

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1489/2016

CATCHWORDS

Domestic building contract; termination of contract by the owners following abandonment of the works by the builder; damages assessed as the reasonable cost, over and above the contract price, to rectify and complete the contract works.

APPLICANTS

Mr Peng Cao

Ms Saiyu Liu

RESPONDENT

GE Builder Pty Ltd (ACN159 835 462)

WHERE HELD

Melbourne

BEFORE

Senior Member M. Farrelly

HEARING TYPE

Hearing

DATE OF HEARING

15 May 2017

DATE OF ORDER

22 May 2017

CITATION

Cao v GE Builder Pty Ltd (Building and Property) [2017] VCAT 725

ORDERS

1. The respondent must pay the applicants \$164,245.13.
2. Costs reserved with liberty to apply. I direct the Principal Registrar to list any application for costs for hearing before Senior Member Farrelly, allowing two hours.

SENIOR MEMBER M. FARRELLY

APPEARANCES:

For Applicants:

Ms S Kirton, of Counsel

For Respondent

Mr G Espinosa, director

REASONS

- 1 The applicants, Mr Cao and Ms Liu, are neighbours and friends. In October 2014 they purchased, and became co-owners of, a property in Maidstone Victoria. It was their intention to demolish the existing home on the property and construct two townhouses, one for each of them and their respective families to live in. They had plans for the development drawn by an architect and, in late 2014, they obtained quotations from builders for the proposed development.
- 2 On 10 December 2014 the applicants entered a building contract with the respondent, GE Builder Pty Ltd (**‘the builder’**), for the construction of two townhouses at the property for an agreed price of \$523,203.59 (**‘the contract’**). A 10% deposit, \$52,320.36, was paid shortly after the contract was signed.
- 3 The works commenced in April 2015.
- 4 By Christmas 2015, the applicants had made a further payment of \$52,320.36 for completion of the ‘base’ stage of the two townhouses, and the construction works were at mid-frame stage. That is, part of the timber and steel framing, including a fire rated partition wall, for the lower level of the townhouses had been constructed.
- 5 No further works were carried out by the builder.
- 6 Mr Espinosa, sole director and shareholder of the builder, says that he was very stressed in January 2016. Concerned to improve his health, in February 2016 he and his wife and three children returned to live temporarily in the Philippines. The move was intended to remove him from the various circumstances causing him stress. Mr Espinosa and his family returned to Australia in January 2017.
- 7 Mr Espinosa says that, prior to moving to the Philippines, he had discussions with the first applicant, Mr Cao, and another builder, Mr Le of ‘K1 Homes’, about K1 Homes taking over the contract in place of the builder. Mr Espinosa says that at the time he left for the Philippines he believed that arrangements were in place for K1 homes to take over the contract works at no extra cost (that is, no increase in the contract price) to the applicants. During the time he was in the Philippines, Mr Espinosa had no communications with the applicants, Mr Le or anyone else in Australia in relation to the contract and the contract works.
- 8 The applicants did not reach agreement with K1 Homes for the taking over of the contract, mainly because they were told by Mr Le that K1 Homes would require an extra \$200,000, over and above the contract price, to complete the contract works. The applicants were not prepared to pay that extra price.
- 9 The applicants tried unsuccessfully to contact the builder throughout 2016. Eventually they engaged a lawyer. By notice from the applicant’s lawyer to

the builder dated 18 October 2016, the applicants gave notice of their intention to terminate the contract if the builder did not return to recommence works within 10 days (**‘the default notice’**). After receiving no response to the default notice, the applicants terminated the contract by letter from the applicants’ lawyer to the builder dated 31 October 2016 (**‘the termination notice’**). Both the default notice and the termination notice were sent to the builder at the builder’s registered office address and the builder’s trading address as noted on the top of the front page of the contract.

- 10 In this proceeding the owners claim damages, measured as the cost over and above the contract price that they say they will incur in rectifying defects in the works carried out by the builder and in completing the contract works. Initially, when they filed their VCAT application in November 2016, the owners estimated the damages at \$206,437. Later, after the applicants had obtained a costing report from Mr Beck, a building consultant, the quantum of damages was specified as \$169,592.13. At the hearing before me, the applicants conceded that the sum claimed should be reduced to take account of the fact that the applicants have recently, in the last two weeks, had the framing works demolished at a cost lower than the cost estimated by Mr Beck.
- 11 In its defence, the builder raises, in essence, four issues.
- 12 First, Mr Espinosa says that a delay of several months on the part of the applicants in making the base stage payment contributed to his stress, which in turn contributed to his decision to cease works and move to the Philippines.
- 13 Second, Mr Espinosa says that he believed the contract works were taken over by K1 Homes, and that he only discovered that that was not the case when he returned to Australia in January 2017, at which time the contract had already been terminated and these proceedings had been issued.
- 14 Third, Mr Espinosa says that since his return to Australia, he/the builder has offered, and has remained willing and able, to complete the contract works at a reduced price. He says that he offered to complete the contract works for a price of \$300,000. He says that the applicants have unreasonably rejected the offer.
- 15 Fourth, Mr Espinosa says that the quantum of damages claimed by the applicants is excessive.

THE HEARING

- 16 The matter came for hearing before me on 15 May 2017. Ms Kirton of Counsel represented the applicants and Mr Espinosa represented the builder.
- 17 Mr Cao gave evidence for the applicants and Mr Espinosa gave evidence for the builder. I found both men to be honest witnesses.

- 18 Mr Beck gave expert evidence with reference to reports he had prepared following his inspection of the property. The reports were filed and served prior to the hearing. Mr Beck has substantial qualifications and experience as an expert building consultant, and I found him to be a helpful and reliable expert witness.
- 19 For the reasons discussed below, I find that the applicants' termination of the contract was justified, and they are entitled to damages which I assess at **\$164,245.13**.

CHRONOLOGY / EVIDENCE

- 20 There is little difference in the evidence of the applicants and the builder as to the chronology of events.
- 21 The contract was signed by the parties on or around 10 December 2014. Unlike standard form contracts such as the HIA or Master Builders standard form contracts, the contract document does not include provisions for its termination in the event of default by either party.
- 22 The contract provided for payment stages as follows:
- deposit, 10%, \$52,320.36
 - base stage, 10%, \$52,320.36
 - frame stage, 15%, \$78,480.54
 - lock-up stage, 35%, \$183,121.26
 - fixing stage, 25%, \$130,800.90
 - final, \$26,160.18
- 23 The 10% deposit, \$52,320.36, was paid by the applicants shortly after the contract was signed in December 2014.
- 24 A building permit for the works was issued by the building surveyor, Mr Short, on 20 March 2015 and works commenced in April 2015.
- 25 On 28 June 2015, the builder sent to Mr Cao an email with an attached invoice for the 10% base stage payment. The email states that the base stage was "nearing completion". Mr Espinosa says that he knew it would take a little while for the base stage payment to be arranged by the applicants, and it was for this reason that he forwarded the base stage payment claim a little before the base stage was actually completed.
- 26 Mr Espinosa says that the base stage was actually completed by around the first week of July 2015. The applicants say the base stage was not completed until near the end of July. It makes little difference.
- 27 In June 2015, the applicants first approached a bank to obtain finance for the construction project. It seems odd to me that application for finance would first be made after the contract was signed and works had

commenced. Mr Cao's evidence is that the applicants could always finance the construction, but that they decided to obtain a bank loan in June 2015.

- 28 In any event, there is no dispute that it took some while for the bank loan to be finally approved, with the result that the base stage payment, \$52,320.36, was made on 26 October 2015.
- 29 Mr Espinosa says that the delay put the builder under financial stress, particularly as the builder was already experiencing payment disputes under other unrelated building projects. Mr Espinosa says that he gave thought to terminating the contract by reason of the delay in the base stage payment, but in the end he decided to help the applicants and not terminate the contract.
- 30 As noted above, by Christmas 2015 the works were at mid-frame stage. Mr Espinosa says that he was very stressed at this time because of problems on other unrelated building projects. He says the builder was having difficulty meeting its obligation to pay trade subcontractors. He says that to meet financial commitments, assets were sold including the builder's company motor vehicle, scissor lift and some tools. He says that he and his wife's motor vehicles were also sold.
- 31 In early February 2016 Mr Espinosa told Mr Cao that the builder was unable to complete the contract works. Mr Espinosa arranged for himself and Mr Cao to meet Mr Le of K1 Homes to discuss the possibility of K1 Homes taking over the contract in place of the builder.
- 32 Mr Cao says that he met Mr Le only once in a brief meeting in Mr Le's office in Braybrook. He says that at this meeting, Mr Le advised that he would contact Mr Cao in the future with a proposal/price to take over the contract.
- 33 Mr Espinosa says that he, Mr Cao and Mr Le met several times, including meetings at the construction site. The difference in the evidence of Mr Espinosa and Mr Cao in relation to the number of meetings one or other of them, or both of them, had with Mr Le is of no real significance.
- 34 A short while after the meeting with Mr Le in his Braybrook office, Mr Espinosa and his family moved to the Philippines. Mr Espinosa says that, at that time, he believed that K1 Homes would be taking over the contract with no uplift in the contract price. His belief appears to me to have been founded on little more than inconclusive discussions he had with Mr Le, and his hope that K1 Homes would agree to take over the contract. Certainly there were no documents prepared confirming any agreement to assign or transfer the contract obligations and benefits to K1 Homes.
- 35 In any event, Mr Espinosa left for the Philippines and had no further communications with anyone in relation to the mooted 'transfer' of the contract to K1 Homes. In my view, it is clear from Mr Espinosa's evidence that in February 2016 he was primarily focused on the intended move to the

Philippines with his family to escape the significant stress he was experiencing at that time.

36 Mr Cao says that no agreement was reached with K1 Homes. He says that, approximately one week after the meeting in Mr Le's Braybrook office, Mr Le telephoned him and advised that K1 Homes would be prepared to take over the contract in place of the builder, subject to a \$200,000 increase in the contract price. The applicants did not accept the proposal. The builder does not dispute this evidence.

37 The works stood dormant throughout 2016. The applicants attempted to contact the builder and, having no success, they sought assistance from the Victorian Building Authority. After the Victorian Building Authority advised the applicants that it was unable to assist them, the applicants engaged their lawyer in early October 2016.

38 The applicants' lawyer promptly engaged Mr Beck to inspect and report on the state of the works constructed at the property.

39 As noted above, the contract document did not include provisions as to its termination in the event of default of either of the parties. Nevertheless, the applicants' lawyer considered it prudent to serve the notice of default on 18 October 2016. When there was no response to the notice of default, the applicants' lawyer terminated the contract by the termination notice served on the builder on 31 October 2016. The termination notice makes it clear that:

- the applicants considered the builder's conduct - failing/refusing to perform the works under the contract - amounted to a repudiation of the contract on the part of the builder; and
- the applicants accepted the repudiation, bringing the contract to an end; and
- the applicants intended to recover their loss and damage.

40 Mr Beck inspected the property on 21 October 2016. He says that the site had obviously been abandoned for some time and that the framework, both the timber framework and the steel framework, had significantly deteriorated by reason of long exposure to the weather. He noted also that there was significant mould on the framework and the fire separation wall. In his view, the framework, including the firewall, was beyond salvation and would need to be replaced.

41 Mr Beck was particularly concerned that some of the steel framework presented a significant safety risk as it was inadequately supported, and he considered that the relevant building surveyor should be alerted. On 21 October 2016, the day of his inspection, Mr Beck telephoned the applicants' lawyer to discuss his concern. He followed up this telephone conversation with an email to the applicants' lawyer dated 24 October 2016.

- 42 The applicants' lawyer promptly contacted the relevant building surveyor, Mr Short. On 28 October 2016, Mr Short issued a stop work notice and a building notice requiring, amongst other things, a registered engineer's opinion on the framework.
- 43 As I understand it, the applicants did not obtain an engineer's opinion on the framework because they accepted Mr Beck's opinion that the framework had deteriorated to the extent that it would need to be demolished and re-constructed.
- 44 The applicants filed their application at the Tribunal, commencing this proceeding, on about 8 November 2016.
- 45 On 15 February 2017, the surveyor, Mr Short, served a further building notice on the owners requiring them to remove the framework within 60 days. As noted earlier, the applicants have recently had the framework demolished.
- 46 Mr Cao gave evidence that the cost of demolishing the framework is \$2000. The demolition was carried out by a contractor called "Mick" whom Mr Cao says was referred to him by the surveyor. Mr Cao says the \$2000 cost to demolish the framework was quoted to him verbally by "Mick", and he, Mr Cao accepted that quote. The demolition has only recently been carried out and the applicants are awaiting an invoice from "Mick". I accept Mr Cao's evidence in this regard. It is not disputed by the builder and neither is there any dispute that the framework has now been demolished. I consider the \$2000 cost is also reasonable having regard to Mr Beck's estimate, discussed later in these reasons.
- 47 The demolished framework is currently sitting on site and will need to be taken to the tip.
- 48 Mr Espinosa does not dispute that he was given a fair opportunity to inspect the framework before it was demolished. Nor does he dispute Mr Beck's opinion that the framework had deteriorated to such an extent that it would need to be wholly replaced.

FINDING ON TERMINATION OF THE CONTRACT

- 49 In my view, the applicants were entitled to terminate the contract as they did by the termination letter dated 31 October 2016.
- 50 The delay on the part of the applicants in making the base stage payment has no bearing on their entitlement to subsequently terminate the contract. As Mr Espinosa himself says, he gave thought to terminating the contract when the applicants were late in making the base stage payment, but he elected not to.
- 51 At the time of the termination of the contract, the applicants had made all payments due under the contract, and there is no evidence that they were otherwise in breach of the contract. Mr Espinosa does not assert any other breach on the part of the owners.

- 52 As to the parties' dealings with Mr Le of K1 Homes, the most that can be said is that the parties had discussions as to the possibility of K1 Homes taking over the contract in place of the builder. There was clearly no concluded agreement, and there was certainly no obligation on the applicants to accept the proposal put by K1 Homes.
- 53 In my view, it is clear from the evidence that the builder abandoned the contract in February 2016. In circumstances where the builder has informed the applicants that it can no longer complete the contract, and the builder ceases works and cannot be contacted, the builder has evinced the intention to no longer be bound by the contract. Such conduct constitutes a repudiation of the contract by the builder, and the applicants were entitled to "accept" the repudiation and bring the contract to an end. This is precisely what the applicants did.
- 54 Having terminated the contract, the applicants are entitled to sue for damages. The general rule with respect to damages for breach of contract is that where a party sustains a loss by reason of the breach, that party is, in so far as money can do it, to be placed in the situation he would have been had the contract been properly performed.¹
- 55 The appropriate measure for damages is the reasonable cost, over and above the contract price, that the applicants will incur in now having the contract works completed. This is the measure of damages now claimed by the applicants, and in this regard they rely upon the cost estimates provided by Mr Beck.

DAMAGES ASSESSMENT

- 56 Mr Beck has provided a detailed costing report (one report for each of the two townhouses) which details his estimates as to the reasonable costs the owners will incur in engaging a new builder to rectify defective works, and to complete the contract works.

Defective works

- 57 The framing as constructed by the builder is, or was before it was recently demolished, defective in the sense that it had deteriorated from long exposure to the elements and was no longer suitable. Mr Beck says that the extent of the deterioration was such that rectification requires wholesale demolition and replacement. Mr Beck's opinion in this regard is not disputed by the builder. Having seen photographs of the framing, and having read Mr Beck's reports, and having heard evidence from Mr Beck, I accept Mr Beck's opinion.
- 58 Mr Beck estimates the cost of demolishing and replacing the framing that was constructed by the builder as \$57,810 (\$28,905 allocated for each townhouse in his costings). His estimate includes a builder's margin of 25%, which I consider to be reasonable, and GST.

8 Robinson v Harman (1848) ALL E.R. 383 at 385

- 59 Having regard to Mr Beck's considerable experience in building construction and preparing costing reports, and having regard to his allowances for materials and labour as set out in his report, and having regard to the fact that there is no alternative costing in evidence before me, I am satisfied that Mr Beck's cost estimates are reasonable.
- 60 However, an adjustment needs to be made because the applicants have recently demolished the framing works at an actual cost of \$2000.
- 61 Mr Beck identifies the cost of demolition and disposal of the framing, including tip fees, as \$14,768 (\$7384 allocated for each townhouse). Of that sum, \$7740 is allocated for demolition alone, not including tip fees. That allowance includes the labour cost in both demolishing the framework and disposing of the demolished material to the tip.
- 62 The \$2000 cost the applicants have incurred for demolition of the framework covers only the cost of demolition. That is, it does not include the extra cost yet to be incurred for disposal of the demolished material to the tip. The applicants submit an estimate of \$2000 for this extra work. There is no independent evidence to support the estimate. At the time the estimate was provided by the applicants at the hearing, Mr Beck had completed his evidence and left the Tribunal.
- 63 Having seen photographs of the framework prior to it being demolished, I have an appreciation of the size of the task to remove the demolished framework to the tip. Having regard also to Mr Beck's overall demolition estimate, I am satisfied that the allowance suggested by the applicants, \$2000, is a reasonable allowance for the cost to dispose of the demolished material to the tip, not including tip fees.
- 64 The upshot is that, in place of Mr Beck's estimate of \$7740 as the labour cost for demolition of the framework and removal of the demolished material to the tip, I will substitute a sum of \$2000 (that is, the \$3870 allocated by Mr Beck for each townhouse is replaced with \$1000 for each townhouse).
- 65 The overall effect on Mr Beck's cost estimate, after including builder's margin allowance and GST, is that the total cost for demolition of the framing and removal of the demolished material to the tip, including tipping fees, becomes \$6875 (\$3437.50 allocated for each townhouse). To this I will add the sum of \$2000 already actually incurred by the applicants, with the result that I allow \$8875 as the reasonable cost to demolish the framework and remove the demolished material to the tip, including tip fees.
- 66 I make no adjustments to Mr Beck's allowance, \$43,042 (\$21,521 for each townhouse), for reconstructing the framework.
- 67 Accordingly, the total sum I will allow as the reasonable cost to rectify defective building works, that is demolishing and disposing of the

framework constructed by the builder, and reconstructing replacement framework, is **\$51,917**.

Incomplete works

- 68 Mr Beck's total allowance for completion of the contract works, not including the rectification of defective works as discussed above, is \$530,891, including GST (\$266,546 allocated to townhouse 1 and \$264,345 allocated to townhouse 2).
- 69 Mr Beck allows a sum for 'preliminaries' including the cost to obtain a new building permit and insurances. He allows a site preparation and management fee, noting in particular that the property is located on a main road. He allows for installation of a temporary power pole, scaffold to access upper stories and various safety measures. He makes a further allowance for "demolition". This has nothing to do with the demolition of the framework as discussed above. This further allowance might be better described as 'site reinstatement/investigation' as it includes the cost to reinstate the site to a satisfactory condition for the completion of works, including the removal of considerable rubbish and vegetation and checking the integrity of all drains under the concrete slab. As with the rectification of defective works, Mr Beck allows a builder's margin of 25%. In my view, all of these allowances are sensible and reasonable.
- 70 Mr Beck's costings for some items of work are a little unusual in that, rather than adopting a standard approach of itemising materials and labour rates and hours, as he has done for other items of work, he provides a global figure. For example, for 'joinery' for the kitchen, laundry and bathroom in townhouse 1, he simply allows a global figure of \$16,500. For painting in townhouse 1, he allows a square metre rate of \$30.33 per square metre, for approximately 460 m², to arrive at a figure of \$13,951.80.
- 71 Mr Beck says he adopted this alternative approach for some items of work because he was recently thoroughly engaged in a very similar construction project, that is, the construction of two very similar townhouses on a very similar site. Mr Beck is confident that he can more accurately estimate the cost of some items of work, such as the joinery, on the basis of his recent hands-on experience in preference to the more standard method of itemising materials and labour. I accept Mr Beck's evidence in this regard.
- 72 Having regard to Mr Beck's considerable experience in building construction and preparing costing reports, and having examined his costings reports, and having regard to the fact that there is no alternative costing in evidence before me, I am satisfied that Mr Beck's cost estimate for completing the contract works is reasonable.
- 73 Mr Espinosa asserts that Mr Beck's costings are excessive, but he provides no analysis, documents or alternative expert opinion to support his assertion.

- 74 When Mr Beck was giving evidence, Mr Espinosa sought and obtained clarification as to Mr Beck’s opinion in respect of the framing, the clarification being that it was not the method of construction of the frame, but rather its deterioration from exposure to the elements, that made the frame defective. Mr Espinosa did not question Mr Beck on any other issues.
- 75 On all the evidence, I am satisfied that Mr Beck’s costings are reasonable and I will allow **\$530,891** as the reasonable cost to complete the contract works, not including the cost to rectify the defective framing as discussed above.
- 76 Together, the framing rectification and the completion costs are **\$582,808**.

Damages assessment conclusion

77 I assess the applicants’ damages, that is the reasonable cost they will now incur, over and above the contract price, to rectify and complete the contract works as \$164,245.13, calculated as follows:

- contract price	\$523,203.59
- less contract payments made	<u>\$104,640.72</u>
- balance	\$418,562.87
- less rectification and completion cost	<u>\$582,808</u>
- balance	- \$164,245.13

INTEREST

- 78 In their Points of Claim filed in this proceeding, the applicants claim “interest” in addition to “damages”. The only “damages” claimed by the owners is the cost, over and above the contract price, to complete the contract works. This has been assessed above. There is no claim for delay damages or damages related to the finance obtained by the applicants in respect of the building project.
- 79 I am not sure whether the applicants maintain a claim for interest, but if they do I reject the claim. As the quantum of damages assessed as set out above is an assessment of the reasonable cost the owners will *now* incur in completing the contract works, I consider there is no good reason to make an additional award of interest on that sum.

BUILDER’S OFFER TO COMPLETE THE CONTRACT WORKS

- 80 Since returning from the Philippines, Mr Espinosa has, on behalf of the builder, offered to complete the contract works at a reduced price of \$300,000. He maintains that offer still.
- 81 There is no contractual obligation on the applicants to accept the builder’s offer. The issue is whether the applicants have unreasonably failed to mitigate their damages by refusing to accept the offer.

- 82 The applicants say that the builder's abandonment of the works caused considerable difficulties for them, and that they no longer trust the builder. They are also concerned as to the financial viability of the builder, and the builder's capacity to complete the works.
- 83 The applicants produced a 'Creditor watch' search report which indicates that the builder has an unsatisfied judgement debt of \$13,004. Mr Espinosa does not dispute this.
- 84 There is little evidence from the builder to suggest that, since Mr Espinosa's return from the Philippines in 2017, the builder has overcome its financial difficulties. Mr Espinosa says that he/the builder has been doing a few minor jobs since his return from the Philippines. Other than this, there is no evidence as to the builder's capacity to complete a major building project.
- 85 In my view, Mr Espinosa's proposal to complete the contract works for a reduced price of \$300,000 is founded on hope rather than a proper analysis of the costs to be absorbed by the builder and the builder's capacity to perform the works.
- 86 This is not to say that the builder's offer is not well-intentioned. I accept that Mr Espinosa accepts responsibility for the predicament in which he left the applicants when he moved to the Philippines, and he seeks to offer a solution that may be attractive to them. However, in my view the applicants' doubt as to the builder's capability to complete the works is well-founded, and their rejection of the builder's offer is both justified and prudent.
- 87 As such, I find that the builder's offer to complete the contract works at a reduced price has no bearing on the sum of damages to be awarded to the applicants.

CONCLUSION

- 88 For the reasons discussed above, I will order that the builder must pay the applicants \$164,245.13.
- 89 I will reserve the question of costs of the proceeding with liberty to apply, and I draw the parties' attention to Divisions 8 and 8A of the *Victorian Civil and Administrative Tribunal Act 1998*.

SENIOR MEMBER M. FARRELLY