VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION
DOMESTIC BUILDING LIST **VCAT REFERENCE NO. D138/2003**

CATCHWORDS

Terms of settlement – terms not complying with statutory requirements of a domestic building contract – relevance - work required to be done –builder demanding that further contract be signed by owners before work commenced – demand inconsistent with terms – contract not signed - work not done – default provisions implemented against builder

[2005] VCAT 1392

FIRST APPLICANT	Patrick Anthony Gleeson
SECOND APPLICANT	Christina Adrienne Gleeson
RESPONDENT	Geoffrey David Harrison
WHERE HELD	Melbourne
BEFORE	Senior Member R Walker
HEARING TYPE	Hearing
DATE OF HEARING	21 June 2005
DATE OF ORDER	12 July 2005

ORDER

1. On the preliminary issue of whether either party had breached or repudiated the Terms of Settlement and the consequences thereof, the Tribunal finds that the Respondent has breached or repudiated the Terms of Settlement and as a consequence of the operation of the terms and what has occurred, the Applicants are entitled to an order that the Respondent pay to them the sum of $79,038.11 plus the reasonable costs of obtaining such an order.

2. As a consequence of the preliminary finding:
   (a) Order the Respondent pay to the Applicants the sum of $79,038.11.
   (b) Order the Respondent to pay the Applicants' reasonable costs of the application to reinstate these proceedings and obtain this order. Unless a different direction is made under paragraph 3 of this order, such costs are to be assessed by the Registrar, if not agreed, on a party/party basis in accordance with Scale "D" of the County Court Scale.

3. Liberty to any of the parties to apply in writing within 14 days of the date of this order that costs be assessed in a different manner from that set out in paragraph 2(b) of this order.

SENIOR MEMBER R WALKER

APPEARANCES:

For Applicants	Mr J Lewis of Counsel
For Respondent	Mr C Hanson of Counsel

REASONS FOR DECISION

Background

1. The Applicants ("the Owners") are the owners of land at 19 Century Drive, Mount Martha upon which there is erected an incomplete dwelling house. The Applicants live on the site in a rented caravan and have done so for the last five years.

2. The Respondent ("the Builder") is and was at all material times a registered builder and is a former friend of the Owners.

3. A building contract was entered into between the parties on 21 March 2000 for the construction of the house. Disputes arose between the parties and agreements were reached on three separate occasions for the resolution of those disputes. The last of these was entered into in early December 2004. The agreement is in the form of written Terms of Settlement dated 3 December 2004 ("the Terms of Settlement").

The Terms of Settlement

4. G D Harrison Project Management Pty Ltd ("the Company") is a company controlled by the Builder. It was a party to the Terms of Settlement in addition to the Owners and the Builder. In essence, it was agreed in the Terms of Settlement that the Company would complete construction of the house in accordance with a schedule of works attached to the Terms of Settlement and that the Builder would provide a guarantee and indemnity to the Owners in respect of the Company's obligations under the Terms of Settlement. The work was to be commenced on 17 January 2005 and completed by 28 April 2005. A supervisor, Mr Ray Martin ("the Supervisor"), was appointed by the parties to inspect the site at three stages, being the commencement of the work, thirty

days thereafter and at the completion date. As supervisor he was empowered to give directions to the Company, allow or disallow any application by the Company for extensions of time and certify the completion of the work.

5. In the event of default, a procedure was established for the supervisor to certify to that effect and, after giving notice and considering various matters, to fix a sum to be paid by the Company to the owners in respect of the cost of completion and rectification of the work.

6. The guarantee by the builder of the Company's obligations is set out in Clause 14 in very general terms. By Clause 15, time was to be of the essence of the contract and by Clause 16 the parties agreed that, other than the remedies and rights provided for therein they should have no other rights, remedies, claims for demands in respect of the subject matter of the dispute.

7. Domestic building insurance was to be obtained for the works in accordance with Clauses 5 and 6 of the Terms of Settlement. These clauses are of particular relevance to today's application and they are as follows:

> "*6. Insurance*
>
> *The Company agrees to obtain valid builder's warranty insurance for the works in accordance with and to provide certificates evidencing the same on or before 10 January 2005, such insurance particularly to include, builder's warranty (as referred to in Clause 2(b)), damage and public liability insurance.*
>
> *7. Gleesons to assist with insurance if necessary*
>
> *In relation to the obtaining of insurance, the Gleesons agree to do all things reasonably necessary to assist in this regard, as are within the terms of this agreement, including, if required, execution of a formal contract in respect to the works to the satisfaction of the Company's insurer PROVIDED THAT any request for the execution of such formal contract must be made by the Company on or before 7 January 2005 AND PROVIDED FURTHER THAT any such formal contract in no way contradicts any provision of this agreement."*

7. After the Terms of Settlement were entered into the Company engaged a contractor to carry out the work in accordance with the schedule.

8. On 6 December 2004 Vero Insurance Limited provided a Certificate of Insurance. This sets out the following as "Building contract details"-

"Contract date: December 03, 2004
Declared building contract value: $80,000.000
Carried out by: G D Harrison Project Management Pty Ltd
ABN: 70007250357
Licence No. DBU 13750
For: Patrick and Christina Gleeson
In respect of: Alterations and additions
At: House number 19
Century Drive
Mount Martha Victoria 3934
Permit Authority: Territory building certifies."

The new form of contract

9. In late December 2004 the Company's solicitors forwarded to the Owners' solicitors a form of contract for execution by the Owners. This was in the form of the Master Builder's Association of Victoria New Homes Contract. It contains all the usual sorts of provisions that such a contract might be expected to contain. The form of guarantee and indemnity is not completed and is blank, it is dated 3 December 2004 and provides for numerous matters that do not appear in the Terms of Settlement. In particular, the contract price provided for in the contract is $15,000.00, whereas the Terms of Settlement provide that, on completion of the work and the fulfilment of certain other conditions the Company is entitled to be paid $10,500.00 less an amount for Supervisor's fees.

10. The Owners refused to sign the contract and the Builder then refused to cause the Company to carry out any work. Correspondence ensued between the solicitors for the respective parties but nothing was resolved. The Builder maintained his position that the contract had to be signed and the Owners maintained their position that they would not sign the contract. As a result, none of the work required to be done by the Terms of Settlement has been carried out. The Owners now claim that the Builder is in default and seek to invoke the default Clause 11 in the Terms of Settlement.

The Default Clause

11. Clause 11 of the Terms of Settlement provides as follows:

*"**11. Default in respect of the works***

(a) If, at the completion date, the supervisor is not satisfied that all of the works are complete and satisfactory … he shall so certify and provide written notice of the same to the parties promptly and particularise the outstanding or unsatisfactory works and the supervisor shall:

(i) determine and fix a sum being the amount to be paid by the Company to the Gleesons in respect of the cost of completion or rectification of the works;

(ii) subject to paragraph (3) below, fix the sum referred to in paragraph (i) by reference to:

the amount determined by Mr Rod Lawrence in his cost of works document prepared on or about 8 September 2004 and attached hereto as Schedule B, namely $79,038.11

deductions and/or allowances in an appropriate amount (if any) in respect of works properly completed by the Company (and in determining any such deductions the supervisor will have regard to the costings of Mr Lawrence); and

half of the supervisor's fee.

(iii) give notice to each party at least 9 days prior to fixing the sum referred to in paragraph (i) above and each party shall be entitled to make a single written submission with respect to the appropriate margin percentage which ought to be applicable within 7 days of the giving of the said notice;

(iv) notify the parties promptly of his determination in writing.

(b) The Company shall, upon receipt of notice of the supervisor's determination referred to in paragraph (a)(i) above, make payment of the sum determined within fourteen days to the Gleesons at the offices of their solicitors, Jerrard & Stuk.

(c) In the event that the Company fails to make payment as required in paragraph (b) above, Gleesons shall be at liberty to reinstate the proceedings in VCAT and obtain an order for the outstanding amount on provision of evidence by affidavit of these terms, the supervisor's determination and the non-payment. The Gleesons shall also be entitled to the reasonable cost of obtaining such an order."

12. No work having been carried out by the completion date, the solicitors for the owners contacted the Supervisor and requested that he make a determination pursuant to Clause 11. By letter dated 11 May 2005 addressed to the solicitors for both parties the Supervisor gave the following notice:

> *"I have inspected the status of the works and note that no progress has been reached since my inspection of 14 January 2005. In accordance with Clause 11(a)(3) I hereby give notice to the parties that I intend to fix the sum in accordance with Clause 11(a)(i). I invite the parties to make a single written submission to me as provided by Clause 11(a)(iii) within seven days of this notice."*

According to a stamp on the document exhibited to Mr Oldham's affidavit it was faxed to the parties on 11 May 2005.

13. On 23 May 2005 the Supervisor sent a further letter to the parties in the following terms:

> *"I refer to my facsimile dated 11 May 2005 and note that I have not received any submissions as provided by Clause 11(a)(iii). My determination with respect to the sum to be paid by the Company to the Gleesons follows.*
>
> *The Company has not completed any works and therefore I do not make any deductions and/or allowances from the costings set out in Schedule B. I determine that the sum of $79,038.11 be fixed with respect to the works.*
>
> *NOTE: In my view, this sum is lower that what the market will charge for this type of work due to the nature of the works and the transfer to risks.*
>
> *I add the sum of $742.50, being half of my fees as set out in the attached invoices, to the amount in accordance with the Terms of Settlement.*
>
> *I therefore fix the sum of $79,780.61 as the amount to the paid by the Company to the Gleesons."*

The present application

14. As a result of the parties having entered into the Terms of Settlement these proceedings were struck out on 7 December 2004. On 14 February 2005 the Owners sought reinstatement which the Builder opposed. The application for reinstatement came on for directions on 29 March 2005. It was set down for hearing on the preliminary issue of:

> *"Whether either party has breached or repudiated the Terms of Settlement dated 3 December 2004 and the consequences thereof."*

Directions were given for the filing and service of affidavits and costs were reserved.

15. The matter came on for hearing on 26 May 2005. On that date the proceeding was reinstated and adjourned until 21 June 2005. Directions were given for the filing and service of further material and also for the Owners to give notice to the principal registrar and the Builder of any further orders they would be seeking at the further hearing.

16. By facsimile dated 6 June 2005 the Owners' solicitors sought further orders including:

> *"An order for the judgment in the sum of $79,780.61 pursuant to the determination of Ray Martin dated 23 May 2005. The determination of Ray Martin is annexed to the affidavit of Daniel John Oldham sworn on 23 May 2005 (Exhibit JDO16)."*

They also sought general damages for alternate accommodation, deterioration of the property, costs and any other order the Tribunal thought fit.

17. The matter came for hearing before me on 21 June 2005. Mr Lewis of Counsel appeared on behalf of the owners and Mr Hanson of Counsel appeared on behalf of the builder.

Submissions

18. After referring to the foregoing matters Mr Lewis sought judgment in the sum certified by Mr Martin and also general damages for the hire of a caravan and mobile toilet on the site, although no evidence was led as to the amounts that were being sought. He argued that it was the obligation of the Builder to carry out the work and he had not done so.

19. In opposing the application Mr Hanson referred to the refusal of the Owners to sign the contract submitted to them by the Builder. He said that they were obliged to sign this contract by the terms of Clause 7. I suggested that Clause 7 related to doing all things reasonably necessary to assist in obtaining insurance and it appeared that that had already been obtained. Mr Hanson submitted that it was necessary to have the contract signed in order for the insurance to be valid. He relied upon the Builder's affidavit to the effect that Vero required a contract to be signed for there to be valid insurance. He called a representative of Vero who tendered a copy of the policy (Exhibit 1).

20. There is no doubt that the policy proceeds on the basis of there being a contract. I suggested to Mr Hanson that the contract could be the Terms of Settlement. Indeed this was the contention of the Owners. Mr Hanson said that could not be so because it did not comply with the requirements of the ***Domestic Building Contracts Act 1995***. He referred in particular to s.31 of the Act and to the numerous things that a contract for the carrying out of major domestic building work is required to include. It is not necessary to go into the various respects in which the Terms of Settlement do not comply with that section. It is sufficient to say that they do not comply in many respects and if the only

contract between the Owners and the Company is the Terms of Settlement and if that is the contract to carry out the work in the schedule annexed to the Terms of Settlement, then as a major domestic building contract it does not satisfy the requirements of s.31.

21. Mr Hanson submitted that in those circumstances, to require the Builder to carry out the work would be requiring him to do an illegal act. I do not accept this submission. If and insofar as the Terms of Settlement are a domestic building contract that does not comply with the Act and if as a consequence, the Builder is exposed to penalties for entering into a contract that is not in accordance with the Act, that offence has already been committed. It was committed at the time that it executed the Terms of Settlement.

22. The details set out in the Certificate of Insurance seem to apply to the Terms of Settlement but they might equally apply to the form of contract that the Builder wanted the Owners to sign, since the form of contract simply annexes the schedule of works to it and, like the Terms of Settlement, it is also dated 3 December 2004.

23. Mr Hanson argues that without the further contract being signed, there could be no valid domestic building insurance. He referred to the wording of the Ministerial Order and in particular, to the definition of "Insurable Domestic Building Contract" which is defined to mean a domestic building contract in which the contract price for the carrying out of domestic building work is more than $12,000.00. He submitted that all that was required by the Terms of Settlement to be paid to the Company for carrying out the work was $10,500.00. He said as a consequence the Terms of Settlement could not be an insurable domestic building contract. I do not accept this argument.

24. It is clear that the value of the work to be done pursuant to the Terms of Settlement is very slight less than $80,000.00 and although the only payment the Company was to receive was $10,000.00, the other consideration for the carrying out of the work was the Owners entering into the Terms of Settlement and thereby compromising their claim against the Builder. It seems to me that the true value of the consideration was in fact $80,000.00 and indeed, this is the figure referred to on the Certificate of Insurance.

25. The Terms of Settlement do not provide that the obligation of the Company to carry out the work or the obligation of the Builder to ensure that it does so are conditional upon

the Owners signing any further form of contract. On the limited evidence available it does not seem to me to be established by the Builder that there could have been no domestic building insurance without the signing of a second contract. In any event, the signing of a second contract would cause some technical difficulties. There would then be two contracts between the parties requiring the carrying out of the same thing. Normally in such a situation it would be said that the earlier contract merged in the later but if this were so, important provisions in the Terms of Settlement that do not appear in the contract proffered by the Builder, would disappear. In particular, the default provisions and the role of the Supervisor. It was clearly not the intention of the parties that this should occur. In addition, by signing the form of contract proffered they would be agreeing to many other provisions in it that do not appear in the Terms of Settlement.

26. Finally, Clause 7 of the Terms of Settlement provides that any "formal contract" proffered pursuant to that clause must not contradict any provision of the Terms of Settlement. Mr Lewis pointed out a number of inconsistencies and it is not necessary to go into these individually. It is sufficient to say that the contract as a whole is substantially inconsistent with the Terms of Settlement.

27. If a "formal contract" was to be prepared in an attempt to overcome any difficulties arising from the fact that the Terms of Settlement did not themselves comply with the requirements of the ***Domestic Building Contracts Act 1995***, then the Terms of Settlement themselves should have been re-engrossed with additions to make up for the deficiencies. A whole new contract containing very different wording is not the appropriate way to carry out the task.

Conclusion

28. For these reasons I think that the Builder was in default and that in view of the finding of the Supervisor it is appropriate to make an order in favour of the owners in this proceeding for the amount sought.

29. As to the claim for damages, this is prevented by Clause 16 of the Terms of Settlement which provides as follows:

"The parties agree that, other than the remedies and rights provided for herein they shall have no other rights, remedies, claims or demands in respect of the subject matter of this dispute."

30. The terms provide elaborate machinery for the handling of disputes of which the Owners have availed themselves. They are relying on the Terms of Settlement and must take Clause 16 along with Clause 11. There is no provision entitling them to claim the other amounts they seek so that that part of their application is refused.

Costs

31. The Applicants seek costs but I did not hear submissions specifically on costs. Normally I would reserve costs but it is clearly stated in the Terms of Settlement that the Applicants are entitled to these too, although the manner in which the "reasonable costs" are to be assessed is not spelled out in the agreement. I think "reasonable costs" would usually mean party/party costs (see ***Pacific Indemnity Underwriting v Maclaw*** [2005] VSCA 165) and the practice in this Tribunal, where party/party costs are awarded is to allow them in accordance with the appropriate County Court Scale, save for very large cases where they are sometimes allowed on the Supreme Court Scale. I will reserve leave to the parties to apply for any different type of order within 14 days. If no such application is made the order will be in accordance with these principles in order to save the parties the cost of a further attendance.

SENIOR MEMBER R WALKER