

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D210/2005

CATCHWORDS

Contract for the supply of frames and trusses – whether a time of delivery was agreed – whether a term as to time can be inferred from the evidence – work to be done within a reasonable time – whether work was a major domestic building contract – consequences of no-registration of director of applicant – no evidence that no director was registered at the time – unnecessary to consider

[2006] VCAT 596

APPLICANT	Clynton Meadows Pty Ltd (ACN 072 359 810) t/as Spantruss
RESPONDENT	James Gray
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Directions Hearing
DATE OF HEARING	7 November 2005
DATE OF ORDER	18 April 2006

ORDER

- 1 Order the Respondent to pay to the Applicant \$37,677.50.
- 2 Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr S Turner of Counsel
For the Respondent	In person

REASONS FOR DECISION

Background

- 1 The Applicant (“Spantruss”) is a manufacturer, supplier and installer of trusses, joists and wall frames. The Respondent, Mr Gray, was at material times the owner of land at 30 Wave Street, Elwood, where there are now constructed 2 residential units (“the Units”).
- 2 Some time before June 2004 Mr Gray sent Spantruss some architectural and engineering plans for the Units and requested a quote for the supply of trusses and frames for their construction. On 10 June Spantruss provided a written quotation of \$31,185.00 for the provision of specified materials. The quotation was accepted by Mr Gray on 9 July. On the copy of the accepted quotation in evidence, adjacent to the note of his acceptance and next to the words: “approximate date required” Mr Gray has written “3rd week July”.
- 3 On 13 July 2004 Spantruss further quoted to provide beams for the Units at a cost of \$3,850.00. It also quoted to install all of the material on site at a cost of \$17,160.00. Again, these were written quotations and were inclusive of GST. The quotations were accepted at a meeting on site which took place on 23 July 2004. There is some dispute about what occurred at that meeting. According to Spantruss’ detailer, Mr Elliot, Mr Gray told him that Section A3 on drawing S4 and sections on drawing A03 were incorrect. He says that Mr Gray was to give them a full set of drawings. Mr Gray denies that there was any such arrangement. Spantruss’ sale representative, Paul Mills was at the meeting but gave no evidence as to this. I think there was probably a misunderstanding about what would be supplied but that there were some problems with the drawings identified by Mr Gray and some information was to be supplied although it is not clear what that was to be.
- 4 On 27 July Mr Gray sent Spantruss a deposit of \$17,717.50 with a note saying that it is for “...half cost to supply whole job” and added: “Confirm start installation date is 9 August 04”. Thereafter there were numerous communications passing between the parties, the architect and the engineer.

The erection of the frame

5 On 25 August materials for the lower storey were delivered on site and Spantruss' sub-contract carpenter, Mr Beaton, and his two workmen commenced putting it together. Further materials were delivered as work progressed. Numerous difficulties were encountered in erecting the frame and the cause of these difficulties was the subject of considerable debate. There were further communications passing between the parties, the architect and the engineer and ultimately by about 9 November 2004 the frame was completed.

The "extra work" dispute

6 On 17 November there was an on-site meeting between the director of Spantruss, Mr Watts, Mr Beaton and Mr Gray. Mr Watts said that, at the time of the meeting, the frame was complete except that corner studs had to be nailed and temporary bracing had to be removed. Mr Gray said that the parapet walls, roof battens, angled walls, windows, skylights, an RB1 stud and strongbacks had not been supplied. Mr Watts contended that they were not included in the quotations. An argument ensued and it was ultimately agreed that the cost of all this work would amount to \$6,400.00 of which the parties would pay half each. At that same meeting, Mr Gray claimed that the work had been unreasonably delayed and demanded that Spantruss pay interest on his construction loan for the period of the delay. Mr Watts says that he was prepared to discuss the matter of interest but thought that the amount of \$22,000.00 Mr Gray was seeking was too high. Thereafter the further work proceeded and on 9 December it was finished.

The claims

7 Spantruss now claims the balance of the contract price which it says is \$38,077.50. On the evidence, I think the amount sought should be \$37,677.50, calculated as follows:

Original quote	\$31,185.00		
Quote for beams	\$3,850.00		
Quote for installation	<u>\$17,160.00</u>	\$52,195.00	
Less amount paid		<u>\$17,717.50</u>	\$34,477.50
Plus extra sum agreed			<u>\$3,200.00</u>
Balance due			<u>\$37,677.50</u>

8 There are a number of defences taken and there was also a counterclaim filed. However by reason of the failure of Mr Gray to comply with an order of the Tribunal that an amount be paid into the Domestic Builders' Fund the counterclaim is stayed and an order was made that it could not be heard with Spantruss' claim. I am therefore left with the defences which follow.

Delay

9 Mr Gray claims that the work was delayed and that he is entitled to set off the damages he suffered by reason of that delay. The quotations themselves do not specify a delivery date but Mr Gray says that, on 9 July 2004, Spantruss's salesman Mr Mills said to him that the work would start in the final week of July 2004 and the frames would take 2-3 weeks to manufacture. Mr Mills said that, in a conversation on that day, Mr Gray asked that delivery take place around the third week in July. He also said that, although he discussed with Mr Gray the possibility of supplying the material at the end of July he told him that it was not possible to do so until Spantruss received a deposit. I am satisfied Mr Mills indicated that the frames and trusses would be supplied during that period but I think he was expressing no more than an expectation and I think that would have been apparent to Mr Gray. I do not find there was a term of the contract to that effect. I am also not satisfied that it was agreed by the parties that installation would take only 2-3 weeks.

10 First, the initial request for delivery in that period was before the quote had been accepted. Secondly, the statements alleged are in general terms. They look more like an indication of an expectation rather than a commitment to a binding obligation. If a contractual obligation were being undertaken one would expect that it would be spelled out specifically what the party was agreeing to do. Thirdly, the materials would need to be manufactured and there was some uncertainty as to how long that might take. Further information was to come from Mr Gray and it must have been apparent to the parties that difficulties might be encountered with the design and manufacture, particularly in view of the unusual and complex design. Fourthly, delivery of the completed material would be dependant upon the site being ready. At the time of their conversation, the parties could not have been certain when that would be.

- 11 Finally, a deposit was not paid until 27 July. The quotations required payment of a deposit of 50% of the contract price. Mr Gray says that he believed that Spantruss would start work before the deposit was paid. Spantruss's witnesses denied this and said that they would not start work without a deposit. The written quotation forms are silent as to when the deposit should be paid but they do specify that there shall be a 50% deposit. Mr Gray says that he was told the deposit was required to be paid just before delivery. This is denied by the witnesses for Spantruss. It is a large project and of an unusual design. I do not believe that it would have been in the contemplation of the parties that materials of this value would be manufactured to the specific requirements of Mr Gray without some deposit having been paid. The parties must have been aware that, if the frames were fabricated and the order were then cancelled Spantruss would be left with frames that it could do nothing with. I am not satisfied on the balance of probabilities that it was agreed between the parties that manufacture should commence before payment of the deposit and I am not satisfied that it was unreasonable for Spantruss to require it to be paid before commencing manufacture.
- 12 I am not satisfied that there was any firm agreement as to a date of delivery or a date upon which manufacture would commence. I think therefore that it was an implied term of the agreement that the work would be done within a reasonable time in all the circumstances.

What was a reasonable time for the job?

- 13 There were two stages of work to be done, namely the manufacture of the frames and trusses and their delivery and erection. There was some confusion in the evidence between the two and, since they appear to have overlapped to some extent, this is understandable. There was considerable debate between the witnesses about how long the job should have taken. Mr Gray says that he was told it would take 2-3 weeks and says that the Director of Spantruss, Mr Watts, said that it would take 4-6 weeks. Mr Watts denies that.

Rain

- 14 Mr Watts said that many days were lost due to rain and produced a rain chart compiled by the Bureau of Meteorology showing rain that fell each day in Melbourne throughout the relevant period. Mr Gray pointed out that there was no evidence as to the location of

the weather station where this data was recorded. I agree. More importantly, there is nothing to indicate when, in any period of 24 hours, the rain fell. It might have fallen overnight. I have not found the rain chart to be of any assistance other than to indicate that, from 9 August, when Mr Gray expected installation to commence, until the end of October some rain fell on 31 of those days. A site diary is a more reliable record of the extent to which works are interrupted by rain and Ms Turner has referred me to Mr Beaton's diary as such a record. However when one looks at the diary which is part of exhibit "JB1" to Mr Beaton's witness statement one finds no reference at all to rain in it. Rain is referred to in the "Timeline" that is the other part of that exhibit but simply as a transcription of the information in Mr Watts' rain chart. That this is the case is obvious, because Mr Beaton's Timeline attributes the rain as having fallen on the days indicated in the rain chart whereas, as the footnote to that chart notes, the rain recorded is the rain that has fallen in the twenty four hour period up to 9 am on the date indicated. For example, the 12.2 mm of rain Mr Beaton records as having fallen on Monday 30 August actually fell, according to the chart, in the twenty four hour period commencing at 9 am on the preceding day which, being a Sunday, might not have been a day when he would have been working. Hence, the exhibit is most misleading and in the absence of further evidence it does not establish the extent to which the work was interrupted by rain. Mr Gray said that no more than four days were lost due to rain but it does not appear that he kept any record either. No doubt there was rain because the work was done during Winter and Autumn but the extent to which this delayed the work cannot be accurately stated.

Incompetence

16. Mr Gray suggested that delay arose as a result of the incompetence of Spantruss and says that Mr Beaton said that to him. However when he gave evidence Mr Beaton denied having said such a thing.

Difficulties with the plans and drawings

- 15 The substantial reason given by Spantruss for the time taken for the job lay in the complexity of the design and ambiguities, inaccuracies and other deficiencies in the plans. There was a great deal of correspondence passing between Spantruss, Mr Gray, the Architect and the Engineer concerning the plans. Mr Gray said in his evidence there were only two small errors in the plans "*...which I corrected immediately and prior to*

Spantruss becoming aware of them and prior to those mistakes causing any delay in the completion of the job.” In cross-examination he said these were the party wall in Unit B, which was a draftsman’s error, and the engineer put the parapet wall rising at a different angle to the wall, whereas it should have been shown as a continuous line. Neither of these figure in any of the messages between the parties or the changes there referred to.

- 16 The Engineer, Mr Bugaj, said the structural drawings were clear although he acknowledged there was an inconsistency in one of the architectural drawings (A01). Some details were not given on the engineering drawings but details appeared on others. Some things were not specifically shown and needed to be inferred.
- 17 The plans tendered do not have dimensions for some of the cupboards and some dimensions have been altered. There are few sections to show what is intended or to describe how the two levels fit together. In considering whether the plans were “clear enough” it is instructive to look at the items of correspondence that passed between the parties. Copies of these were annexed to the Witness statements of a number of the witnesses called by Spantruss.

The correspondence

- 18 On 21 July Mr Gray sent to Mr Elliot a fax attaching front window details. Mr Elliot said that he spoke to Mr Bugaj and was told that the column C2 did not interfere with floor trusses. On 23 July, Mr Oram, the frame detailer, told Mr Elliot that the detail 1 on drawing A03 needed to be changed. This seems to have been the change that Mr Gray told them about at the meeting on that same day when he accepted the quotation and indicated that further information was to come
- 19 On 2 August the Architect sent a Section to Mr Elliot with “humblest apologies”. Just what this was and why he apologised is not in evidence. On 5 August there is a note: “Called Brian. Put job on hold. Few changes need to be done”. Again, there is no explanation of that in evidence.

- 20 On 9 August the Architect sent more changes to wall and first floor beams to Mr Elliot. On the same day, Mr Elliot sent a fax to Mr Gray showing the location of the upper floor.
- 21 On 16 August, Mr Oram told Mr Gray that there were insufficient dimensions on the plans to enable him to detail the lower walls. Why he had not noticed that before is not explained. On 18 August, Mr Oram sent Mr Gray a fax setting out room dimensions and asking him to attend the office to discuss them. On the following day, 19 August, Mr Gray sent Mr Oram room dimensions and, also on that day sent him a further fax asking him to delete certain walls.
- 22 On 23 August, Mr Gray sent several sheets of Sections to Mr Oram with dimensions to enable the front windows and wall heights to be dimensioned. On the following day, 24 August, the drawings for the lower walls were finished.
- 23 On 25 August, Mr Gray sent a fax with a revised plan and saying that the internal height was to be 2750 from the underside of the roof. According to Mr Oram, this showed that the manufactured and erected wall frames were wrong. On that same day, Spantruss commenced putting the structure together. Mr Gray agrees that this occurred in “the last week in August”.
- 24 On 30 August, the Architect asked for details of the rafters being used. Spantruss was then told to revert to solid rafters because of height restrictions. On 30 August, Spantruss informed Mr Gray that “*as per your request*” the PS-260 trusses were being changed to 200-45 Hyspan LVL and the price of \$5,790 would be maintained. This fax was signed and returned that day by Mr Gray.
- 25 On 2 September, Mr Gray sent a detail of roof stud/rafter connection and the Architect sent Mr Oram a fax containing details of the box gutter on the West boundary
- 26 On 6 September, the Architect sent a fax containing new changes to Mr Oram. According to Mr Oram, these necessitated the redoing the detailing of the first floor walls. Exhibit “J” seems to be part of that plan.

27 On 9 September 9, the Architect sent a further fax to Mr Oram with new drawings. According to Mr Oram, these meant that the detailing of the first floor walls had to be done again. On 20 September, the detailing of the upper floors was complete.

Conclusion from the correspondence

28 It is clear on the evidence that Spantruss had great difficulty interpreting the plans and detailing the job into their computer. The upper storey had angled walls and was of a highly unusual design. Spantruss acknowledged not having had to design angled walls before. The architect who designed the project did not give evidence but the engineer, Mr Bugaj did and I have referred to his evidence above.

29 It is regrettable that neither side called an expert witness not involved in the project who could explain to me clearly whether these plans were sufficient or not. Although in the course of hearing domestic building cases I have had occasion to examine many sets of plans and drawings I am not an expert. I have found it impossible to form a concluded view as to the sufficiency or otherwise of these plans and drawings simply because there are so many aspects of them that I cannot understand. It is a complicated construction with different angles and very few sections and details have been provided. This may well have been the source of the problem. Nevertheless, the Applicant agreed to construct the frame on the plans provided and it was contractually obliged to do so. To what extent any delay arose because of lack of skill on the part of the employees of Spantruss and to what extent it was due to problems with the plans or the many changes that seem to have been made is impossible for me to determine on the evidence. Mr Gray's assertion that these various communications amounted to no more than clarification and assistance does not seem justified on a fair reading of the documents. In any event I cannot infer from the limited evidence that I have that the job was delayed due to inexperience on the part of the detailers. There is direct evidence of other causes.

The changes to the floor trusses

30 One aspect of the job that seems to have contributed to the delay was the change of floor trusses and the change back again because of the height problem. Mr Gray blames Spantruss for that but he agreed to it at the time.

Builder's "time off":

31 Mr Beaton took four days off with Mr Gray's consent. He also said that he was held up by the bricklayers for 5 days between 11 and 15 October (both inclusive).

Expert evidence

32 Evidence was given by the building surveyor on the job, Mr Middling, that the erection of the framing on the job seemed to drag on for a long time. He said: "*I expected that a prefabricated timber frame would take about 3 to 4 weeks on that sort of project.*" He said that he passed the frame in "about early December". In cross-examination he said that rain days would increase the time.

33 The engineer, Mr Bugaj, after saying there was no ambiguity in the structural drawings added: "*I would expect a reasonable time for a framing company to erect a prefabricated frame on that project to be about 4 to 6 weeks including time for the central brick wall to be erected.*" In cross-examination he said that this view was based upon what he was told upon checking with other builders he works with, who suggested the period of 4 to 6 weeks. It does not appear that this was his own view but rather, something he has been told by someone else and the basis upon which that other person formed the view is unknown. Hence, the evidence is of no value.

Subsequent events – the "framing extras" list

34 On 29 October Mr Gray drew up a list headed "Framing extras" listing 10 items which the on site carpenters had attended to and three others that were still to be attended to. Next to each item he put initials to indicate whether he or the Applicant should pay for it. He said that Mr Beaton agreed with the list but Mr Beaton said that, although he agreed to take the list to Spantruss he did not agree that the allocation of responsibility for the various items was necessarily as described on the list. Mr Gray acknowledged in cross-examination that Spantruss did not accept the list. Whatever was discussed between Mr Gray and Mr Beaton about these items is not to the point. I need to be satisfied myself as to where responsibility lies and there is insufficient evidence to establish that.

Conclusion as to delay

35 I am not satisfied on the balance of probabilities that Mr Gray has proven that Spantruss failed to manufacture and install the components within a reasonable time in the circumstances or that he is entitled to offset any damages for delay as a result.

Other defences

36 The next defence taken is that not all of the materials were provided. Mr Gray said that it was agreed that Spantruss would supply all timber framing for the units. I think in interpreting the agreement I should look at what it is that is set out in the quotations. The items that Mr Gray says were not supplied are as follows:

(a) **Waling plate, bolts and Chemset system to fix floor joists to central brick wall**

A waling plate is mounted on the central brick wall to support one end of the floor joists. Not one of the quotations mentions a waling plate. The installation quote says that Dynabolting- etc. are included. The quote also says “all other ancillary items not quoted to be supplied and erected by builder”. I am not satisfied that the waling plate was within the contract. Dynabolts could not be used to support the waling plates because of the type of bricks used to construct the central brick wall and Mr Gray had to use a Chemset system instead. Accordingly, Spantruss would not have needed to supply any Dynabolts to fix the waling plate. Since the waling plate was not included I think the reference to Dynabolts in the quotation probably refers to the fixing of the components that Spantruss had quoted to erect, not other items that it had not quoted upon to supply and erect.

(b) **Timber for west boundary wall noggins**

Noggins were included in the quotation but I have no evidence to establish precisely which noggins were not supplied or how much it cost Mr Gray to provide them himself.

(c) **Upper exterior wall packers**

I have insufficient evidence to enable me to understand what this is about.

(d) **Roof battens**

The quotation provides for roof trusses to be installed, straightened and braced and the hips and valleys filled in. There is no mention of battens.

(e) **Various extra timber material**

I have insufficient evidence to determine this claim

The agreed increase

37 Mr Gray says that he agreed to increase the contract price by \$3,200.00 "... only to mitigate the Respondent's loss in order to have the works completed by the Applicant". I am not sure what to make of this statement. Clearly he thought that all of the work that the \$6,400 cost represented was included in the quotations but he accepts that, following an argument about it, he agreed to split the cost with Spantruss. It seems to me that amounted to a resolution of the dispute. Having agreed to pay the amount I think Mr Gray is bound by that agreement.

The contract was for major Domestic Building Work

38 Mr Gray submits that the agreement that he had with Spantruss for the supply and erection of the frame for the two Units was a major domestic building contract within the meaning of s.3 of the *Domestic Building Contracts Act 1995*. That section defines the term "builder" as follows:

"“Builder” means a person who, or a partnership which –

- (a) carries out domestic building work;*
- (b) manages or arranges the carrying out of domestic building work; or*
- (c) intends to carry out, or to manage or arrange the carrying out of, domestic building work;”*

39 The term "domestic building work" is defined as being any work referred to in s.5 of the Act that is not excluded by s.6. Section 5 is very widely expressed and includes the erection or construction of a home or, by sub-section (2), a part of a home. By s.6 the Act does not apply to certain work including work that the Regulations state is not building work to which the Act applies. Reference to the regulations would suggest that work of the nature carried out by Spantruss in this case is not exempted.

- 40 By s.29(c) of the Act, a builder that is a corporation must not enter into a contract to carry out major domestic building work unless at least one of the directors is registered as a builder under the *Building Act 1993*. Mr Gray suggests that Spantruss is not a registered builder and the contract is therefore illegal and unenforceable. What he must mean is that this consequence follows because no director of Spantruss is a registered builder. As authority that the contract is void and unenforceable in such circumstances he relies on the Tribunal's decision in *Cathie v Classic Period Homes Pty Ltd* [2004] VCAT 2543.
- 41 Miss Turner submitted that I ought not to allow Mr Gray to raise this argument since it was not raised in his defence and counterclaim. She also pointed out that there is no evidence at all that Spantruss is or is not a registered builder. Finally, she submits that the Tribunal's decision in *Cathie v Class Period Homes Pty Ltd* was incorrectly decided and that the Tribunal in that case was not referred to certain binding authorities to the contrary.
- 42 It is unnecessary for me to consider Mr Gray's very able argument in detail because ultimately it depends upon a finding of fact that cannot be made, namely, that no director of Spantruss was a registered builder at the relevant time. As to that there is no evidence at all one way or the other. Mr Watts gave evidence that he was the Managing Director of Spantruss but he did not say whether or not he was a registered builder. He could easily have been asked. There is no evidence as to what other directors, if any, Spantruss had at the time or whether they were registered builders. Mr Gray submitted that it was within the knowledge of Spantruss whether or not it was registered and therefore one would have expected it to give some evidence about it. He submitted that in the absence of such evidence I ought to draw an adverse inference to the effect that it is not a registered builder.
- 43 I do not believe that I can draw such an inference. It would have been a simple matter to conduct a company search and check to see whether any of the named directors was registered. It was not for Spantruss to disprove in advance facts that might have provided a defence to Mr Gray. It was not alleged in the Points of Defence that Spantruss was not a registered builder and in any event, it is Mr Gray who is making the assertion and so it is for him to prove his case.

Conclusion

44 I do not find that any of the defences are made out and so there will be an order for the payment of the amount that I found to be due.

SENIOR MEMBER R. WALKER