

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. **BP36/2014**

CATCHWORDS

Building contract – builder to obtain building permit – impossible to obtain permit – impossible to build lawfully without permit – contract frustrated – further performance discharged - deposit returned less amounts paid by Builder in performance of the contract

APPLICANT	Mrs Anne Foley
RESPONDENT	Afonso Building Solutions Pty Ltd (ACN 128 237 098)
WHERE HELD	Melbourne
BEFORE	Senior Member R Walker
HEARING TYPE	Hearing
DATE OF ORDER	5 November 2014
DATE OF WRITTEN REASONS	20 February 2015
CITATION	Foley v Afonso Building Solutions Pty Ltd (Building and Property) [2014] VCAT 1640

WRITTEN REASONS FOR DECISION MADE ON 5 NOVEMBER 2014

I heard and determined this proceeding on 5 November 2014 and gave oral reasons for the decision that I made.

Written reasons are now requested. These are now provided. The delay between the request and the provision of these reasons is due to a substantial delay in obtaining an audible recording of the proceeding from the temporary premises in Exhibition Street where the hearing occurred.

SENIOR MEMBER R. WALKER

APPEARANCES:

For Applicant Mr S. Hoban, Solicitor

For Respondents Mr D. Avery, Solicitor

WRITTEN REASONS PROVIDED PURSUANT TO REQUEST

Background

- 1 This is an application by the Applicant, Mrs Foley, to recover the amount of a deposit of \$10,066.00 she paid to the Respondent builder (“the Builder”) pursuant to a building contract they had entered into (“the Contract”).
- 2 The Contract was for the construction of a house on land that she had contracted to buy (“the Land”). The Land was one of the lots of a two lot subdivision of a larger allotment. The larger allotment was part of an estate in which each of the lots had a restrictive covenant on the title preventing the construction of more than one dwelling house. The effect of this covenant on the Land was not known to Mrs Foley or to the Builder at the time the Contract was signed.
- 3 The director of the Builder is Mr Falso who is a registered Builder and has been for some years. He builds in the area where the Land is situated. His sales agent is a Mr Antonello, whom he employs on a commission basis.
- 4 Mr Antonello was manning a display home when Mrs Foley came in and inspected it. Over a series of meetings it was eventually agreed that a house of a particular design would be built for Mrs Foley by the Builder. The Builder paid Mr Antonello a commission of \$8,000 for introducing Mrs Foley.
- 5 A preliminary agreement was entered into that was intended to hold matters until such time as a formal building contract was prepared. Ultimately the Contract was prepared and signed.
- 6 The relevant provision of the Contract for the purpose of this case is paragraph 4.2, which reads as follows:

“If the necessary building and/or planning permits are not obtained within 60 days of the date of the signing of this Contract, then either party may give written notice to the other party terminating this Contract without liability to the other except only that the Builder shall be entitled to be paid a reasonable sum for services lawfully performed and expenses incurred under this Contract to the date of termination and this amount shall be a debt due and payable by the Owner to the Builder and shall be recoverable accordingly.”

Under the terms of the Contract the Builder was to obtain the building permit.

The problem with the title

- 7 After the Contract was signed it transpired that there were difficulties with the title. There had been considerable delay in having the title issued from the Titles Office which had concerned the parties. Mrs Foley was anxious to get the house built as soon as possible.

- 8 In March Mr Antonello received a call from the estate agent who had sold the land to Mrs Foley (“the Agent”). The Agent was Mr Antonello’s brother in law and he told Mr Antonello that there were some “complications” with the title.
- 9 The complication was that the parent title which had been subdivided into two allotments, including the Land, was burdened by a restrictive covenant prohibiting the construction of more than one dwelling house on the land comprised in the parent title. As a consequence, only one house could be built which could be on either of the two allotments but there could not be a house on both. Since the Builder was to build a house on the other allotment, if that were to proceed, it would not be possible to build a house on the Land.
- 10 Further discussion took place and Mrs Foley then attempted to recover her money on the basis that, if the Builder was building a house for the other lot owner in the two lot subdivision then it could not build the house for her.
- 11 The evidence about the actions and intentions of the Builder and Mr Antonello in all this was not very clear. Mr Antonello said in evidence that he did not actually bring the application into the council to obtain a permit for the other allotment until after he was of the view that Mrs Foley was not proceeding. That is not consistent with Mrs Foley’s evidence which I prefer. He did not seem to consider that he might have had a conflict of interest. It seems to me from his evidence that he preferred the other purchaser and, after he obtained a building permit for the other house, the council would not issue one for Mrs Foley’s house. The relationship between the Builder, the Agent and Mr Antonello appears to have been a close one. There was also a connection between them and the purchaser of the other allotment. I am not satisfied that I was told the whole story by either the Builder or Mr Antonello.
- 12 How it was that the other lot owner was able to build a house and Mrs Foley was not does not appear clearly from the evidence. Mrs Foley asked Mr Antonello whether he would prefer her to the other purchaser and he indicated that he would have to prefer the other purchaser due to a connection they had.
- 13 The fact is that the situation arose without any fault on the part of Mrs Foley where it was simply impossible to obtain a building permit to construct the house that the Builder had contracted to build for her, at least until the restrictive covenant expired, which will be in 2016 or 2017. Without a building permit, the construction of the house on the Land would have been illegal.

The Builder’s claim of repudiation

- 14 Mr Avery has submitted that I should find from the conduct and conversations by or on behalf of Mrs Foley that she repudiated the Contract. I do not accept that submission.

- 15 There are two difficulties with the repudiation suggestion. The first is that repudiation is not found lightly. The cases say that one should only find a party has repudiated a contract if that party has clearly evinced an intention no longer to be bound by the contract. It is not a finding that should be made lightly and I cannot make that finding on the evidence in this case. Mrs Foley wanted the house built.
- 16 The second difficulty is that, even if Mrs Foley's conduct had amounted to repudiation then the Builder would have had the option to accept the repudiation and bring the Contract to an end, elect to affirm the Contract or do nothing. If it had done nothing then after a while it might have been found to have affirmed the Contract.
- 17 In this instance it is clear from Mr Afonso's own evidence that he did not accept any repudiation because he said that the Contract was still on foot so far as he was concerned. I must therefore find that, even if I had found repudiation by Mrs Foley, and I did not, the Builder affirmed the Contract. Finally, quite apart from the affirmation, there is no evidence that the Builder accepted any repudiation.

Clause 4.2 of the contract

- 18 As to the application of Clause 4.2 of the Contract, the building permit was not obtained within the 60 day period. In fact it could never be obtained, at least not earlier than 2016 or 2017 when the covenant will expire. But although that part of the clause is satisfied, neither party served the notice required by that clause to bring the contract to an end.

Frustration

- 19 Since the Contract was not determined, the Builder was required by the Contract to get a building permit yet it was impossible for it to do so. The Builder was required to build a house in accordance with the Contract but could not lawfully do so without a building permit.
- 20 It is no answer to say that construction could have been delayed until 2016 or 2017 when the covenant expires because that would be a quite different performance from that required by the Contract. Either party could fairly say: "That was not what I agreed to". Such a delay would have had practical significance. Building costs might well have gone up and Mr Afonso might well have been building it at a loss. Mrs Foley would also have been left without anywhere to live for the next two or three years.
- 21 In these circumstances the Contract was frustrated because it could not be lawfully performed.

Consequences of frustration

- 22 Frustration always used to be governed in Victoria by the *Frustrated Contracts Act 1959*. That Act was repealed 2008 when it was replaced by later legislation which has now been replaced in turn by the new consumer

legislation. The current incarnation is Part 3.2 of the *Australia Consumer Law and Fair Trading Act 2012* which is as follows:

“35. Contracts to which this Part applies

(1) This Part applies to a contract if the parties to the contract are discharged from the further performance of the contract because—

- (a) performance of the contract becomes impossible; or
- (b) the contract is otherwise frustrated; or

.....

36. Adjustment of amounts paid or payable to parties to discharged contracts

(1) All amounts paid to any party under a discharged contract before the time of discharge are recoverable.

(2) All amounts payable to any party under a discharged contract before the time of discharge cease to be payable.

37. Court may allow amounts paid or payable to be recovered or paid

Despite section 36, the court may, if it considers it just to do so having regard to all the circumstances of the case, allow a party to a discharged contract—

(a) to whom amounts were paid or are payable under that contract before the time of discharge; and

(b) who has incurred expenses before the time of discharge in or for the purpose of the performance of that contract—

to retain or recover (as the case may be) the whole or any part of the amounts paid or payable to that party under the contract in an amount not exceeding the expenses incurred.

38. Parties to pay an amount for valuable benefits obtained

(1) This section applies if a party to a discharged contract obtained a valuable benefit (other than a payment of money to which section 36 or 37 applies) before the time of discharge because of anything done by another party in or for the purpose of the performance of the contract.

(2) Despite section 36, the benefited party is liable to pay to that other party any amount (not exceeding the value of the benefit obtained) that the court considers just having regard to all the circumstances of the case.

(3) For the purpose of subsection (2), the court may have regard to—

(a) the amount of any expenses the benefited party incurred before the time of discharge in or for the purpose of the performance of the contract, including any amount paid or payable by the benefited party to any other party under the contract and retained or recoverable by that party under section 36 or 37; or

(b) the effect, in relation to the benefit obtained, of the circumstances giving rise to the frustration or avoidance of the contract.

(4) For the purpose of this section, if a party to the contract has assumed obligations under the contract in consideration of the conferral of a benefit by another party to the contract on any other person (whether or not that person is a party to the contract), the court may, if in all the circumstances of the case it considers it just to do so, treat any benefit conferred on that other person as a benefit obtained by the party who has assumed those obligations.

39. Calculation of expenses incurred

In estimating, for the purposes of this Division, the amount of any expenses incurred by any party to a discharged contract, the court may include an amount that appears reasonable for—

- (a) overhead expenses; and
- (b) work or services performed personally by the party.”

- 23 In essence, where the performance of the contract becomes impossible, the parties to the contract are discharged from further performance and money paid under the discharged contract goes back to, and is recoverable by, the party that paid it. Any amounts that are payable in the future do not have to be paid.
- 24 The qualification to that is found in s.37 which says that, despite s.36 the Court, which in this case is the Tribunal, may if it considers it just to do so having regard to all the circumstances of the case allow a party to a discharged contract to whom amounts were paid or payable under that contract before the time of discharge, in this case the Builder, and who has incurred expenses before the time of discharge in or for the performance of that contract order that that party retain or recover (as the case may be) the whole or any part of those amounts in an amount not exceeding the expenses incurred.
- 25 In calculating the expenses incurred the parties’ overhead expenses and what they’ve done personally s can be taken into account (s.39).

The Builder’s claim for expenses

- 26 Mrs Foley paid to the Builder a total of \$10,066.00. She is entitled to have that returned to her less any adjustment pursuant to s,37. The Builder claims that it is entitled to retain that money because it has paid out more than that sum. It has listed these as:

Commission paid to Mr Antonello	\$8,000.00
Soil test	\$ 400.00
Surveyor	\$ 451.00
Door phone	\$ 142.95
Plans	\$ 670.00

It also claims various internal administrative costs under s.39.

- 27 In determining what falls within or without s.37 or s.38 one must have regard to what the Contract required the Builder to do in order to see whether the claimed expense was "...in or for the performance of that contract".
- 28 The Builder had to build on the Land within a building envelope and to that extent it needed to engage the surveyor. It needed to do a soil test, it needed to prepare drawings because it was a design and construct contract and it needed to prepare an application for the building permit, because that was one of its obligations under the Contract. All of those things had to be done as part of the performance of the contract by the Builder so they can all be said to have been in or for the performance of the Contract.
- 29 The big item claimed by the Builder is the commission that it has paid to Mr Antonello. Mr Hoban said that Mr Antonello was paid a very substantial sum indeed for the limited time that he spent with Mrs Foley but I think that is not to the point. The agent was engaged and the expense was incurred by the Builder. However it was an expense incurred in order to bring about the Contract. At the time it was incurred the Contract did not exist. It was the signing of the Contract that resulted in the obligation of the Builder to pay Mr Antonello his commission. It was not a term of the Contract that the Builder pay Mr Antonello this commission. As a consequence, it cannot be said that the expense of Mr Antonello's commission was in or for the performance of the Contract. It was related to the contract but it was not part of the performance of the Contract. Consequently I cannot allow it under s 37.
- 30 The amount for the door phone cannot be allowed. It was not bought specifically for this job but was part of a bulk buy by the Builder. It has since been used on another job. I can allow the surveyor's fee, which was \$451, the soil test which was \$400 and the cost of the drawings which was \$670. The general expenses figure claimed under s.39 includes the cost of preparing the Contract which I cannot allow for the same reasons that I cannot allow the commission paid to Mr Antonello. However I should allow something for the preparation of the permit application. The bulk of the permit application documents that go into the building surveyor is made up of the other documents that I have already allowed so I will allow \$150 for the preparation of the permit application itself. To those figures, GST must be added, giving a total of \$1,838.10. When that is subtracted from the \$10,066 Mrs Foley has paid, it leaves an amount of \$8,227.90 to be returned to her.

Order

- 31 Order the Respondent to pay to the Applicant \$8,227.90.

SENIOR MEMBER R. WALKER