VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP1723/2015

CATCHWORDS

Domestic building – delay claim - scope of works – Contract plans showing balcony – planning permit requiring balcony to be deleted – Builder constructing building with the balcony in accordance with Contract drawings – council requiring balcony to be removed – Developer electing to try and amend permit to retain balcony – application for amendment of permit unsuccessful - delay – responsibility of Builder for delay between contractual completion date and attempt by Developer to amend permit – thereafter delay caused by Developer – liquidated damages for delay stated to be "Nil" – open to Developer to prove actual damage – interest on development loan for period of Builder's responsibility – how interest calculated – entitlement to variation asserted by Builder – variation accepted and payment made – whether payment voluntary and not recoverable

APPLICANT	Bros Eastern Developments Pty Ltd (ACN 164 707 126)
RESPONDENT	Van San Constructions Pty Ltd (ACN 104 934 732)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	11 October 2016 and 2 June 2017
DATE OF ORDER	9 August 2017
CITATION	Bros Eastern Developments Pty Ltd v Van San Constructions Pty Ltd (Building and Property) [2017] VCAT 1232

ORDERS

1. Order the Respondent to pay the Applicant $7,914.75.
2. Costs are reserved, save that, if no application by either party is made for the costs of the proceeding within 21 days of the date of this order there will be no order as to costs.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr P. Sutcliffe, Director
For the Respondent	Mr C. Twidale of Counsel

REASONS

Background

1. The applicant ("the Developer") was the owner and developer of four residential units in Noble Park ("the Units"). The respondent ("the Builder") is the builder that constructed the Units pursuant to a major domestic building contract ("the Contract"). Its director is a Mr Sutharsan, who is a registered builder.

2. The Developer claims $90,000 from the Builder, part of which is damages for alleged breach of the Contract and part is by way of restitution of money that is claimed to have been paid by the Developer under compulsion.

The hearing

3. The matter came before me for hearing on 11 October 2016 with one day allocated. The Developer was represented by its two directors, Mr Sutcliffe and Mr Reaks and also by Mrs Sutcliffe. The Builder was represented by Mr Twidale of Counsel.

4. The time allocated was insufficient and the hearing was adjourned part heard. The date allocated was changed a number of times to suit the convenience of the parties and the matter eventually came back before me for hearing on 2 June 2017 with one further day allocated.

5. At the resumed hearing I was informed that there had been a falling out between the directors of the Developer. Mr Sutcliffe contended that Mr Reaks was no longer a director.

6. Mr Sutcliffe's cross examination was concluded by Mr Twidale and I then heard the evidence of Mr Reaks, who was called on behalf of the Builder. After that, I heard from the director of the Builder, Mr Sutharsan, and the project engineer for the project, Mr Chandrakumara. The resumed hearing took up the whole day.

7. On conclusion of the evidence I gave directions for the filing and service of written submissions and informed the parties that after considering their submissions I would provide a written decision.

The witnesses

8. I thought that Mr Sutcliffe was a less than satisfactory witness. He appeared to have a poor recollection of events and on many occasions did not give a direct answer to the question put to him. I thought that Mr Reaks was a more responsive witness, although the scope of his evidence was limited. Mr Sutharsan did not seem to have any direct knowledge of the relevant events. Mr Chandrakumara, the project engineer who had overall responsibility for the construction, was rather vague about a number of matters but I thought that he was a credible witness.

The issue

9. The claims made by the Developer are as follows:

   (a) damages for delay, including liquidated damages;

   (b) a refund of an amount of $3,300.00 that was paid to the Builder by the Developer for the construction of a crossover from the street to the driveway;

   (c) a refund of a further amount of $3,300.00 that was paid to the Builder by the Developer for making an application to the Council to have the planning permit amended in order to permit the retention of a balcony ("the Balcony") that had been constructed on the second storey of the front unit facing the street.

The Balcony

10. A key issue in the case was the construction of the Balcony. The site upon which the Units were constructed had been purchased by the Developer together with a planning permit for the Units. The plans that were submitted with the permit application showed a balcony at the front of Unit one, but it was a condition of the planning permit that was subsequently granted that this balcony be deleted.

11. Both the architectural and the engineering plans that were provided to the Builder and upon which it quoted, showed the Balcony. These plans subsequently became the Contract drawings and they were the plans upon which the building permit was issued by the relevant building surveyor.

12. The Builder's quotation contained a list of the documents upon which the quotation was based. That list included a copy of the planning permit. I asked Mr Sutharsan why he did not query the presence of the Balcony on the Contract drawings if he had a copy of the planning permit. He said that the planning permit might have since been amended by deleting the condition but, from his evidence, I think it likely that neither he nor Mr Chandrakumara noticed the condition in the permit or turned their minds to the possibility that the building permit drawings and the planning permit were not consistent.

The Architect

13. The plans for the development had been drawn by an architect ("the Architect") who had been engaged by the vendor that sold the site to the Developer. It does not appear that, following the purchase, the Developer then engaged the Architect to continue as architect for the project or do anything further.

14. By an email dated 2 April 2014, Mr Chandrakumara informed the Architect that he was "still waiting" for the updated working drawings. The Architect

replied shortly afterwards, saying: "I sent these yesterday as discussed". The plans that he sent included the Balcony, although on each page of the plans there is a stamped message saying "PRELIMINARY UNTIL BUILDING PERMIT IS ISSUED".

15. In a later email from the Architect following the discovery of the problem with the Balcony, the Architect suggested that the relevant building surveyor should never have issued a building permit based upon preliminary drawings. Quite obviously, part of the duty of a building surveyor is to ensure that the proposed construction conforms to the requirements of any planning permit but neither the Architect nor the relevant building surveyor are parties to this proceeding and it is undesirable that I should say anything concerning their involvement in what occurred.

The Developer's knowledge of the Balcony

16. Mr Sutcliffe denied any knowledge of the construction of the Balcony until April 2015. He agreed that he inspected the construction with Mr Reaks during the frame stage but he said that, although the wall leading onto the Balcony might have been framed out for a double door he said that it could equally have been framing for a window.

17. Mr Reaks said that that was not the case. He said that, when he and Mr Sutcliffe inspected the Units at frame stage and the double doorway leading onto the Balcony, he commented to Mr Sutcliffe that the Balcony area had already been tiled. Mr Sutcliffe said that he could recall no such conversation.

18. I prefer the evidence of Mr Reaks. Mr Sutharsan also said that the Balcony was clearly seen from the street and looking at the plans, it seems to me that it should have been obvious to Mr Sutcliffe that there was a balcony there from frame stage.

19. A document was tendered on behalf of the Builder setting out various colour selections that were made before the start of construction. Mr Sutcliffe acknowledged that the signature on this document appeared to be his but said that he could not recall making the selections that were recorded on it.

20. In particular, he was referred to page 5 where a selection was made for the balustrading of the Balcony. Some alterations appear on this page but Mr Sutcliffe denied that the handwriting was his. The employee of the Builder who was present when the colour selection document was signed was not called. Consequently, although I accept that the document was signed by Mr Sutcliffe I cannot find that he made the alterations on page 5 because he has sworn that he did not do so and there is no contrary sworn evidence.

Attempt to amend the permit

21. Thereafter attempts were made to amend the permit to allow the Balcony to be retained. To this end, an application needed to be made to the Council's planning department. At the Developer's request, the Architect obtained a quotation from a town planner for that work but this quotation was rejected by Mr Sutcliffe as being too expensive. It was then agreed that the Developer would pay the Builder $3,300.00 to make the application. The Developer did so but, after several months, it was finally rejected by the Council.

22. Shortly after the rejection of the application to amend the permit the Builder removed the balustrading and substituted a window for the double doors and the development was then completed.

23. The Developer now blames the Builder for the delay in completing the Units, including the delay occasioned by the construction of the Balcony. Mr Sutcliffe said that he had been assured by Mr Sutharsan that he had a friend at the Council who would obtain the permission for them. That was denied by Mr Sutharsan and I regard him as being a more reliable witness than Mr Sutcliffe.

24. Mr Reaks said that he did not remember ever being told by Mr Sutcliffe that the Builder had built a Balcony that should not have been built.

25. I am satisfied that Mr Sutcliffe was always aware that the Balcony was to be constructed and that when an objection to it was taken by the council his concern was, not that the Builder had built something that should not have been built but rather, to keep what had been built. Consequently, I do not believe that any delay caused by the subsequent attempt to amend the planning permit is the fault of the Builder. It built the Units in accordance with the building permit drawings and with the knowledge of the Developer.

The claim for delay

26. The Contract provided that the building period was 280 days from the commencement of work. According to the Developer, work commenced on 17 May 2014 and so the construction ought to have been completed by 18 February 2015. On my calculation, the completion date ought to have been 20 February 2015.

27. It was not disputed by the Builder that the occupancy permits for the four Units were not finally obtained until 17 December 2015. However it was claimed that:

    (a) it was entitled to extensions of time for variations requested by the Developer and for various other causes in accordance with Clause 15.1 of the Contract;

    (b) the Contract provided that there were to be no liquidated damages payable by the Builder to the Developer in the event of delay; and

(c) the work would have been completed by April 2015 but for the fact that the Developer was anxious to retain the Balcony.

28. As to the first of these, the procedure for seeking an extension of time under the Contract is provided for in the clause referred to. In essence, the Builder was required, within a reasonable time, to advise the Developer of the cause and reasonable estimated length of the delay and if the Developer then did not notify the Builder in writing that it rejected or disputed the cause of the delay within a 14 day period, the completion date under the Contract would be automatically extended. The Builder did not suggest that it had followed this procedure. Further, apart from the general assertion that it was delayed by variations requested by the Developer, there is no detailed evidence of these variations upon which I could make any finding to that effect.

29. As to the second, the Builder was required by the terms of the Contract to complete the work within the time specified and failure to do so was a breach of contract. The mere fact that the Contract made no provision for payment of liquidated damages does not prevent the Developer from proving actual loss.

30. As to the third, although the Builder cannot be blamed for a delay that results from the Developer's own actions, the problem with the Balcony was not noticed until April 2015 and the Units had still not been completed at that time.

31. It is open to the Developer to prove actual loss for the period between 20 February 2015, when the work should have been completed, and the date on which the Units would have been completed if the Developer had not elected to attempt to have the planning permit amended.

32. The damages sought in the Points of Claim are the interest payments made by the Developer for the period in question which are said to be $45,145.74. Mr Sutcliffe also argued that I should allow $42,000.00 as liquidated damages, which he said was $250 per week per unit. He said that these should be allowed in addition to the claim for general damages.

33. The claim for liquidated damages is clearly misconceived as there was no provision in the Contract for payment of liquidated damages by the Builder. If there had been, I could not also allow unliquidated damages because the whole idea of specifying a figure for liquidated damages is to quantify in advance the loss the owner will suffer by reason of any delay which, in effect, puts a ceiling on what can be claimed.

Unliquidated damages

34. The Developer's claim is for the interest that it paid on its bank loan between the contractual completion date and the date upon which it received possession of the Units from the Builder.

35. The Builder maintains that the construction would have been completed in April 2015 if the problem with the balcony had not been discovered. The

evidence, which I accept, is that a meeting took place between the parties on 28 April 2015 during which Mr Sutcliffe told the Builder that he would speak to the Architect and try to get approval for the Balcony. The Developer subsequently decided to engage the Builder to try and obtain the necessary approval.

36. The Developer provided a list of interest payments that it made on the debit balance of its bank account between 5 March 2015 and 19 January 2016. The two payments made during the period in question were $3,575.50 on 5 March 2015 and $4,501.85 on 8 April. The precise periods with respect to which these amounts of interest were paid is not clear from the accompanying bank statements. However throughout the whole of the period the debit balance of the account was a constant $675,454.55 and the interest rates varied from 7.315% to 7.390%. At these rates, the interest that was incurred on the principal sum for the relevant period was therefore $7,914.75, calculated as follows:

Period	**No. of days**	**Rate**	**Interest**
Up to 5 March 2015	7	7.315%	$946.93
6 March to 8 April 2015	33	7.155%	$4,369.45
9 April to 28 April 2015	19	7.390%	$2,598.37
Total			$7,914.75

37 The Units were subsequently sold for a price far in excess of the amount of the debit balance of the account. Consequently, insofar as the delay in discharging this debt to the bank was caused by the Builder's breach of Contract, it is reasonable to find that the Developer suffered a loss by reason of the Builder's breach equivalent to the interest that it paid for that period. There is no evidence of any other loss.

Payment for the crossover

38. There was a crossover shown in the Contract drawings but the Contract documents did not specify that the Builder was to construct it. I asked Mr Sutcliffe why he said that the Builder was required to construct it and he said that it was because it was shown on the drawings. Mr Sutharsan said that, although shown on the drawings, it was not on the building site and that in the absence of a specific inclusion, crossovers are generally not included.

39. The Contract documents required the Builder to construct driveways but do not mention the crossover, which is not on the subject site. It is specified to be paved with bluestone. I asked Mr Sutcliffe if he expected that the Builder would pave the crossover with bluestone and he said that he did not. It was ultimately made of plain concrete. I think that if it was the intention of the parties that such an elaborate crossover was to be included

in the scope of works then there would have been something in the Contract, the specifications or the plans to say so.

40. I asked Mr Sutcliffe why, if he considered that the Builder was obliged to construct the crossover, he agreed to pay it $3,300.00 for doing so and he said that he had no choice because the Builder threatened to cease work if the amount was not paid.

41. By s.27(2) of the Act, a building owner may still dispute any matter relating to work carried out under a domestic building contract, even though the building owner has paid the builder in relation to the work. However there is no suggestion that the cross-over was not constructed or that there was anything wrong with it. The complaint was that the Developer should not have paid for it.

42. A voluntary payment is generally not recoverable (see the analysis by Ormiston J of the relevant principles in *Hookway v. Racing Victoria Ltd* [2005] VSCA 310 at paras. 22 to 47). If a payment is made under compulsion then the element of compulsion robs the payment of its voluntary nature but "compulsion" in this sense does not include claims that are honestly made and rights that are honestly asserted.

43. In this case the alleged "compulsion" was the fear that the Builder might stop work if the variation was not accepted and the money was not paid. Even if the Builder asserted that the cross-over was not within its scope of works, asserted a right to be paid for a variation and then threatened to suspend work if its variation claim was not paid, that does not, without more, render the payment made to the Builder involuntary. The Developer had its rights under the Contract if it disagreed with the claim or if there were no valid grounds for a suspension.

44. It does not appear from the material that the claim for a variation was baseless. I am not satisfied that the payment for the cross-over was made under any compulsion. It is therefore irrecoverable

The application to amend the planning permit

45. Recovery is also claimed of the amount of $3,300.00 paid by the Developer to the Builder as well as the sum of $502.00 that the Developer paid to the Council for the permit amendment application.

46. In regard to these, Mr Sutcliffe requested the Builder to make the application after having received and rejecting a higher quotation from a town planner via the Architect. I am satisfied that the Developer requested the work and that it was carried out and there is no justification for recovering either figure back from the Builder.

Conclusion

47. The Developer has proven an entitlement to general damages for delay which I have assessed at $7,914.75. The remaining claims are not established. I have heard no submissions as to the costs of the proceeding.

Given that the Developer has been only partially successful and that it was not legally represented in this proceeding it may be that no order for costs would be justified. I will direct that, if no application by either party is made for the costs of the proceeding within 21 days of the date of this order will be no order as to costs.

SENIOR MEMBER R. WALKER