

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D414/2014

BUILDING AND PROPERTY LIST

CATCHWORDS

Domestic building dispute; ss8, 37 and 132 *Domestic Building Contracts Act 1995*; building contract required the owners to demolish existing residence including sub-surface structures; owners failed to remove or seal sewer branch line; concrete poured by builder to fill bored piers entered the branch line causing flooding to adjoining property; builder claimed rectifications costs as a variation; owners alleged demolition works were domestic building work and exclusion from contract scope of works was a breach of ss8 and 132; builder entitled to exclude demolitions works from contractual scope of works; excluded work not domestic building works; owners liable for rectification works.

FIRST APPLICANT	Fotios Gondopoulos
SECOND APPLICANT	Anastasios Stamenos
RESPONDENT	Metricon Homes Pty Ltd (ACN 005 108 752)
WHERE HELD	Melbourne
BEFORE	Member B Thomas
HEARING TYPE	Hearing
DATE OF HEARING	19 May 2015
DATE OF ORDER	1 October 2015
CITATION	Gondopoulos v Metricon Homes Pty Ltd (Building and Property) [2015] VCAT 1533

ORDERS

1. The claim of the Applicants is dismissed.
2. Costs are reserved with liberty to apply.

Member B Thomas

APPEARANCES:

For the Applicants

Mr J Sumskas, solicitor

For the Respondent

Mr J Stavris, barrister

REASONS

Background

- 1 The Applicants are the owners of a block of land in Moorabbin (the site).
- 2 On 27 May 2011 each of the Applicants entered into a separate contract with the Respondent (the Contracts) for the construction of one of two units on the land (the building works).
- 3 Each contract required the owner to jointly obtain a permit demolish the existing residence on the site. Each owner was also obliged to remove materials or infrastructure found buried beneath the surface of the site and disconnect and seal off of branch lines including gas, electricity, telephone, water, sewerage and stormwater services (the demolition works).
- 4 The Applicants jointly engaged a contractor to carry out the required demolition works. The Certificate of Final Inspection for these works was issued on 19 July 2001.
- 5 The Respondent took possession of the site on or about 29 September 2011.
- 6 On or about 6 October 2011 the Respondent poured concrete into piers bored for the foundations for each unit. The concrete entered an underground sewer pipe on the site that had not been disconnected or sealed. As a result that a neighbouring property was flooded with sewerage.
- 7 South East Water were required to carry out remedial works (the sewer works) and the Respondent was charged \$13,086.05.
- 8 On 15 May 2012 the Respondent issued a variation claim to the Applicants for \$13,311.60 (including the cost of resurveying the site) which was required to be paid as a condition of handover of the completed works.

The Claim and Defence

- 9 The Applicants allege that the Respondent was negligent in either failing to identify, disconnect and seal the sewer or failing to advise the Applicants that this had not been done as part of the demolition works.
- 10 The Respondent alleges that it was the Applicants' responsibility, as part of the demolition of the existing dwelling on the site, to clear the site of underground materials and infrastructure and disconnect or seal off service branch lines including sewerage.

The Issues

- 11 The issues for determination by the Tribunal are –
 - a) How did the damage to the sewer occur?
 - b) Was it the obligation of the Applicants to identify and disconnect or seal off the sewer branch line?

- c) Are the special conditions and notes in the Contracts an attempt by the Respondent to contract out of the Act and thereby avoid the warranties a builder is required to give under the Act?
- d) What was the outcome of the meeting between Mr Gondopoulos and Mr Cassar on 5 October 2011?

The Evidence

Fotios Gondopoulos

- 12 Mr Gondopoulos gave evidence on behalf of himself and the Second Applicant.
- 13 He said he was not specifically requested by the Respondent to seal off any sewer branch lines. He said that if he had been asked to do so, he would have engaged a plumber.
- 14 He referred to a conversation he had with the Respondent's site manager, Simon Cassar, on 5 October 2011, the day after the concrete had been poured into the bored piers. They were standing opposite the site as South East Water was removing the sewer branch line. He said that Mr Cassar told him that the "sewer problem was not your responsibility".
- 15 He denied having being made aware of Notes 76-79 in the Job Cost in his Contract which required, as part of the demolition of the existing residence, removal of any materials found buried beneath site and the disconnecting or sealing of any branch lines including the sewer.
- 16 In cross examination he recalled a meeting at the Respondent's offices on 31 May 2012 to discuss the sewer works and the terms of the Contract.
- 17 He conceded that at this meeting, he did not mention the discussion with Simon Cassar on 5 October 2011 as a reason why the Respondent's variation should not be paid.
- 18 He said that he had attempted unsuccessfully to recover the cost of the sewerage works from the demolition contractor.
- 19 He said that he had called gas, electricity and telephone providers to disconnect their respective services but did not contact the sewerage services provider because he did not have a contact telephone number, and so he took no further action.

Jarrold Sturdy

- 20 Mr Sturdy is the Respondent's Dual Occupancy Operations Manager.
- 21 Mr Sturdy said he attended a meeting with Mr Gondopoulos at the Respondent's offices on 31 May 2012.
- 22 At that meeting Mr Gondopoulos agreed that the effect of the notes to the Job Cost in his Contract was that he was responsible for sealing or

disconnecting the sewer line and that therefore he was responsible for paying for the cost of the sewer works.

- 23 It was agreed that the cost of the sewer works would be added to the Respondent's Final Claim to give the Applicants time to pay.
- 24 He suggested to Mr Gondopoulos that the cost of the sewer works could be recovered from the demolition contractor or insurer.
- 25 At that meeting, Mr Gondopoulos did not mention the discussion he had on site with Mr Cassar.
- 26 Mr Sturdy believed that any dispute regarding the Variation for the sewer works had been resolved.
- 27 In cross examination, Mr Sturdy conceded that he could not say how the damage occurred or where the concrete entered the sewer.
- 28 He agreed that the contract made with each Applicant comprised 40 pages and did not specifically mention sealing the sewer branch, but the Job Cost document did so in notes 76-79, and that they formed part of each contract.
- 29 He did not consider that notes 76-79 in the Job Costing document were confusing.

Dianne Anderson

- 30 Ms Anderson is the Respondent's Customer Relations Manager and the point of contact for client complaints.
- 31 She explained that the progress of each project was plotted by means of an online diary system. However, Ms Anderson could not assist the Tribunal with entries in the diary system beyond 6 October 2011.
- 32 She could not say where the sewer line had been damaged and the concrete had entered. However, she said that an excavator had been on site the previous week to carry out a site strip.
- 33 The occupants of a property in close proximity to the site had reported blockages in their sewer to South East Water, who had traced the cause to the sewer branch line on the site.
- 34 Without any notification to or authorisation from the Respondent, South East Water arrived on site, carried the necessary rectification works and invoiced the Respondent.
- 35 South East Water refused to re-issue its invoice to the Applicants and the Respondent was obliged to pay the invoice because South East Water threatened to suspend the Respondent's account.
- 36 The discussion between Mr Gondopoulos and Mr Cassar concerning responsibility for the rectification works had not been raised in her dealings with the Applicants or their solicitors. However, Mr Cassar had recorded that the surveyor's set out costs resulting from the sewer works were to be passed onto the Applicants as a variation.

Simon Cassar

37 Mr Cassar was not called to give evidence. Mr Sturdy said he is no longer employed by the Respondent and could not be located.

The Contracts

38 On 27 May 2011 each of the Applicants entered into a domestic building contract with the Respondent for the construction of a unit.

39 Special Condition (a) in Schedule 4 of the Contracts stated –

Confirmation of the Owners carrying out demolition works (where applicable) including removal of foundations drainage and tree removal.

40 At the bottom of Schedule 4, is the statement –

Refer Addendum at Section G for further special conditions (end of contract)

41 The Addendum contains Special Condition 1 which simply states –

The parties acknowledge that the Builder must comply with all requirements of the Occupational Health and Safety Act on the Land.

42 Special Condition 1.1 refers to the Builder having an exclusive licence to occupy the land for the purpose of construction and the Owner may not enter the Land without prior consent of the Builder. There is no reference to the Owner's obligation to demolish the existing residence.

43 Following the Addendum came in turn –

- Schedule 5 (Excluded Items);
- the Respondent's 25 Year Structural Guarantee; and
- the Willis Australia Ltd Confirmation of Insurance Certificate.

44 Then follows an 18 page document entitled "*New Home Contract Metricon Dual Occ Solutions*". Item 1 of which is headed *House Type* and this document appears to be the specifications for each unit.

45 The Notes in the *New Home Contract Metricon Dual Occ Solutions* document provide –

*The whole of the existing residence, outbuildings, garages, driveway/paths and/or paving, garden beds or retaining walls, front fences, gates, etc. are to be demolished by the Owner. (AFTER A DEMOLITION PERMIT & A BUILDING PERMIT HAS BEEN GRANTED), prior to the start of construction and the site cleared to the satisfaction of the builder including the removal of long grass, trees, shrubs etc. **In the event that materials or infrastructure are found to be buried beneath the site surface, such as but not limited to service pipes, disused septic tanks, wells, etc., it is the Owners***

responsibility to contact the relevant authorities to clear the site to the satisfaction of the builder ; (emphasis added)

Metricon Homes requires the site to be free of all obstructions to the building operations. Therefore the owner is responsible for arranging disconnection and sealing off of branch lines including sewerage facilities by the relevant authorities prior to construction. (emphasis added).

Any additional costs incurred due to previously demolished buildings, existing and/or previously removed drains or services shall be the owner's responsibility.

The Applicants Submissions

- 46 The Applicants say the Respondent failed to—
- a) call Simon Cassar or any other employee on site, to rebut the allegations of Mr Gondopoulos or provide an account of what had occurred in the days prior to the sewer line becoming blocked;
 - b) call the concreting contractor, to give an account of what had occurred when the piers were being poured;
 - c) Produce site or supervisor notes, logs or diaries for the relevant period.
- 47 Further, the Applicant says that the Respondent did not —
- a). carry out the building works in a proper and workmanlike manner;
 - b). ascertain where the sewer line was before boring the piers and pouring the concrete; and
 - c). exercise reasonable care and skill in completing the works.
- 48 The Applicants contend that the special conditions in Schedule 4 of the Contracts and the Job Cost Notes did not require the Applicants to cut and seal the branch sewer line.
- 49 In relying on the on the special conditions in the Contracts, the Applicants say that Respondent is seeking to contract out of the *Domestic Building Contracts Act 1995* (the Act) in breach of S132 and take away a right to a warranty in breach of S10 of the Act.
- 50 S132 states —
- (1) Subject to any contrary intention set out in this Act—
 - (a) any term in a *domestic building contract* that is contrary to this Act, or that purports to annul, vary or exclude any provision of this Act, is void; and
 - (b) *any term of any other agreement that seeks to exclude, modify or restrict any right conferred by this Act in relation to a domestic building contract is void.*

- (2) *However, the parties to a domestic building contract may include terms in the contract that impose greater or more onerous obligations on a builder than are imposed by this Act.*

51 S10 states –

A provision of an agreement or instrument that purports to restrict or remove the right of a person to take proceedings for a breach of any of the warranties listed in section 8 is void to the extent that it applies to a breach other than a breach that was known, or ought reasonably to have been known, to the person to exist at the time the agreement or instrument was executed.

52 Finally, whilst Mr Gondopoulos acknowledged signing/initialling each page of the Contract, he only signed the last page of the 23 page Job Cost document, and specifically Item 109 in that documentation was not drawn to his attention.

The Respondent's Submissions

53 The Respondent says -

- (a) Schedule 4 (Special Conditions) of the Contract signed by each Applicant required them to demolish an existing dwelling on the site including foundations, drainage and trees and referred to an addendum to Section G for further special conditions.
- (b) The Notes in the Addendum to Section G in each Contract require the Applicants to –
 - Ensure that any materials or infrastructure found beneath the surface of the site were removed; and
 - Arrange the disconnection or sealing of the branch sewer line.
- (c) The Notes further provided that any additional costs incurred from the demolished building and existing or previously removed drains or services shall be the responsibility of the Applicants.
- (d) Therefore, as the terms of the Contracts required the Applicants to undertake the demolition works, the Applicants assumed responsibility for any risks and additional costs arising from these works, including their non-performance.
- (e) There is nothing in the Act precluding the Respondent from allocating the demolition works and the risks associated with those works to the Applicants.
- (f) None of the contractual terms relied on by the Respondent offend the Act, are contrary to the Act, or purport to annul, vary or exclude any provision of the Act.
- (g) Because the demolition works were specifically excluded from the works under the Contracts, they were not *work to be carried out under a domestic building contract* within the meaning of s8 of the Act.

Therefore the statutory warranties under the Act do not apply to the demolition works.

- (h) Finally, to the extent that the Applicants submit that the contracts do not include the Job Cost document, this document is part of the documents comprising each contract and was signed by each Applicant at the same time as the other documents comprising the contracts.

54 As to the cause of the blockage of the sewer line, the Respondent relies on the notes recorded by South East Water on 6 October 2011 and says that the only plausible explanation is that concrete being poured on the site entered the branch line and blocked the sewer main located outside the rear boundary of the site.

55 In response to the Applicants' criticism of its failure to call certain evidence at the hearing, the Respondent says –

- to the best of its knowledge no site diaries, photographs or other material exist in relation to the incident;
- its employees on site at on the day in question are no longer employed by the Respondent and could not be located to appear at the hearing;
- the contractor who undertook the boring and concreting works could not be located; and
- in view of Ms Anderson's evidence that the damage to the sewer was reported to South East Water by the occupants of a nearby property, it is unlikely that the Respondent's former employees and contractors could shed any light on the incident.

56 Finally, as the Applicants' Application admits the damage, it can be reasonably inferred that the Applicants failed to seal or disconnect the sewer as required by the Contract.

57 Although, Mr Cassar not be located to give evidence at the hearing, the evidence of both Mr Sturdy and Ms Anderson is that prior to the commencement of this proceeding, neither Applicant had raised with the Respondent the discussion between the first Applicant and Mr Cassar as to responsibility for the South East Water charges. Furthermore, Mr Cassar's notation in the online diary system that the costs arising from the sewer works were to be passed on to the Applicants is inconsistent with any claim that the Applicants' failure to disconnect and seal the sewer line had not caused the damage.

Discussion

How did the damage to the sewer occur?

- 58 The South East Water job notes state that the repair of the damaged sewer pipe required the digging out and replacement of 7 meters of retic and the supply of a new branch for (the site) *“due to sewer line being full of concrete from bored piers which came from the house drain which was not cut and sealed.”*
- 59 In the Applicants’ Application it is stated that *“The bored piers were filled with concrete which ran into the sewer pipe and eventually into the easement and caused flooding on the neighbour’s property”*. However, in cross examination Mr Gondopoulos stated that he did not know how the damage to the sewer occurred.
- 60 I accept that the only plausible explanation is that the concrete poured for the bored piers caused the blockage in the branch sewer line.

Was it the obligation of the Applicants to identify, disconnect and seal off the sewer branch line?

- 61 Putting the question another way, can the Respondent rely on the Notes to the contracts as placing that obligation on the Applicants?
- 62 In his evidence Mr Gandopoulos said that he signed or initialled each of 40 page contract but only page 23 of the Job Cost document. In particular, he said he was not taken to Item 109 which is the notation regarding the owner’s responsibility for arranging disconnection of branch lines including sewerage. The Applicants’ submission appears to suggest that their obligations regarding disconnection and sealing off of the sewer branch line should have been specifically pointed out to Mr Gandopoulos.
- 63 If that is so, I do not accept that submission. Mr Sturdy’s evidence was that the documents comprising the Contract, including the plans, specifications and the Job Cost document, were bound together in the one document. I do not consider that the Respondent has any obligation to take the Applicants through every document comprising the Contract. It is for the Applicants to read the contract documents and understand their rights and obligations.
- 64 I therefore consider that the contracts clearly place this obligation on the Applicants.

Are the special conditions and notes in the contracts an attempt by the Respondent to contract out of the Act and thereby avoid the warranties a builder is required to give under the Act?

- 65 I do not accept the Applicants’ submission that the Special Conditions in Schedule 4 of the Contracts and the notes referred to in paragraph 46 above, is an attempt by the Respondent to contract out of its obligations under the Act, specifically ss10 and 132.

- 66 I accept the Respondent’s submission that the Act does not preclude the Respondent from excluding some works from the contractual scope of works, and allocating responsibility for these excluded works to the Applicants. In fact the definition of *base stage* in s41(1) of the Act does not include demolition or site clearing.
- 67 Conversely, the builder is not obliged to do all work associated with the building works. S31(1)(c) of the Act requires the contract to have *a detailed description of the work to be carried out under contract*. I consider that the Respondent has complied with this obligation in each Contract.
- 68 It follows that the demolition works were not work carried out under a domestic building contract by the Respondent. Therefore the Respondent, in excluding the demolition works from the scope of works under the Contracts, has not sought to contract out of its obligations under the Act.
- 69 Consequently, the Applicants assumed any risks or additional costs arising from the non-performance or inadequate performance of these demolition excluded works.

THE MEETING BETWEEN MR GONDOPOULOS AND MR CASSAR ON 5 OCTOBER 2011

- 70 Mr Gondopoulos alleged that at a meeting on site on 5 October 2011 Mr Cassar told him that “the sewer problem was not your fault (liability)”.
- 71 This allegation is not consistent with the Respondent’s evidence. Specifically, Ms Anderson’s said that Mr Cassar had recorded in the online diary entry system that the set-out costs resulting from the sewer works were to be passed onto the Applicants as a variation.
- 72 Ms Anderson also said that the conversation between Mr Gondopoulos and Mr Cassar on 6 October 2011 had not been raised with her, or to her knowledge, with any other employee of the Respondent. One would have thought that as she suggested, if that conversation had in fact taken place, it would have been recorded in the Respondent’s online diary system.
- 73 At the Directions Hearing on 10 March 2015, in a folder entitled “VCAT Defence” and tendered by the Respondent, is an email from Ms Tina Doolan of the Respondent to Mr Gondopoulos dated 17 May 2012. In regard to the damage, Ms Doolan states “*Simon Cassar the site manager discussed this with Frank at the time and advised any costs were at the owners*”.
- 74 This email is followed by an email dated 2 July 2012, from Mr Sturdy to Ms Anderson of the Respondent, in which he says –
- Tina and I met with the customers 31/5/12 3-4pm to discuss and explained (sic) the notes in the contract which shows exactly what was required in the scope of works on the demolition company. At this meeting they also confirmed that they did a cashy for the demo works and have nothing in writing from them as the works were carried out.*

The meeting ended that they understood what was required in relation to the demolition and the note in the contract. They were to pursue avenues in recouping costs from their demolisher, and that if they needed any further documentation from us, they would let us know
(emphasis added)

- 75 I consider that the evidence of Mr Gondopoulos is not supportive of the Applicants' case in that he says that –
- called gas, electricity and telephone providers to disconnect their services;
 - did not have a telephone number for disconnecting the sewerage services, so he took no action in relation to this matter; and
 - Had attempted to recover the cost of the sewer works from the demolition contractor he had retained.
- 76 At the meeting with Mr Sturdy on 31 May 2012 at the Respondent's offices he did not mention the discussion with Mr Cassar on 6 October 2011.
- 77 I regard these matters, taken in totality, as strongly indicating that the Applicants were well aware of their obligations regarding the demolition works.
- 78 I accept the evidence of the Respondent that it was the Applicants' Points of Claim was the first occasion that the allegation of the conversation between Mr Cassar and Mr Gondopoulos on 6 October 2011 was made.

Findings

I find –

- (a) The concrete poured by the Respondent's contractor into the bored piers for the foundations of the units entered and blocked the sewer line remaining under the surface of the site.
 - (b) The Respondent is entitled to rely on the provisions in the Contracts requiring the Applicants to clear the site of underground materials and infrastructure and disconnect and seal off the sewer lines.
 - (c) The Applicants failed to ensure that as the sewer branch line located under the surface of the site was disconnected from the main sewer or at least sealed.
 - (d) The Applicants are responsible for the flooding of the neighbouring property.
 - (e) The Applicants are liable for the cost of the sewer work; and
 - (f) The Respondent, being obliged to pay South East Water for the cost of the sewer works, was entitled, by way of a variation to the Contracts, to require the Applicants to pay for the cost of the sewer works
- 79 I will order accordingly that the claim of the Applicants is dismissed.

Costs

80 Costs are reserved but I remind the parties of the provisions of s109 of the *Victorian Civil & Administrative Act 1998*.

Member B Thomas