

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D124/2010

CATCHWORDS

Application for injunction – relevant principles – whether a serious issue to be tried – balance of convenience - whether specific performance of contract should be ordered

APPLICANTS	Gregory Blaszczyk, Nicole Blaszczyk (nee Thomson)
RESPONDENT	Dawn to Dusk Building Services Pty Ltd
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Hearing
DATE OF HEARING	5 March 2010
DATE OF ORDER	5 March 2010
CITATION	Blaszczyk v Dawn to Dusk Building Services Pty Ltd (Domestic Building) [2010] VCAT 249

ORDER

1. By 4.00 p.m. on 10 March 2010 the respondent must deliver to the Relevant Building Surveyor the information and certificates identified in the letter from Westside Building Surveying (Vic) Pty Ltd dated 18 November 2009 and which are required to obtain an Occupancy Permit.
2. The applicants' application for injunctive relief and/or specific performance is otherwise dismissed.
3. **The proceeding is referred to a directions hearing before Deputy President Aird on 25 March 2010 at 9.30 a.m. at 55 King Street Melbourne at which time directions will be made its further conduct.**
4. The applicants have liberty to amend their claim, and directions for the filing of Points of Claim will made at the directions hearing.
5. Liberty to apply including liberty to the parties to apply by consent for the proceeding to be referred to a compulsory conference to be conducted by Senior Member Levine.
6. Costs reserved.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For Applicants

Ms P Neskovicin of Counsel

For Respondent

Mr A Beck-Godoy of Counsel

REASONS

- 1 On 15 February 2008 the applicant owners entered into a contract with the respondent builder for the construction of a new home on land they own in Sunbury. The contract price was \$590,000. At the time, and until recently, the first named owner Mr Blaszczyk and Mr Smoult of the builder were best friends. As recently as eight months ago, Mr Smoult was best man at the owners' wedding.
- 2 Under the contract the works should have been completed by Christmas 2008. On 13 November 2009 Mr Blaszczyk attended the site with the relevant building surveyor who carried out the requisite inspection for the issuing of an occupancy permit. I do not know if Mr Smoult attended the inspection. Mr Blaszczyk says that he understood from the building surveyor that no further works were required to enable the issuing of the occupancy permit.
- 3 On 18 November 2009 the building surveyor wrote to the builder setting out the documents and certificates he required before issuing the occupancy permit. Although the builder apparently has all of the necessary certificates he has not provided them to the building surveyor.
- 4 The builder is yet to render a final account and under clause 36 of the contract cannot do so until the occupancy permit has been issued. To date the owners say they have paid \$631,000 of which, they say, they have paid \$101,691.52 direct to suppliers.
- 5 After an exchange of correspondence between the solicitors for the parties over the past couple of months, the owners lodged an application on 25 February 2010 seeking the following orders:
 1. That the respondent deliver to the applicants and/or the building surveyor the information and certificates identified in the letter from Westside Building Surveying (Vic) Pty Ltd dated 18 November 2009 and which are required to obtain a Certificate of Occupancy.
 2. That the applicants are entitled to immediate access to and possession of the property located at [the property address]
 3. That the respondent deliver to the applicants keys to all locks at the premises and replace locks which are currently jammed with broken keys within 24 hours or such longer period as the Tribunal considers appropriate; and
 4. That the respondents re-instate the security system so that it can be used by the applicants.
- 6 The application was accompanied by an Application for Orders/Directions seeking effectively the same orders as the application, and an affidavit in

support sworn by Mr Blaszczyk on 24 February 2010. On 26 February 2010 the tribunal received a facsimile from the owners' solicitors confirming their clients were seeking urgent relief.

- 7 The application was treated administratively by the tribunal as an application for an injunction and listed for hearing today, which was the first available date. The owners were represented by Ms Neskovcin of Counsel and the builder was represented by Mr Beck-Godoy of Counsel.

Jurisdiction

- 8 At the commencement of the hearing counsel for the builder submitted the tribunal did not have jurisdiction to consider the application for an injunction in the absence of an application which otherwise invoked the original jurisdiction of the tribunal. He relied on the commentary to s123 of the *Victorian Civil and Administrative Tribunal Act 1998* in *Pizers, Annotated VCAT Act, 3rd edition* and in particular, as I understood him, to the observations by the Court of Appeal in *Herald & Weekly Times Pty Ltd v Victoria* [2006] VSCA 146 at [127] as summarised by the learned author that:

- first, the section confers a power on the VCAT to grant injunctions only in matters in which it has original jurisdiction;
- second, the section does not enlarge the VCAT's jurisdiction, but operates in aid of whatever jurisdiction the VCAT already has.

- 9 I ruled that the tribunal has jurisdiction and indicated I would provide short written reasons for that ruling, which are convenient to include here. There are two statutes which are relevant here: the *Domestic Building Contracts Act 1995* ('the DBC Act') and the *Fair Trading Act 1999* ('the FTA'). The tribunal's jurisdiction under the DBCA is found in s53. Section 53(1) provides that '*the Tribunal can make any order it considers fair to resolve a domestic building dispute*'. The tribunal's powers are set out in ss53(2). I am satisfied this application concerns a domestic building dispute as defined in s54. This definition is very wide and includes 'any dispute' '*in relation to a domestic building contract or the carrying out of domestic building work*'. Section 58 empowers the tribunal to '*make any order to resolve a domestic building dispute even though the domestic building contract under which the dispute arose is still in operation*' as is the case here.

- 10 Further, I am satisfied this is a 'consumer and trader dispute' as defined in s107 of the FTA and that the tribunal has power to make an order for specific performance under s108.

Should an injunction/specific performance be ordered

- 11 Care must always be taken in ordering a permanent injunction because of the finality of the order. In considering any application for an injunction the tribunal must first be satisfied whether there is a serious question to be

tried, and secondly whether the relief sought should be granted having regard to the balance of convenience.

- 12 This was recently considered in *Brady Constructions Pty Ltd v Everest Project Developments Pty Ltd* [2009] VSC 622 where Osborn J said at [2]

The Tribunal correctly stated the applicable legal principles by reference to the decision of the Court of Appeal in the case of *Bradto Pty Ltd v State of Victoria*

It was agreed, I think, that the relevant test I should apply is that set out in *Bradto Pty Ltd v State of Victoria*. In the first place, I must be satisfied there is a “serious question to be tried”. As to that test the Court of Appeal in that case said this:

Whether there is a “serious question to be tried” requires a judgment to be made, for the purpose of which the court or tribunal will examine both the legal foundations of the claim(s) made in the proceeding and such of the evidence in support as is exposed on the interlocutory application. Unless upon such examination the court concludes that the applicant’s claims are not reasonably arguable, that is, they do not have “any real prospect of succeeding”, then the court will ordinarily be satisfied that there is a serious question to be tried.

I must then be satisfied that the “balance of convenience” lies in favour of the grant of the injunction. However, the Court in *Bradto* reformulated this test as follows:

In our view, the flexibility and adaptability of the remedy of injunction as an instrument of justice will be best served by the adoption of the Hoffmann approach. That is, whether the relief sought is prohibitory or mandatory, the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong”, in the sense of granting an injunction to a party who fails to establish his right at the trial, or in failing to grant an injunction to a party who succeeds at trial. [emphasis added]

- 13 I am unable to identify a single serious question to be tried such that the owners should have the benefit of an immediate order for possession. It is apparent from the correspondence passing between the parties’ solicitors, as exhibited to Mr Blaszczyk’s affidavit filed in support of the owners’ application, that there are a number of issues in dispute between the parties, not least of which, as indicated by counsel for the builder, is a claim by the builder for payment of at least \$80,000. I understand the builder is waiting on advice of a quantity surveyor to settle the amount it claims it is owed. Issues about delay in the progress and completion of the works have been raised by both parties, and at this stage it is unclear whether the owners have any claims for alleged defective and incomplete works.
- 14 Although it is asserted by counsel for the owners that they are not in breach of their contractual obligations under the contract, this is a finding I am unable to make on the limited evidence before me.

- 15 With one exception, it seems to me that this application is premature. Whilst I can understand the owners' frustration that they are unable to move into their new home, they have certain contractual rights which they are yet to exercise.
- 16 Similarly, s108(2)(f) of the FTA enables the tribunal to make an order for specific performance of a contract. The only 'outstanding obligation' of the builder under the contract is its failure to provide the relevant documents and certificates to the building surveyor to facilitate the issuing of the occupancy permit. In his affidavit Mr Smoult states that the primary issue between the parties is the amount owed to the builder for additional work and variations. Clause 36 of the contract contemplates that the builder will issue a Notice of Completion and Final Claim when it considers the works have reached completion, but that it must not do so until an occupancy permit has been issued. Counsel for the builder conceded from the bar table that the works are substantially complete although some hardware is still to be installed. However, the builder has failed to do all things necessary to facilitate the issuing of the occupancy permit.
- 17 There is no contractual obligation for the builder to deliver up possession of the site before it is paid in full (clause 38). The parties both agree that the final claim has not been made, and although the owners might have paid more than the contract price this is not evidence of overpayment, and does not give rise to an entitlement to recovery of possession.
- 18 It is important that, other than in exceptional circumstances which I am not persuaded apply here, parties exhaust their contractual rights before commencing proceedings. When I raised this with counsel for the owners she suggested that if the owners exercised their contractual rights they might be exposed to an allegation that they had repudiated the contract. The concerns the owners have about exercising their rights under the contract reinforces my view that it would be inappropriate to make the orders sought, with the one exception referred to above.
- 19 Even if I were satisfied there was a serious question to be tried such that would warrant the granting of immediate possession, I would not make that order on the balance of convenience. This project has seemingly suffered significant delays. Completion was due under the contract around Christmas 2008. The reasons for the additional time taken to complete the works, and the responsibility for any delays are matters to be determined at another time. Although the owners have been living apart since they were married which they say this is because of the delays in the completion of their new home, about which I make no finding, any damage they might have suffered or may continue to suffer is compensable by damages.
- 20 I will therefore order the builder deliver the requisite documents and certificates to the relevant building surveyor.
- 21 After delivering my decision counsel for the builder made an application for costs. Counsel for the owners submitted the appropriate order was that

costs be reserved because they should be costs in the cause, but that if the builder was applying for costs then the owners would also apply for their costs. Having regard to the matters set out in s109(3) of the VCAT Act, and the merits of the substantive issues between the parties having still to be determined, I am not persuaded there should be an order for costs and will reserve them.

DEPUTY PRESIDENT C. AIRD