

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D1139/2013

CATCHWORDS

Domestic Building – plans – inconsistent engineering plans prepared after contract – contract plans to be adhered to unless a variation

APPLICANT	Mr Vince Bilotto
RESPONDENT	Barrett Property Group western region Pty Ltd (ACN: 099 375 630)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Small Claim Hearing
DATE OF HEARING	16 January 2014
DATE OF ORDER	22 January 2014
CITATION	Bilotto v Barrett Property Group Western Region Pty Ltd (Domestic Building) [2014] VCAT 304

ORDER

- 1 Order the Respondent to demolish the retaining wall on the western boundary of the subject land at 37 Queens Gardens, Bundoora 3083, and rebuild it an even distance of 150mm from the title boundary so as to be vertical.
- 2 The work is to be done in a proper and workmanlike manner using good and sufficient materials and is to be completed within 90 days.
- 3 Liberty to apply for further orders or directions in regard to implementing this order

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant

Mr V. Bilotto in person

For the Respondent

Mr T. O'Neill and Mr J. Huddart in person

REASONS

Background

1. The Applicant (“the Owner”) is the owner of a house in Bundoora that was constructed for him by the Respondent (“the Builder”) pursuant to a building contract (“the Contract”). It was completed in approximately September 2012.
2. A dispute has arisen between the Owner and the Builder concerning the manner of construction of a retaining wall which he claims is not in accordance with the Contract. He wants the Builder to demolish and rebuild the wall. The Builder is not willing to do so and so the Owner has issued this proceeding.
3. The dispute came before me for hearing on 16 January 2013. The Owner appeared in person and the Builder was represented by its Manager Mr O’Neill and its employee, Mr Huddart.
4. As well as the evidence of those present the Owner relied upon an expert’s report prepared by a Mr Alan Green, an architect from Archicentre.

What the Contract required

5. Site works required a cut and fill and the construction of a retaining wall along part of the western boundary. The architectural plans included the following notation relative to this wall (*see Sheet 2 of 15*):
 - “Retaining walls to be constructed 150mm off titled boundary to the back of rails
 - Provide sleeper retaining wall to FSL (approx. 1200mm high max) to engineer’s details”.
6. Another sheet of the architectural plans, Sheet 6, depicts this retaining wall extending vertically from the actual ground level up to the proposed filled level.
7. Despite the reference to “engineer’s details” in Sheet 2 of the architectural plans, it does not appear that any engineering detail relevant to the construction of this wall was in existence at the time the Contract was signed.

The form of contract

8. The form of contract used contains provision for there to be inserted the documents that form part of the Contract, most of which have been completed. As well as the contract document there are said to be fifteen pages of architectural drawings and specifications.
9. The provision in part of the form for details of engineering drawings to be inserted has been left blank. As a consequence, there are no engineering drawings that form part of the Contract. Quite obviously, if the retaining wall and the house itself were to be constructed, engineering drawings

would have to be prepared but, unless the Contract was varied, they would have to be in accordance with the Contract.

10. The engineering design of the wall that was subsequently prepared provided for the wall to be constructed, not vertically as the architectural plans required, but at an angle of five degrees from the vertical. There was no variation of the Contract to allow for the retaining wall to be constructed in this way.

The defects alleged

11. Because the retaining wall is not vertical, it leans away from the western boundary. Following construction of the house the subdivider built a fence along the boundary. There is a substantial gap between the top of the retaining wall and the internal face of the fence.
12. According to the expert report of the architect, Mr Green, there is a gap between the top of the wall and the bottom of the fence of approximately 200mm. He says the back of the rails is 300mm from the boundary line, not 150mm as provided for in the contract drawing.
13. Mr Green said that the gap is wider than that allowed for balustrades of stair treads over 1,000mm above the ground and it is considered dangerous, especially for children. In addition, he says that the lean of the wall reduces the useable land along the west side of the house, looks unsightly and creates privacy and security problems along the boundary with adjoining owners. He says the gap is wide enough to allow a small child or family pet to fall through and it is also a serious tripping hazard. He recommended that the retaining wall be removed and a new wall constructed as provided for in the plan.
14. There are two criticisms of the retaining wall in his report. The first is that the back of the rail of the retaining wall is more than 150mm from the boundary and the second is that the wall is not vertical.

The distance from the boundary

15. The first issue turns partly on the meaning of the words “150mm of titled boundary to the back of rails”. It was agreed that the word “rails” refers to the sleepers from which the wall is constructed. These are inserted into metal uprights 150mm wide which in turn are set into concrete pads in the ground 450mm wide.
16. According to both Mr O’Neill and Mr Huddart, the term “back of rails” refers to the face of the rail closest to the fence whereas Mr Green’s interpretation and, initially, mine, was that it refers to the face of the rail that is furthest from the fence.
17. I suggested to both Mr O’Neill and Mr Huddart that if one started at the boundary line and proceeded towards the house, the usual meaning of the word “back” would refer to the far side of the rail with the soil against it as Mr Green stated. Mr Huddart said that it depended upon which side of the

retaining wall one was standing. From the house side, he said it would be the side closest to the fence.

18. Both Mr O'Neill and Mr Huddart explained that the reason the Contract required the wall to be built this distance away from the boundary was to enable the Builder to construct the concrete pad into which the steel supports were to be founded without encroaching on the neighbouring property. Since the pad was to be 450mm wide and the steel supports 150 deep, that would allow 150mm of concrete on either side, accounting for the difference referred to in the plan.
19. Despite my earlier disposition to favour Mr Green's interpretation I think the wording on the architectural plans is ambiguous and that, for the reason stated by Mr O'Neill and Mr Huddart, it was intended to refer to the fence side of the rail and I so find.

The wall is not vertical

20. The other aspect was the five degree inward lean on the wall. The plans clearly show that the wall is to be built upright. Further, although I have accepted that the 150mm refers to the fence side of the rail, the whole of the retaining wall has not been constructed that distance from the boundary.
21. Mr Huddart said that the back of the rail was only to be that distance from the fence at ground level. That is not what the plans provide. The plans do not say that it is only to be the back of part of the bottom row of rails that is to be 150mm from the boundary. It is the wall itself that is to be constructed in that way. That is, the wall, not just a very small part of the wall.
22. Moreover, the wall is depicted as being vertical on Sheet 6 of 15 and that is how it should have been built. Mr Huddart said that the sheet in question was only indicative but there is nothing on the document to indicate that.

The engineering design

23. I accept that the wall has been constructed as it was designed in the engineering drawings that were prepared after the Contract was entered into. As I said to Mr O'Neill and Mr Huddart, if the detail in question had been part of the Contract that would have been conclusive but it was not part of the Contract. Although it was implicit that the Builder would be preparing engineering drawings to show how the structural issues in the construction were to be dealt with, those drawings had to be consistent with the Contract. It was not open to the Builder to change the design after the Contract had been entered into without a variation of the Contract permitting the alteration. It was not suggested that there had been such a variation.
24. That being so, to construct the retaining wall in the manner in which the Builder has constructed it was a breach of the Contract and the Owner is entitled to have it constructed the way the contract provided.

Order to be made

25. There will be an order that the Builder demolish the retaining wall on the western boundary and rebuild it an even distance of 150mm from the title boundary so as to be vertical. The work is to be done in a proper and workmanlike manner and to be completed within 90 days.

SENIOR MEMBER R. WALKER