VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST **VCAT REFERENCE NO. D863/2004**

CATCHWORDS

Stage Progress Payments, Variations, Breach, Termination, Domestic Building Contracts Act

[2005] VCAT 1100

APPLICANT	Darvale Homes Pty Ltd (ACN 006 763 328)
FIRST RESPONDENT	Huy Pham
SECOND RESPONDENT	Ha Tran
WHERE HELD	Melbourne
BEFORE	Senior Member R J Young
HEARING TYPE	Hearing
DATE OF HEARING	25-27 May 2005
DATE OF ORDER	8 June 2005

ORDER

1. The respondents will pay the applicant $50,316.00 on the claim, such sum to be paid within 30 days of the date of these orders.

2. The counterclaim is dismissed.

3. The respondents will pay the applicant's costs of this proceeding on:-

   (a) a party and party basis up to and including 10 May 2005, such party and party costs to be assessed in accordance with Scale D of the County Court Scale; and

   (b) thereafter, to be on an indemnity basis;

all such costs to be agreed; and failing agreement, to be assessed by the Principal Registrar in accordance with Section 111 of the *Victorian Civil and Administrative Tribunal Act* 1998.

SENIOR MEMBER R J YOUNG

APPEARANCES:

For Applicant	Mr R Squirrell of Counsel
For 1st Respondent	In person
For 2nd Respondent	Mr H Pham, Husband

REASONS

1. The respondent owners ("owners") were represented at the hearing of this proceeding by the first respondent, Huy Pham. The second respondent, his wife, Ha Tran, in a letter to the Tribunal dated 11 May 2005 informed the Tribunal, that she would not be attending the hearing. She had to look after the owners' children and she gave her husband Mr H Pham unlimited authority to act on her behalf.

2. This is a claim by an applicant builder ("builder") against the owners for unpaid progress claims for base stage, frame stage and a claim for a variation, arising out of a contract whereby the builder constructed a dual occupancy dwelling at the rear of 14 Gerbert Street, Broadmeadows on the corner with Smiley Street, for the owners. The contract sum was $105,635.00. The form of the general conditions of contract were the "HIA New Homes Contract: July 2003" ("the contract").

3. The owners claim in their defence that the builder was not entitled to claim a variation for rock excavation as what was excavated from the sewer trenches was not rock but was, in their opinion, soil. The owners claim that the applicant is not entitled to claim a variation for rock or for any other matter. They claim that it was a breach of contract by the builder to maintain that the variation was valid when the owners ordered the builder to remove the variation claim from the contract sum.

4. The owners' counterclaim is based on the builder's alleged breach of contract by maintaining that the variation was valid and refusing the remove it when ordered to do so by the owners. Under the counterclaim the owners claim that because of the builder's breach they were entitled to refuse payment for the base and frame stage. Secondly, as a result of the builder's breach they owners were entitled to:-
    (a) liquidated damages of $13,000.00, 52 weeks at $250.00 per week;
    (b) interest on the loan for the land value of $128,000.00 at $8,484.00;

(c) return of the deposit of $5,281.75; and that any sums due for the base and frame stage would be later adjusted to reflect any additional costs incurred by the owners in completing the work using another builder, this entitlement of the owners is set out at Clause 44 of the contract.

5. The facts of the case are that work started in approximately May 2004 with the builder's drainer sub-contractor, Mr Copley, excavating and installing soil drains to carry the sewerage from the existing house via new sewer drains to the boundary trap and the house branch sewer. It was Mr Copley's evidence that during the installation of these drains it was necessary to excavate rock, i.e. basalt, to reach the correct trench depth. He submitted an invoice to the builder for the removal of eleven cubic metres of rock. His evidence was that he had measured this rock at eleven metres cubed as he had piled any rock separately to any soil spoil; the rock was not allowed to be used to backfill any soil drain trenches. It was agreed that subsequently the owners had this material removed by a Mr Phuoc Le, who charged the owners $500.00 for removing what he claimed was ten cubic metres of material. This accords with Mr Copley's measurement of 11 cubic metres.

6. On 8 June 2004 the builder forwarded the owners a request to sign a variation order for three additional sums. The first for the excavation of $11m^3$ of rock at $250.00 per metre ^{3}, a sum of $2,750.00. The builder justified the claim for rock on the basis that in the specification at page 2 there was an allowance for "Excavation of rock and removal from site" which stated that "if rock is struck during construction it will be excavated without notification at a cost to the owner of $250.00 per cubic metre." The builder did not have the rock removed in fact it was carried out by the owners cost by Mr Le, who charged $500.00.

7. Variation Order No 1, also contained two other variation claims. Firstly, "Water tapping under road - $924.00", the builder's justification for this claim for additional cost was that in its preliminary quote it had assumed that the water

main was on the same side of the road as the subject property; whereas, upon starting work the builder found that it was in the nature strip on the opposite side of the road pavement; this necessitated a longer pipe and a bore under the road pavement to install the water tapping hence the increased cost which the builder claimed.

8. The third claim in the sum of $120.00 was for the installation of two external lights as requested by the owners. At the commencement of this hearing the builder withdrew its claim for the water tapping and the external lights; acknowledging that in relation to the water tapping the water tapping had been included in the contract price and it was the builder's responsibility to carry it out whether it had made a mistake in the actual assessment of the cost of the water tapping or not. Secondly, in relation to the two external lights Mr Pham had withdrawn his request as described below.

9. Together with GST the Variation Order No was in the sum of $3,794.00 and attached to the request for the variation order was an invoice for the variation in this sum.

10. On 21 June 2004 the owners wrote to the builder in relation to Variation Order No 1 and pointed out that the water tapping was included in the specification and withdrawing the request for two external lights. In relation to the builder's claim for rock excavation Mr Pham stated in the letter that:-

> *"I have been on the site all the time. It seems to be normal work to be carried out. I have carefully confirmed with Mr* Ray (that is Mr Ray Pollock a director of the applicant) *on the site before I did get the man to remove it away. Mr Ray told me I only need to pay for the removal. There is no additional charge from the builder."*

Therefore, the owners did not sign Variation Order No 1; they considered that there had been no variation to the contract and no additional money was due to the builder.

11. Meantime the work had been continuing and on 29 June 2004 the builder sent the owners an invoice for the base stage progress payment in the sum of $10,563.50 with a note on the invoice that payment was due within ten days. There was no claim for the variation sum of $3,794.00. On the bottom of the invoice as on all invoices submitted for completed stages, there was two horizontal lines under the heading "Debtor History". These two horizontal lines were set out in columns of twos. The first column was headed "Contract" and showed the figure 105,365.00. The second column was headed "Variation" and beneath it was the figure 3,794.00. The third column was headed "Total" and this showed a figure of 109,429.00. On 2 July 2004 the owners wrote to the builder in response to the invoice stating that:-

> *"I have received your letter today. I would like to tell you that there is no variation to the contract as I have discussed to you in the previous letter.*
>
> *Would you please issue the bill with the amount in the first stage then we pay you.*

12. On 12 July the builder sent the respondents a faxed invoice for the combined base stage of $10,563.50 and the variation of $3,794.00 i.e. claiming the base stage and variation. The owners responded stating there was no variation. The owners wrote again on the 15 July stating that:-

> *"I've just received your letter yesterday. I would like to repeat that there is no variation of the contract. Please issue the only base stage tax invoice of $10,563.50 then we pay you."*

13. Meanwhile work had been continuing, on 22 July 2004 the builder forwarded a claim to the owners for the frame stage progress payment in the sum of $15,845.25. This invoice also contained the note that payment of this progress payment was due in ten days. The owners responded on 27 July 2004 stating that they wanted to keep the original contract price and when revised invoices were issued to this effect they would pay for both stages together with a sum of $1,000.00 as a "*negotiation suggestion*". On 2 August 2004 the builder forwarded a notice to the owners that if they did not pay the base and frame stage progress payments within seven days as required by Clause 30.O then under Clause 35.O of the contract the builder would be suspending work.

14. Clause 30.O of the building contract requires that the owners must pay the progress payment set out in schedule 3 to the contract within the stated time, in this case ten days. Schedule 3 sets out the progress payments for each completed stage of the contract works and in the case of this contract, Method 1 of Schedule 3 was used, this method adopts the progress stage percentages set out in Section 40 of the *Domestic Building Contracts Act* 1995 ("the Act"). On 4 August 2004 the owners wrote to the builder requesting that it "*take the variation off from the contract*" and that as soon as the owners received such amended invoices they would be paid.

15. By notice of 9 August 2004 the builder informed the owners that they had suspended the work under Clause 35.O of the building contract due to failure to pay the base and frame stage. On 19 August 2004 the owners responded, saying all they wanted was the variation removed. In this letter Mr Pham commented that:-

> *"The reason is that I have carefully with Mr Ray on the site. Mr Ray told me that I only pay for the debris/soil removal and nothing to pay from the builder. As discussed with Mr John today, we are both aware of the things."*

The letter went on with other assertions that do not carry any weight in my assessment. On 20 August 2004 the owners again wrote to the builder requesting the variation to be removed and increasing his offer to $1,500.00 to settle the variation.

16. On 3 September 2004 the builder's solicitor, Balbata & Associates, wrote to the owners demanding payment of the outstanding base, frame and variation amounts to allow work to recommence. On 6 September 2004 the owners responded to the solicitor reiterating their offer of $1,500.00 and stated that on or receiving invoices with the variation amount removed the stage payments would be made. On 21 September 2004 the builder wrote to owners claiming base and frame stage progress payments together with the interest on the outstanding payments. The owners wrote to the builder on the 29 September 2004

"*ordering*" the builder to remove the variation sum from the contract as it was not reasonable and that if the builder did not do this the owners would forward a notice to end the building contract.

17. On 3 November 2004 Balbata & Associates forwarded a notice of intention to terminate the building contract to the owners and suggested that the owners get legal advice. The notice stated that the owners had failed to pay the base and frame stage progress payments and if such payments together with the outstanding interest was not paid in ten days the applicant would terminate the building contract. The owners responded by letter of 29 September 2004 stating that they would not pay for the variation because it was not reasonable. In this letter the owners' allegations became increasingly erratic. At the end of the letter there was a section headed "*Final Call*" requiring the builder to forward the invoices for base and frame stage with the original contract price before 10 November 2004. On 12 November 2004 the owners again wrote to the builder stating that they would end the contract on 25 November 2004 unless the owners received the tax invoices for the base and frame stage with the original contract price immediately.

18. On 23 November 2004 Balbata & Associates forwarded a letter to the owners terminating the contract. The owners acknowledged receipt of this letter in their letter to Balbata & Associates of 24 November 2004. Thus the contract was brought to an end by one of the parties.

19. I now turn to the owners' claims. I commence with the owners' claim that no rock was excavated by the builder, that in fact it was soil that was excavated. It was Mr Copley's evidence that as well as having a bucket for the excavator on site he also had a hydraulic hammer to excavate any rock that was encountered.

20. The owners had supplied the builder with the plans for the new development together with a soil report from C E Lawrance dated 17 February 2004. The soil report showed that the geology of the surrounding area is quaternary basalt and

the bore logs showed soil or rock floaters in two bore holes from approximately 500mm beneath the surface. The other two bore holes showed refusal at 500mm. The top 500mm in all four bore holes was stated to be "Grey/brown clay silt and clay filling with rock pieces through."

21. The owners did not call the remover of the spoil, Mr Phuoc Le, to give evidence as to the nature of the spoil he removed. The only evidence that the owners had was from Mr Pham. He produced no definitive evidence to establish that the subject spoil was not rock other than to say that there was no rock hammer on site and from his observations it was soil.

22. I note that in his early correspondence with the builder Mr Pham did not dispute that the spoil was rock. In his letter of 21 June 2004 the reason he gave for not wanting to pay for the rock excavation was that he claimed Mr Pollock had told him on site that the owners did not have to pay any more than for the removal cost of the spoil. In his letter of 19 August 2004 responding to the builder's suspension of 9 August 2004 Mr Pham described this spoil as "debris/soil." The allegation that it was not rock that was excavated but soil does not appear to have arisen until after the termination of the contract and in fact the first document in which it was drawn to my attention was in the defence.

23. At a view on the subject property on 26 May 2005 the builder used a small excavator to scrape away the surface vegetation of thick couch grass and dug into the ground surface along where sewer trenches were laid. Within a few metres of the boundary trap, which would be the deepest sewer point, i.e. adjacent to the house branch sewer connection, the excavator uncovered a rock approximately 400mm long by 200mm wide which showed a tooth mark from a rock hammer. The rock appeared fresh and there was still a large amount of rock dust embedded in the groove made by the hammer tooth. I am mindful of the bore log saying "*rock pieces*" were evident near the surface, prior to any work being carried out, but I am confident that this rock and other smaller pieces of rock that were in the vicinity were freshly broken rock.

24. A reading of the Lawrance report indicates that there is a high likelihood of striking rock in any trench excavation on this site and it would be imprudent of any excavation contractor to attend the site without a rock hammer. I do not accept Mr Pham's evidence the rock hammer was not on site and based on my own observations and the evidence of Mr Copley, I accept that $11m^3$ of rock were excavated from the soil drain trenches.

25. In the analysis of this case the question of rock is somewhat of a red herring. The crucial issue in this dispute is whether the owners could refuse to pay the base and frame stage on the basis that the builder was in breach of the contract for maintaining that a variation was due and not removing such variation when ordered to do so by the owner, thereby returning to the original contract price. It should be noted in this analysis that although the builder maintained that the variation was validly made and the contract price increased, it had not pressed for the payment of the variation. Does the owners' refusal to pay for completed stages put them in breach of their obligations under the building contract? There is no dispute between the parties that the base stage and frame stage had been completed at the time the builder invoiced the owners for these stage progress claims.

26. What is the owners' obligation to pay for recognised stages of the contract works? Under Clause 30.O of the contract the owners **must** make the stage progress payments within the required numbers of days, here ten days. Under Clause 35.O of the contract the builder may suspend work if the owner has not made a progress payment within seven days of it becoming due. Given the emphatic language of the contract I consider that the owners were in breach of the building contract for failing to pay the base and frame stage when they had by common consent been completed and moved for them.

27. Was the builder in breach for maintaining a variation sum in the debtor history which was disputed by the owners? If the builder removed such sum and

accepted the owners' offer of $1,500.00 by way of ex gratia payment it would be an accord and satisfaction. I do not consider that the builder was in breach of the contract for failing to remove such amount.

28. I do not consider that the owners were entitled to require such variation removal before making payments of the progress payments for recognised stages of completed work as set out in Schedule 3. To hold that they were would defeat the legal framework for the administration of building contracts. The basic promise made by each party in a building contract is that the builder builds in return for the owner paying money. It is common that disputes arise about variations, the quality of the work and time during the course of the contract works. If the owner was entitled to refuse all payment until a dispute regarding the legitimacy of a variation was adjudicated there would have to be a likewise right given to the builder. This would result in the administration of building contracts becoming chaotic and unworkable with a vast increase in litigation. That is why Clause 30.O states in emphatic terms that the owner must pay for completed stages.

29. The only grounds for the owners not to pay a completed stage is if they have legitimately terminated the contract for one of the grounds in Clause 43 of the contract. These legitimate grounds for the owners' termination do not include the builder insisting in maintaining a variation against the wishes of the owner.

30. The owners have let a dispute over a relatively minor amount of a variation to colour their attitude to the whole contract. This has led them to breach Clause 30.O and they are thereby in breach of the contract. This dispute about the variation in relation to rock excavation etc could have waited until the completion of the contract works.

31. I consider that the builder was entitled to maintain that it was entitled to the variation, whether this was correct or not; the builder was also entitled to insist upon payment for the completed base and frame stage under Clause 30.O of the

contract. When the owners refused to pay, the builder was entitled to suspend the work. I have some disquiet about the applicant's solicitors' letter of demand which required the payment of the variation amount. However, the notice of intention to terminate the contract, issued under Clause 42.O of the contract, relied only upon the owners' failure to pay the base and frame stage and this is an acknowledged ground by which the builder may terminate the contract under Clause 42.O of the contract. The Notice of Termination was served some nineteen days after the Notice of Intention to Terminate was sent and thereby the required time period of ten days under Clause 42.1 of the contract was satisfied.

32. The owners submit that they had satisfactorily terminated the building contract as the builder had unreasonably suspended the work. This ground cannot be made out as I have found that the builder reasonably and for a legitimate reason suspended the work. Further, the failure by the owners to pay for the base and frame stage as required by Clause 30.O meant that the owners were in substantial breach of the contract and for that reason could not have bought the contract to an end at the time they did so; see Clause 43.2.

33. It follows from what I have said that the owners' counterclaim must be dismissed.

34. In relation to the builder's claim, I allow the base and frame stage payments together with interest on those outstanding sums at the contractual interest rate of 20% until the date of termination of 23 November 2004 and thereafter at the penalty interest rate.

35. Under the Clause 42.3 of the contract where the builder brings the contract to an end legitimately, it is entitled to the contract price and other amounts payable by the owners under this contract less the cost to the builder of performing the remaining building works. Thus, I consider that as well as being entitled to the completed stage payments the builder is entitled to the actual cost of the work

that it has carried out on the lock-up stage. During the hearing this was assessed from invoices as being:-

(a)	garage brick work:	(i)	materials purchases: mortar etc	$ 362.00
		(ii)	brick purchase	$ 1,568.00
		(iii)	bricklayer	$ 1,575.00
(b)	windows:	(i)	purchase	$ 2,220.00
		(ii)	installation	$ 200.00
(c)	plumbing rough-in			$ 2,135.00
(d)	tiled roof supply and install			$ 4,395.00
(e)	structural steel			$ 350.00
(f)	facia and gutter purchaser and installation			$ 1,454.00
(g)	temporary fencing			$ 250.00
Lock-up stage expenses				$14,590.00
Administration and profit 10%				$ 1,451.00
Builder's costs allowed for lock-up stage				$15,960.00

36. The last matter to deal with is the builder's claim for the variation, of which only the rock claim remains. I do not agree that placing a statement in the specification that rock excavation will be charged at $250.00/metre ^{3} is sufficient to entitle the builder to claim such cost from an owner. In this contract there is a provision in Schedule 2 for "Prime Cost and Provisional Sums" of which there were a small number but not rock excavation.

37. "Provisional sums" are defined in Clause 1 of the contract as:

> *"The items of work (labour and material) included in the contract price for which the builder cannot give a definite price, for example, site excavation, rock removal and concrete footings."*

Such a requirement and specification of rock removal as a good example is only in keeping with the general purpose of the Act which requires, by the operation of its sections, for the builder to provide the owners with a reasonable estimate of all of the costs they are likely to be obliged to pay under the contract. By placing the statement in the specification that rock will be charged at $250.00 per metre ^{3} without further reference or with any estimate of the amount of rock likely to be

struck when there is a competent and wide ranging soil report evidencing the presence of rock means that the builder is not providing the owners with the information they are entitled to under the Act. I consider this is a breach of the Act and I refuse the builder's claim for the variation.

38. This was a difficult case as Mr Pham, the respondent who appeared, had no legal training; further, I am unsure as to how well he reads and understands English. As I understand it he has had no legal advice. Mr Pham was advised to obtain legal advice by the builder's solicitor when he wrote his letter of demand of 3 September 2004. Mr Pham laboured under a number of fundamental misunderstandings as to his legal position. Firstly, he considered that he was entitled to withhold any payments until a variation was sorted out; and, secondly, that he could order the builder to remove the variation. Both of these are fundamentally legally incorrect. I informed Mr Pham at the commencement of the case once I had heard him explain his defences and counterclaim, that I must apply the law as it exists no matter how dire the consequences for a party and in this case, himself and his family. At the time Mr Pham seemed to understand this but as the case went on it became obvious that Mr Pham is convinced that his view of the law is correct, however untenable that position. I am sorry that I could not make my position and responsibilities clearer to Mr Pham. This may have serious consequences for himself and his family.

39. At the conclusion of delivering these reasons orally the builder made application for its costs on an indemnity basis; firstly, as the owners' arguments were held to be untenable and this was a complex dispute. Secondly, from at least 10 May 2005 as the builder had served an offer to settle under the *Victorian Civil and Administrative Tribunal Act* 1998 and my award in this decision was more favourable to the builder than what it would have accepted under the offer to settle.

40. I checked the compliance of the offer with the requirements of Part 4, Division 8 of the *Victorian Civil and Administrative Tribunal Act* 1998, my award is more

than the sum in the offer and in all other respects the offer complies. Section 112 of the *Victorian Civil and Administrative Tribunal Act* states that unless the Tribunal orders otherwise the party who served the offer is entitled to call their costs. I consider the language plain, 'all' means on an indemnity basis, and I would so find for all costs incurred by the builder after 10 May 2005.

41. In relation to costs up to an including 10 May 2005 I accept that the owners' case was very weak and could be regarded as untenable, i.e. it was wrongheaded and completely at variance with the specific written terms of the contract. The builder claimed its costs on an indemnity basis citing Supreme Court cases but I do not consider the tests as to whether indemnity costs are appropriate are the same between the courts and the Tribunal. The Tribunal is a "no cost" jurisdiction and much stronger reasons are required than in the courts to find costs should be paid on an indemnity basis. Here the owners' case though untenable was not motivated by malice or arrogance but by ignorance and a failure at a basic level to understand the contractual relationship. The builder in its correspondence does not appear to have explained to the owners their misunderstandings. I consider the owners are entitled to their costs on a party and party basis up to and including 10 May 2005.

SENIOR MEMBER R J YOUNG