

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D53/2008

CATCHWORDS

Domestic Building List; Major domestic building contract terminated by mutual agreement; No breach proven and no damages payable.

FIRST APPLICANT	Dan Dang
SECOND APPLICANT	Annette Dang
RESPONDENT	Drocon Constructions Pty Ltd
WHERE HELD	Melbourne
BEFORE	M.F. Macnamara, Deputy President
HEARING TYPE	Hearing
DATE OF HEARING	10 April 2008
DATE OF ORDER	15 April 2008
CITATION	Dang v Drocon Constructions Pty Ltd (Domestic Building) [2008] VCAT 917

ORDER

- 1 The name of the respondent is amended such that it reads '*Drocon Constructions Pty Ltd*'.
- 2 Annette Dang is joined as a party to the proceeding and designed as second applicant.
- 3 Proceeding dismissed.

M.F. Macnamara
Deputy President

APPEARANCES:

For Applicant

Mr Dan Dang

For Respondent

Mr & Mrs Drossos

REASONS

BACKGROUND

- 1 Mr Dan Dang and Mrs Annette Dang, his wife, are the owners of a long established house at 1 Park Street, Moonee Ponds. They recently decided to add an additional residential structure at the rear of No. 1 in which Mr Dang's 'in-laws' could reside. According to Mr Dang the proposed structure would be a 'glorified granny flat'. The Dangs signed a contract in the form of the HIA Victorian New Homes Contract, October 2004 edition. The builder was Drocon Constructions Pty Ltd and the contract was dated 26 April 2007. The contract price was \$156,108.58 and the building period was 130 days. Schedule 5 to the contract included an acknowledgement by the owners that the building work did not include certain materials, namely:

Palings/colorbond fence

Storage shed

Rainwater tank

Temporary fence

Portable toilet.

- 2 Clause 19 governed the subject of planning approvals and building permits. Clause 19.0 stated that the owner was responsible for obtaining any planning approval. Clause 19.1 provided as follows:

Subject to the receipt of the planning approval and if the **Owner** has not already got the necessary building permits, the **Builder** must apply for them within 14 **Days** after receiving evidence of the **Owner's** title to the **Land** and ability to pay under Clause 13.

- 3 Clause 19.3 provided an entitlement for the one party or the other party to terminate the contract subject to certain conditions within 14 days of the expiration of the time set out in Schedule 1. Item 5 in Schedule 1 is headed

Person responsible for obtaining and paying for the building permit and number of days to obtain building permit.

- 4 The owners were given responsibility for obtaining the building permit and it was stated that they were to do so within seven days. Item 4 of Schedule 1 imposed the obligation of obtaining planning approvals on the owners within 14 days.

- 5 Also excluded from the contract price were charges estimated at \$1,000 for water, \$1,500 for building permit, \$1,000 for re-establishment survey and \$400 for set-out fees.

- 6 The building period according to Clause 10 and commencement of the works was required to occur within 21 days after the builder received certain information designated by Clause 13 of the contract as 'essential' and 'all necessary building permits and planning approvals' and also the

payment of a 5% deposit of \$7,805.43. The building permit was obtained on 31 July 2007.

- 7 A sub-contractor entered the site to demolish the shed which was an excluded work under Schedule 5 of the contract and to flatten out the site. Another contractor arrived looking for the easement drain into which the stormwater from the site would be directed. The building site had a laneway or right-of-way immediately adjacent to it and the easement drain was located under that laneway. The contractor had difficulty locating the drain and the matter appeared unresolved when he departed from the site.
- 8 When the 'set-out' process was attempted, Drocon through its principal Mr Drossos stated that the proposed building could not be accommodated within the site boundaries. There had it seemed been a misalignment of the fence such that if erected exactly according to the plans the eastern wall of the new building would project approximately 23 or 24 cm into the right-of-way. Mr and Mrs Drossos, the principals of Drocon referred this issue to the HIA Legal Service. They recommended to Mr Dang that he seek the assistance of a qualified property legal specialist with a view to re-establishing title to his premises in accordance with that register kept under the *Transfer of Land Act 1958* depicted. According to Mr Dang when this issue was raised with him initially on 14 September 2007 he convened an on-site meeting including his architect, Mr David Wawrowski, building surveyor of Brimbank City Council who was the relevant building surveyor and a statutory planner from the City of Moonee Valley, the local municipality. According to Mr Dang, these people concurred in the view that it was okay to continue. I was somewhat unclear as to whether the suggestion was that the property should be built as shown on the plans or be built with slightly reduced dimensions. Mr Drossos, according to Mr Dang, initially agreed to continue but then demurred. During October and the early part of November matters did not seem to progress. Eventually on 20 November Ms Drossos wrote on behalf of Drocon, stating as follows:

Due to the delayed time frame from contract signing to still awaiting amended plans for 1 Park Street, Moonee Ponds (rear) we have a few issues that need to be looked at.

In preparation to receiving your new set of plans, we have noticed most of our quotes are dated February 2007. Most companies/suppliers have had price increases in that time. With a new design/size to your plans all quotes will have to be re-quoted. It is important for you to note Drocon Constructions will not be altering their margin and any price increases are due to design change or price changes during 2007.

We feel before you endeavour in such a large financial decision it is imperative that we update all records. In order to start the process we feel the best option is to end the HIA New Homes Contract signed 26 April, 2007 and re-sign a new HIA New Homes Contract including any Prime Cost Item/Provisional Sum Item changes.

We hope this doesn't cause you too much of an inconvenience. We will try to make the process as easy and quick as possible for you. Please feel free to contact me with any concerns that you may have.

- 9 Meanwhile, amended plans reflecting the slightly smaller dimensions for the structure were submitted to the building surveyor on 1 November. These amended plans were approved by the building surveyor on 26 November 2007. Mr Dang said that he immediately made those plans available to Drocon. According to Ms Drossos there was some days delay and it was only in early December that her company received the amended plans. Mr Dang agrees that one of his children was in the Royal Children's Hospital around that time and that this caused great disruption in his family. Ms Drossos attended the Dang house to obtain the new plans.
- 10 For his part, Mr Dang accepted the issues raised by Drocon as to the staleness of the quotes on which it had based its contract price. He said he was not going to sign up for what he described as an '*open*' quote. If the quotes caused too great an increase in the contract price he reserved his entitlement simply to walk away. On 14 December he had a telephone conversation with Mr Drossos. At that stage he demanded a schedule of work which would give a clear indication as to when work would commence and when it would finish. Mr Drossos said that a six week break for the Christmas/New Year period was about to ensue. It was simply impossible in those circumstances for him to obtain new quotes from the various trade sub-contractors, certainly nothing would start before February and maybe it would be March. Mr Dang became incensed. On 17 December Mr Drossos wrote on behalf of his company as follows:

Dan and Annette,

Due to much consideration and recent personal issues I have decided that I am unable to take on your project at 1 Park Street, Moonee Ponds.

We spoke last week in regards to the beginning of works, as I stated to you, firstly I would have to complete your quote, we would then seek your approval before contracts could be signed, works would then follow into early 2008. On reflection and the whole scheme of things I feel I am unable to meet your demands. I know it has been stressful and a very trying time preparing documents from Planning Permits, Hoarding Permit, Building Permit and having to alter your plans, which therefore caused the project time delays.

I have tried to work out a way in which I can fit the project into my schedule but it would be totally unfair on you, the client, to make promises I know I cannot keep. This has been a very difficult decision for me to have to come to and I hope you realise it is with deep regret I make this decision.

Now that all your documentation is complete I'm sure you won't have a problem finding the builder of your choice. Please feel free to call if you have any questions or require any further assistance whilst still selecting a builder.

Regards,

John

- 11 Meanwhile, Drocon raised an invoice in the sum of \$2,523.70 which included a charge in the sum of \$1,467.70 for what is known as a 'PIC' number from City West Water; \$220.00 to 'North Western Set-Outs' and \$836.00 to Coast Rock for what was described as site cut/fill/tip, no builder's margin was included in these charges. Mr Dang received this invoice on 23 December.
- 12 On 10 January 2008 Mr Dang had a telephone conversation with Mrs Drossos. There was some dispute as to exactly what was said. Mr Dang says he '*offered to pay what can be reused*'. He said he would meet the charge to City West Water so long as the application was transferred to himself. He had been advised by City West Water that the PIC number which provided authority to tap into City West Water's main could only be availed of by the person to whom it was issued, namely Drocon, unless transfer was approved. Mrs Drossos denies that Mr Dang ever offered to pay the City West charge. Whatever was said it is clear that Drocon was pressing for the payment of the entirety of its invoice. It would be unsurprising if, for instance, Mrs Drossos declined to transfer the PIC number, even despite tender of the charge for it, unless the other amounts demanded by Drocon were paid at the same time. Mrs Drossos wrote by letter dated 14 January 2008. She noted that Mr Dang had complained about crushed rock being left in the laneway leading to complaints from the neighbours. She reiterated an offer that she had made previously that her husband would remove the crushed rock. This proposal was declined by Mr Dang. Mrs Drossos followed up with a letter of demand for the amount invoiced dated 15 December 2008.
- 13 It appears this letter of demand led Mr Dang to file the application which commenced the present proceeding. He showed himself as the applicant, though given that his wife was also a party to the contract, I made an order at the outset of the hearing upon Mr Dang's assurance that he brought this proceeding with his wife's authority, that she be joined as an applicant.

APPLICANTS' CLAIM

- 14 According to Mr Dang's application his claim was for:
 1. The cancelling of Drocon's invoice 000000045, for defective and incomplete work. Estimated cost to rectify these works exceeds the invoiced amount.
 2. Estimated cost of delays in the appointment of a new builder following Drocon's termination of the building contract.

- 15 He claimed \$3,673.70 for rectification, \$900 relating to the appointment of a new builder and \$2,000 for loss caused by delays. More specifically these items included \$836 for site work being the amount shown on the Drocon invoice, a set-out fee of \$220, again a figure derived from the Drocon invoice, the payment of \$1,467.70 being the charge by City West Water for the PIC number. He sought \$1,000 to 're-do' the incomplete drainage. He sought \$150 for his own time moving the crushed rock from the laneway. These were the amounts claimed to rectification. He sought \$220 for a new building permit, \$80 for a new application to Council and \$600 for the establishment fee of a new lane facility to finance the project. He said that \$2,000 should be allowed to him and his wife at the liquidated damages rate set in the contract of \$250 per week from the period from December 2007 to February 2008.

STATUS OF BUILDING CONTRACT

- 16 There seemed to be an inconsistency in the way in which Mr Dang mounted his claim. On the one hand he seemed to concede that he agreed as at 20 November to cancel the April contract because of the staleness of the trade quotes upon which it was based; nevertheless, he now makes a claim for a period after 20 November for liquidated damages in accordance with the contract. This latter claim assumes that the contract remains in force and unterminated, at least up to the end of February.
- 17 Drocon contends that the contract was terminated by mutual agreement on 20 November and no claims can be made arising out of it.
- 18 In my view Drocon's view of matters is correct. It would be possible I suppose, for parties to a building contract to agree to vary the price based on re-quotes by the subcontracting trades. No wise owner however would leave himself liable to pay whatever figure the revised quotations might throw up. Certainly Mr Dang was quite clear that in no way did he commit himself to that. He said he would not sign up to what he described as an 'open quote'. Nor as it seems to me is there any reason to think that he regarded himself and his wife as remaining 'on the hook' for whatever revised price might ultimately be held to be reasonable if necessary by a court or tribunal by the process used upon the hearing of a *quantum meruit* claim. Certainly there was no question that Drocon intended any such thing. It is clear that Drocon was looking to offer a new price based upon the information which its quotations would provide to it. For his part Mr Dang intended to leave it open to him and his wife to 'go on' with a deal with Drocon if it offered what they regarded as a reasonable price or simply to forget about things if it did not. I find this measure of uncertainty as to the vital issue of price quite inconsistent with the view that the April contract remained on foot after 20 November. The absolute discretion which the Dangs in the circumstances quite reasonably reserved to themselves to proceed or not depending on whether an acceptable price was

offered to them is also inconsistent with the view that they remained bound by a contract.

CONSEQUENCES FOR A CLAIM

- 19 Once it is accepted that the April contract was no longer in force from December 2007 to February 2008, the claim for liquidated damages under a contract no longer in force cannot be sustained.

RECTIFICATION WORK

- 20 According to Drocon the \$836 charged on its invoice represented work outside the scope of the contract which was the owners' responsibility. That work had been carried out and should be paid for. Once again, I accept Drocon's view. I noted above that the 'shed' was noted in Schedule 5 of the contract as excluded from the builder's responsibilities under the contract. What was done was with respect to this excluded item of work not the overall obligation of site preparation under the contract. This claim must fail.
- 21 So too must the claim to 're-do' the drainage. According to Mr Drossos what was done on site when attempting to establish the location of the easement drain is a purely preliminary piece of work, in no way was it the execution of the drainage works required by the contract. It was not the subject of any attempted charge by Drocon. Since the April contract has been cancelled by mutual agreement, I cannot see that there is a basis for any claim for the drainage. I accept that Drocon was acting reasonably in not proceeding to construct the building until plans that accorded with the site as occupied were provided. According to Mr Dang this was a fairly minor matter. Had he set his architect to the preparation of these plans when the issue first arose in mid-September, no doubt matters could have moved forward a lot more swiftly. As it was the building surveyor took over three weeks from the time that the revised or corrected plans were lodged with him to approve the amendment. The building permits were the owners' responsibility. In so far as they failed to move swiftly on this dimensions issue they were in my view the authors of their own wrong. I should observe also that it was common ground that no deposit had been paid by the Dangs. The terms of Clause 13 indicate that in those circumstances the builder was not obliged to commence work. Mr Dang said he was never asked for the deposit but a debtor is obliged to seek out his creditor so on that view it was incumbent upon the Dangs to pay the deposit whether it was demanded of them or not. There might I suppose be an argument based on waiver but it unnecessary to pursue this.
- 22 Once it is accepted that by mutual agreement the April contract was discharged and it came to an end by mutual consent and not by virtue of breach by the builder, the claims for the costs of establishing a new building contract such as for the new permit, the new establishment fee and so forth, cannot be recovered.

- 23 The outlay to City West Water for the PIC number was clearly incurred by Drocon. There is no basis for requiring Drocon either to transfer it free of charge to the Dangs, much less to pay the same fee a second time. Again, I do not regard it as an unreasonable position for Drocon to adopt to transfer the PIC number only when its invoice has been paid.
- 24 Again, it has not been suggested that the \$220 claimed as an outlay to North Western Set Outs has not properly been incurred.

CONCLUSION

- 25 I therefore do not make any determination that the amounts invoiced by Drocon are not payable or that Drocon should pay any compensation to the Dangs. As to the \$150 claimed for the movement of the crushed rock from the laneway to the Dangs' property, first, it would not seem reasonable to make that award when Drocon was willing and able to move the crushed rock itself. Secondly, I know of no authority whereby a party to a contract is entitled to claim from the other party remuneration for its own work in remedying a contract breach. I also observe that the cost of the installation of water is by virtue of Schedule 1 excluded from the contract price which0020is another reason why it would be wrong to award the cost of the PIC number against Drocon.
- 26 The proceeding is dismissed.
- 27 Drocon has filed no counterclaim and so there can be no award in its favour.

MFМ:RB