

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D1263/2013

CATCHWORDS

Terms of settlement between Owners and Builder. Builder to provide plumbing and electrical compliance certificates. Issue as to whether Builder complied with its obligations under the terms of settlement.

APPLICANT:	Mrs Linda Christine Doyle
SECOND APPLICANT:	Mr George Paul Doyle
RESPONDENT	R & P Trevorrow Pty Ltd (ACN: 005 272 953)
WHERE HELD	Melbourne
BEFORE	Senior Member M. Farrelly
HEARING TYPE	Hearing
DATE OF HEARING	31 July and 1 August 2014
DATE OF ORDER AND REASONS	22 August 2014
CITATION	Doyle v R & P Trevorrow Pty Ltd (Building and Property) [2014] VCAT 1083

ORDERS

- 1 I find and declare that the Respondent has complied with its obligations under the Terms of Settlement between it and the Applicants dated 16 January 2014.
- 2 I direct the Principal Registrar to list this proceeding for further hearing before Senior Member Farrelly with a half day allocated, at the next available date.
- 3 Should either of the parties consider a further half day to be insufficient time to conclude the hearing, or should either party seek to change the listed hearing date by reason of the availability of Counsel, they must notify the Principal Registrar in writing as soon as practicable.

SENIOR MEMBER M. FARRELLY

APPEARANCES:

For the Applicants

Ms S. Kirton of Counsel

For the Respondents

Mr A. Rollnik of Counsel

REASONS

- 1 In June 2013 the Applicants (“Owners”) and the Respondent (“Builder”) entered into a building contract for alterations and renovations to the Owners’ home in Sunshine, Victoria (“the renovation contract”). In August 2013, at which date the building works were well progressed but some considerable way off completion, the Owners and the Builder fell into dispute over the nature and quality of some of the building works carried out by the Builder, which culminated in the Owners telling the Builder to stop work.
- 2 In around November 2013, the Owners commenced this proceeding by filing an application in the Tribunal seeking damages in respect of the cost to complete the building works. On 3 December 2013, the Builder filed a counter-claim seeking a declaration that the building contract was at an end together with damages in respect of works carried out but not paid for and damages in respect of the loss of profit in not being able to complete the contract (“the proceeding”).
- 3 At a mediation conducted at the Tribunal on 16 January 2014, the Owners and the Builder agreed to settle the proceeding and their disputes on terms set out in a document entitled “Terms of Settlement”, signed by the parties that day (“the TOS”). Under the TOS, the Builder was to provide to the Owners:
 - (a) a roofing compliance certificate
 - (b) a plumbing compliance certificate
 - (c) an electrical compliance certificateand, within seven days of the provision of those certificates, the Owners were to pay the Builder \$20,373.00 (“the settlement sum”).
- 4 The TOS provide that if the Owners fails to pay the settlement sum within the seven day period, the Owners and the Builder irrevocably consent to the Builder applying [to the Tribunal] to have the proceeding reinstated and to obtaining a determination for the outstanding sum plus all reasonable costs incurred in so doing.
- 5 On around 23 January 2013, the builder, in purported fulfilment of its obligation under the TOS, provided three compliance certificates to the Owners. The Owners, however, refused to pay the settlement sum to the builder because they considered that the building works identified in the compliance certificates had not been completed. In her letter to the Builder dated 25 January 2014, the owner, Mrs Doyle, states:

“We will not be accepting compliance forms as jobs are not complete.

Electrical work – no roughing in bathroom, laundry and 2 bedrooms.
smoke alarms?

Plumbing – no gas line in kitchen

Roof – not complete”

- 6 The Builder subsequently filed an application seeking an order for the reinstatement of the proceeding and orders against the Owners for the settlement sum plus costs. At a Directions Hearing at the Tribunal on 29 April 2014, the proceeding was reinstated and further orders were made for the file and service of claims brought by each party, defences to those claims, expert reports and the provision of lists of documents.
- 7 In their Points of Claim, dated 15 May 2014, the Owners allege that the Builder, by providing compliance certificates which did not comply with relevant legislative requirements, breached its obligations under the TOS. The Owners say that, by reason of that breach, they have suffered loss and damage and they seek damages in the sum of \$11,221 calculated as follows:
 - \$6,221 as the cost to rectify and complete items of building work identified in the compliance certificates, and
 - \$5,000 as general damages for loss of amenity, stress and inconvenience.
- 8 By its Counterclaim, dated 10 June 2014, the Builder seeks to enforce its entitlement under the TOS to obtain a determination [orders] for payment of the settlement sum, \$20,373.00, together with its costs. The Builder also seeks interest on the settlement sum from the date it says it ought to have been paid by the Owners, namely 30 January 2014.

THE HEARING

- 9 The hearing commenced before me on 31 July 2014. The Owners were represented by Ms Kirton, of counsel, and the Builder was represented by Mr Rollnik, of counsel.
- 10 At the commencement of the hearing, Ms Kirton made an application that leave be granted to the Owners to amend their Points of Claim. The application was made without prior notice to the Builder or the Tribunal, and no draft proposed amended pleading was produced. Ms Kirton indicated that, if permitted to amend their claim, the Owners would, in their amended claim, allege that the Builder had “repudiated” the TOS by providing compliance certificates which did not comply with relevant legislative requirements, and that the Owners “accepted” that repudiation and would seek an order that the TOS be set aside.
- 11 The Builder objected to the late application. After some discussion, and having regard to the fact that the parties had made arrangements for the attendance of witnesses, including expert witnesses, at the hearing that day, it was agreed that the hearing would proceed that day for the purpose of determining the threshold issue, namely:

Whether the Builder has complied with its obligations under the TOS and, if the Builder has not complied, whether the Builder has repudiated the TOS.
- 12 The hearing continued for two days. Mr Lloyd gave evidence for the Owners. The Owners also called evidence from Mr C. Papadopoulos, an

electrician who carried out some electrical works at the home after the Builder had left the site. The Owners also adduced expert evidence from Mr Gairns, a building consultant. Mr Gairns also produced a report on the building works carried out by the Builder.

- 13 For the Builder, Mr Trevorrow, a director of the Builder, gave evidence. The Builder also called evidence from Mr. Harastov, a plumber who had issued one of the compliance certificates in issue, and Mr Chandra, the electrician who had issued another of the compliance certificates in issue. The Builder also called expert evidence from Mr Quick, a building consultant with particular experience in plumbing. Mr. Quick also produced a written report.
- 14 For the reasons discussed below, I find that the Builder complied with its obligations under the TOS.

COMPLIANCE CERTIFICATES

- 15 The TOS provide no explanation as to what is meant by a “*compliance certificate*”.
- 16 Legislative requirements in respect of plumbing compliance certificates are found in Division 4 of *the Building Act 1993*. The requirements include the following :
- A licensed plumber, who has carried out or supervised plumbing work, must give the person for whom the work was carried out a signed compliance certificate in respect of the work. (s221ZH(2)(a)).
 - A document is not a compliance certificate unless the certificate form used is a form that has been supplied by the [Plumbing Industry] Commission or a person authorised by the Commission. (s 221ZH(3)).
 - A licensed plumber must not sign a compliance certificate in relation to plumbing work unless the certificate describes the work, confirms that he or she carried out the work or that the work was carried out under his or her supervision, and states that the work complies with plumbing laws. (section 221ZI(I)).
 - A licensed plumber must not sign a compliance certificate in relation to any plumbing work if the plumber knows, or ought reasonably to know, that the certificate contains any misstatement of fact. (s 221ZJ).
 - Where a plumber gives a building practitioner a compliance certificate, the building practitioner must then give the compliance certificate to the owner of the premises (s 221ZLA).
- 17 In respect of electrical works, the relevant legislative provisions in respect of compliance certificates are found in the *Electricity Safety Act 1998* (“the ESA Act”) and the *Electricity Safety (Installations) Regulations 2009* (“the ES Regulations”). The provisions include:

- An electrician must complete and sign a certificate of compliance in respect of electrical works he has carried out (s44(2) ESA Act).
 - The certificate must describe the work carried out and state that the work complies with the ESA Act and the ES Regulations (s44(3) ESA Act).
 - In respect of certain prescribed electrical work, the work must be inspected by a licensed electrical inspector and that inspector must provide to the electrician who carried out the work a signed certificate of inspection (s45 ESA Act).
- 18 The Builder obtained the three compliance certificates from sub-contractors who had been engaged by the Builder to carry out works under the renovation contract. One certificate was obtained from Mr Longhurst, a licensed plumber who carried out roof plumbing works (“the roof plumbing certificate”). The second certificate was obtained from Mr Harastov, a licensed plumber who carried out water and gas pipe plumbing works (“the pipes plumbing certificate”). The third certificate was obtained from Mr Chandra, a licensed electrician who carried out electrical works (“the electrical work certificate”).
- 19 The certificates provided by the two plumbers are in standard form format as supplied by the Plumbing Industry Commission. Each certificate briefly describes the works carried out, and each certificate provides certification by the plumber that the works described in the certificate comply with plumbing laws as defined in Part 12A of the *Building Act* 1993.
- 20 The electrical works certificate is in the standard form format as approved by *Energy Safe Victoria*. The certificate briefly describes the works carried out together with the certification of the electrician, Mr Chandra, that such works comply in all respects with the ESA Act and the ES Regulations. The certificate also includes certification from a licensed electrical inspector, Mr Ron, that on 21 January 2014 he inspected *prescribed* electrical installation work and certifies that such work is compliant with the ESA Act and the ES Regulations. I accept Mr Chandra’s uncontested evidence that the *prescribed* electrical installation work to which Mr Ron’s certification applies is the main power switchboard installed by Mr Chandra.

OWNERS’ SUBMISSIONS

- 21 The Owners submit that there is an implied term in the TOS that the compliance certificates would be “*properly obtained and validly issued and comply with*” relevant legislative requirements.
- 22 The Owners say that the certificates are defective or invalid because the certificates do not accurately describe the works actually carried out, and as such, the certificates purport to provide certification in respect of certain works which were not carried out.
- 23 As discussed below, I am satisfied that the Builder has complied with its obligations under the TOS, regardless of whether the compliance certificates accurately describe the works carried out by Mr Longhurst, Mr

Harastov and Mr Chandra. For completeness, I will first briefly discuss the alleged inaccuracies in the compliance certificates.

- 24 In the case of the pipes plumbing certificate, the description of works includes “*New PEX gas line from gas meter to HWS, cooktop and wall furnace heater*”. At the time the Owners called a halt to all works, no kitchen cabinetry or appliances had been installed. Mr Harastov had installed a gas line, intended for the cooktop, from the gas meter to a point on a wall in the kitchen. The Owners say that the intended position of the cooktop was, as noted on the working plans, on an adjacent wall. As such, say the Owners, the certificate inaccurately describes the installation of the gas line as being *to* the cooktop. In my view, the alleged misdescription is trivial, particularly in view of the expert evidence of Mr. Quick who says that, once the cooktop is installed, it would be a straightforward, normal task to run a connecting gas line to the gas line point on the adjacent wall.
- 25 In the case of the electrical work certificate, the description of works includes rough-in for 20 lights, 20 power points and 2 smoke alarms. The Owners say that rough-in was provided for only 18 lights, 17 power points and 1 smoke alarm. After the Owners brought a stop to the building works, they engaged an electrician, Mr Papadopoulos, to inspect the electrical works. Mr Papadopoulos gave evidence that he was able to detect rough-in for only 18 lights, 17 power points and 1 smoke alarm, however he also conceded that it was possible that he failed to detect some rough-in points. Having also heard evidence from Mr Chandra, who produced a plan of the electrical rough-in works he had prepared prior to carrying out the works, and having regard to the fact that Mr Chandra himself did the rough-in works, I prefer Mr Chandra’s evidence and find that the electrical work certificate does not inaccurately describe the works as alleged by the Owners.
- 26 The Owners also say that there is doubt as to whether the electrical inspector, Mr Ron, actually inspected the main power switchboard on 21 January 2014. I am satisfied, on the evidence of Mr Chandra and Mrs Doyle, that the inspector attended the Owners’ home on 21 January 2014. Mr Chandra confirms Mr Ron’s attendance and inspection of the main power switchboard. Mrs Doyle accepts that a gentleman attended the premises with Mr Chandra on about 21 January 2014, but she is unsure, or unable to recall, who the gentleman was and whether he actually inspected the main power switchboard. I prefer Mr Chandra’s evidence to the uncertain evidence of Mrs Doyle, and am satisfied that the electrical work certificate accurately records Mr Ron’s inspection and certification of works on 21 January 2014.
- 27 In the case of the roof plumbing certificate, the description of the works is “*GUTTER AND ALL METAL ROOFING TO PITCHED AREA ONLY AND FRONT PORCH, DOWN PIPES TO NEW GUTTERED AREA ONLY REAR SKILLION ROOF*”. There is no dispute that, at the time the Owners called a halt to all works, no gutter had been installed to the front porch, and in this sense it

may be said that the compliance certificate does not accurately describe the works carried out.

DISCUSSION

- 28 As noted above, I am satisfied that the Builder has complied with the TOS, regardless of the accuracy of the description of works noted on the compliance certificates.
- 29 The Builder's obligations under the TOS should not be confused with the obligations Mr Longhurst, Mr Harastov and Mr Chandra may have had in their preparation of compliance certificates. The Builder's obligations under the TOS were limited to the provision of a roofing compliance certificate, a plumbing compliance certificate and an electrical compliance certificate. The Builder had no obligation to carry out any further building works.
- 30 As a matter of law, for a term to be implied into a contract, the term :
- (a) must be reasonable and equitable;
 - (b) must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it;
 - (c) must be so obvious that "it goes without saying";
 - (d) must be capable of clear expression;
 - (e) must not contradict any express term of the contract.¹
- 31 In my view the term "*compliance certificate*" in the TOS means, by implication, a compliance certificate of the type commonly provided by a plumber or an electrician in respect of works carried out, and in this case, the works carried out at the Owners' home by the plumbers and the electrician engaged by the Builder. Such implication is, in my view, reasonable, obvious and necessary to give efficacy and meaning to the TOS, at least in so far as the TOS raise an obligation on the part of the Builder. Without such implication, the reference to *compliance certificate* in the TOS would have little, if any, meaning.
- 32 It is entirely another thing, however, to saddle the TOS with an implied obligation on the Builder to produce compliance certificates which can be proven to be strictly compliant with all applicable legislative provisions.
- 33 The central nature of plumbing and electrical compliance certificates is that the plumber or electrician who actually carried out, or supervised the carrying out of, plumbing or electrical works certifies that such works are compliant with applicable laws. A builder cannot himself provide such certification.
- 34 If information contained in a compliance certificate is inaccurate, there may be repercussions at law for the plumber or electrician who completed and signed the certificate. There may also be ramifications for a builder under

¹ BP Refinery (Western Port) Pty Ltd v Shire of Hastings (1977) 180 CLR 266 at 282-3

the contractual and/or statutory warranties covering building works under a contract to which the builder is a party. But whatever repercussions there may be for a builder, the builder cannot alter or interfere with compliance certificates provided to him by plumbers and electricians. The role of a builder, at law, is to pass compliance certificates on to the owner with whom the builder has contracted for the carrying out of building works.

- 35 In my view, the TOS obligated the Builder to do no more than obtain from its plumbing and electrical subcontractors compliance certificates in respect of the works those subcontractors carried out at the Owners' home, and to pass those certificates on to the Owners. The Builder has done exactly that, and accordingly, I find that the Builder has complied with its obligations under the TOS.

CONCLUSION

- 36 I will direct that the matter be listed before me for a further half day hearing at the next available date. Should either of the parties consider a half day to be an insufficient amount of time to conclude the hearing, or should either of the parties seek to change the listed hearing date by reason of the availability of Counsel, they should notify the Principal Registrar in writing as soon as practicable.

SENIOR MEMBER M. FARRELLY