owners' delays (although it is not clear how these are calculated. I note that Item 12 in Schedule 1 to the Contract specifies \$250 per unit per week for delay damages or \$500 per week). In paragraph 6 of his affidavit Mr Sulaqa states:  The work progress was delayed due to the owners delays in specifying kitchen cabinetry, electrical layout, staircase design, tiling type and layout, windows type, stone benchtop selection among others. Another delay was due to a requirement to get council's approval to a change in the stormwater and lift the slab height, due to a conflict between the finished floor levels in the plans and a re-establishment survey, this caused a 4 months delay. Another delay was caused by the gas supply company delaying the gas meter installation hence connection by 49 days, due to the owners request to have the gas meters installed at the front boundary.  On my calculations (and I make no finding that the works were delayed by this period or that the Builder is entitled to any delay damages) this means that the works were allegedly delayed by 24.381 weeks (4 months being 17.381 weeks plus	\$16,250

49 days or 7 weeks) which at \$500 per week equals delay damages of \$12,200 not \$16,250 as claimed by the builder. It may be that there are further periods of alleged delay which have not been referred to by Mr Salaqa in his affidavit.	
Interest applied to Invoice 13198 to due non-payment. (sic) Although there is a schedule setting out interest calculations on a daily basis commencing on 26 November 2019 on an amount of \$3,872 there are no details about what that payment is for, or a supporting invoice in relation to it. As noted during the hearing it is puzzling that there is an invoice with a much higher invoice number which predates the final payment claim invoice.	\$4,141,88
Unit 1 bathroom mixer (onsite) relocation (it is not clear whether this is a variation or how this charge is made)	\$5885
Various electricity charges – although these are supported by invoices from Energy Australia it is not clear how reimbursement for these invoices is being sought from the owners (the total of charges is included here by way of summary rather than listing each one individually).	\$738.03
City Water West – PIC application fees/charges (it is not clear how this is being claimed from the Owners and a copy of the invoice is not included).	\$457.25
Carpentry (onsite) changes to Unit 1 Ensuite (it is not clear whether this is a variation, and if so, whether it is supported by a signed variation, or otherwise how the claim is made).	\$200
VicRoads – Crossover application (\$614.30 + GST) – it is not clear how this is being sought from the Owners and a copy of the invoice is not included.	\$2,010

## Discussion

- 16 Not only are details of some of the charges unclear, including the basis upon which the Builder claims reimbursement or payment, copies of the supporting invoices are only provided in relation to the claim for reimbursement of the electricity charges.
- 17 Although the final payment claim is for \$87,708.59, in its application the Builder seeks an injunction requiring the Owners to pay it \$97,000. Mr Gray indicated at the hearing that the extra amount was for interest, although he was unable to provide the calculations. He conceded, however, that it was possible that the Builder had calculated interest on the final payment claim of \$87,708.59 which would mean it was claiming interest on interest, having regard to the interest claim which was included.

## THE OWNERS' POSITION

- 18 Following receipt of the Builder's application for an injunction, the Owners' solicitor sent the Builder's solicitor an 8 page letter dated 11 November 2019 setting out the history of the dispute. The Owners' position in relation to this application is clearly set out at page 7 of that letter:

The Builder's application for an injunction is, in truth, a claim for summary judgement of a money claim for the completion payment, other changes and delay damages, noting that the amount of the completion payment under the contract is \$61,926.70. On any view the claim is premature and arguable. The Owners maintain their reliance on section 42 of the [DBC] Act and clause 44 of the Contract and in particular their desire to reconcile the unpaid balance once they have had the opportunity to obtain Mr Johnson's further advice on the matter.

I also submit that the Builder's claim for the completion payment should not have been commenced in VCAT before the Builder obtained a certificate under s. 56 of the [DBC] Act.

Even if the application by the Builder could be categorised as an application in the nature of an injunction, the balance of convenience would not favour the grant of an injunction. Given the financial condition of the Builder set out in the builder's affidavit and its intention to use the proceeds of the injunctive relief on other projects which it could not have otherwise commenced, the undertaking as to damages in support of the injunction would be insufficient to protect the Owners' position.

The Builder was then invited to withdraw its application for an injunction.

- 19 When no response was received to a request on 12 November for an urgent response to the letter of 11 November, the Owners' solicitor sent a follow up letter on 13 November requesting, in the event the injunction application was not withdrawn, an adjournment of the hearing pending the finalisation of Mr Johnson's report. No meaningful response was received to this request.

## IS THIS AN APPLICATION FOR AN INJUNCTION?

- 20 As noted above, the Builder relies on s53(2)(ba) of the DBCA in seeking the order for payment. However, s53(2)(ba) cannot be read in isolation of s53(1). Section 53 relevantly provides:

### **53 Settlement of building disputes**

- (1) VCAT may make any order it considers fair to resolve a domestic building dispute.
- (2) Without limiting this power, VCAT may do one or more of the following –

...

(ba) order the payment of a sum of money representing a part payment under a major domestic building contract if –

- (i) the requirement in paragraph (b) of section 42 has been met but the requirement in paragraph (a) of that section has not; and
- (ii) VCAT is satisfied that the work required to complete the contract (including rectifying any defects) is minor in nature and not such as would prevent the owner from occupation and quiet enjoyment of the building.

21 Section 42 provides:

**42 When work is considered to have been completed**

A builder must not demand final payment under a major domestic building contract until –

- (a) the work carried out under the contract has been completed in accordance with the plans and specifications set out in the contract; and
- (b) the building owner is given either –
  - (i) a copy of the occupancy permit...

22 The Owners acknowledge that they have received a copy of the occupancy permits for the two units.

23 I am not persuaded that this application seeks an order in the nature of an injunction. I agree with the Owners that the Builder is, in effect, seeking summary judgement for its final payment claim.

24 During the hearing Mr Gray indicated that any injunction ordered would be interlocutory in nature as it would not affect the parties' rights to make further claims under the Building Contract or in respect of the Works. I disagree. In a building case, an interim or interlocutory injunction will generally only be ordered when it is absolutely necessary to preserve the status quo, or to otherwise protect a person's interests which are at risk of being severely prejudiced; for instance (and this list is not exhaustive):

- to restrain an owner from calling on a bank guarantee provided by a builder to guarantee its performance under a building contract;
- to secure the amount of a bank guarantee where it has been called on by an Owner, (where the builder contends it should not have been called upon), usually by ordering that the amount of the guarantee be deposited in a trust account or similar;
- to stop a builder continuing with works when an owner seeks an opportunity to inspect alleged defective work;



- to compel a builder to provide certificates to a building surveyor in order to issue an Occupancy Permit.
- 25 Moreover, even if I were satisfied that this application was in the nature of an injunction, I could not be satisfied on the evidence before me that there is a serious question to be tried such that the Builder should have the benefit of an immediate order for payment of its Final Claim.
- 26 The parties are in dispute about the nature and extent of the incomplete and defective works, and the Owners are awaiting a further report, including cost estimates, from their expert. On the evidence before me, I cannot be satisfied that any outstanding works are minor in nature, as alleged by the Builder. Having regard to the Tribunal's obligations under ss97 and 98 of the *Victorian Civil and Administrative Tribunal Act 1998* I could not be satisfied that it would be fair to make an order under s53(2)(ba) of the DBCA.
- 27 First, there is a clear dispute between the parties as to the status of the Works. The nature and extent of the incomplete and defective works, and the cost of rectification and completion cannot be determined until all of the expert evidence is available and the expert evidence tested under cross-examination.
- 28 Further, I cannot be satisfied, on the material before me, that the amount claimed by the Builder, is owed to it. I note, for instance, that the Owners contend that the completion of the Works was significantly delayed. Although no claim has yet been made by them for liquidated damages, clause 40 of the Building Contract provides that the Owners are entitled to agreed damages if the Works are not completed within the Building Period. Further, clause 40.1 provides that the Owners may deduct the amount of any such damages from the final payment.
- 29 Nor, for the reasons set out above, can I be satisfied, from the material before me, as to the calculations of the Builder's claim for final payment.
- 30 In any event, the balance of convenience would not favour the making of the order, in circumstances where the Owners have foreshadowed a counterclaim for the cost of rectification and completion works, and possibly liquidated damages. Until they receive their further expert report, they say they will be unable to finally reconcile the Builder's final claim. This is reinforced by the Builder's stated parlous financial position.

## **CONCLUSION**

- 31 Accordingly, the Builder's application for an injunction must be dismissed. However, as it is clear that the application is, in reality, for payment of its final claim, I consider it appropriate to stay the proceeding to enable the Builder to obtain a certificate of conciliation from DBDRV as required by s56 of the DBCA.

32 I will also reserve the question of costs.

**DEPUTY PRESIDENT C AIRD**