

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP588/2015

CATCHWORDS

Domestic building, interlocutory application for immediate delivery of certificates allegedly necessary to obtain occupancy permit, occupancy permit issued without builder providing certificates to developer, lack of proof of current need for certificates.

APPLICANT	Icecorp Pty Ltd (ACN: 081 874 464)
RESPONDENT	Prodom Developments (ACN: 150 123 578)
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Directions Hearing
DATE OF HEARING	18 September 2015
DATE OF ORDER	29 September 2015
CITATION	Icecorp Pty Ltd v Prodom Developments (Building and Property) [2015] VCAT 1534

ORDERS

- 1 The Respondent's application to receive various certificates is dismissed.
- 2 Costs are reserved with liberty to apply.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant	Mr V. Eddy, Solicitor
For Respondent	Mr G. Hellyer of Counsel

REASONS

- 1 These reasons concern the application of the Respondent-Developer for immediate delivery of various certificates from the Applicant-Builder.
- 2 The parties entered a building contract dated 21 September 2013 for the Builder to build two double storey units on the Developer's land in St Kilda. There is a dispute between the parties and the Builder claims over \$175,000 from the Developer. The Developer is yet to file points of defence or counterclaim, but Mr Hellyer of Counsel for the Developer said that the nett counterclaim will be approximately \$105,000 plus liquidated and general damages for delay.
- 3 The proceeding had a compulsory conference on 3 and 4 September 2015 where it did not settle. Orders were made readying the proceeding for hearing and setting it down. Orders 1 and 2 foreshadowed the application made by the Developer. They were:
 1. By 11 September 2015 or such later date as may be ordered any Application for Orders by the respondent seeking orders that the applicant provide the following documents to it must be filed and served together with affidavit material in support:
 - a. Certificate of Electrical Safety;
 - b. Plumbing Certification
 - c. Certificate to provide evidence that all thermal insulation provisions have been installed to BCA standards and energy report;
 - d. Certificate to provide evidence that all wet areas have been protected to BCA and AS 3740 standards;
 - e. Glazing Certificate to AS 1288 and AS 2047;
 - f. Certificate of Compliance regarding the as built energy efficiency of the building;
 - g. Termite Certificate to AS 3660.
 2. By 16 September 2015 any reply material must be filed and served.
- 4 In response to the orders the Developer filed an affidavit by its solicitor, Ms Dimitra Iatrou, dated 11 September 2015. The application is articulated in paragraph 3, where she states, among other things:

This affidavit is filed and served in support of the Respondent's application for the following orders:-

 - (a) Within seven (7) days the Applicant must provide to the Respondent's solicitors the following certificates in their possession or if not in their possession they must so advise the Respondent's solicitors:-

[the list is substantially the same as the list in order 1 of 4 September 2015]

- (b) The Applicant pay the Respondent's costs of and incidental to this application.

5 Other parts of the affidavit include:

Paragraph 4(e)(ii):

if completion of the works was delayed by more than three months the Respondent would be entitled without further notice to take over the project expressly with the right to compensation for any loss or damage thereby suffered by the Respondent (special condition);

Paragraphs 4(f) – (i):

- (f) there were substantial delays on the part of the Applicant in carrying out the works;
- (g) by letter dated 15 April 2015 from the Respondent's solicitor to the Applicant the Respondent determined the building agreement pursuant to the special condition as referred to in paragraph 4(e)(ii) above, and at common law;
- (h) subsequent to the determination the Respondent has discovered that the Applicant failed and neglected to provide to the relevant building surveyor the certificates of compliance for the roof plumbing and electrical works at the time of carrying out the relevant electrical roof and plumbing works and other relevant certifications;
- (i) the failure and/or refusal on the part of the Applicant to provide the documents referred to in paragraphs 3(a)(i)- (vi) above is preventing the Respondent from obtaining the occupancy permit in respect of the works. As a consequence, the Respondent is being prevented from renting out the two dwelling houses. ... [Emphasis added]

6 Paragraph 5 referred to a number of letters from the Developer's solicitors to the Builder's, seeking the certificates. Each of the letters sought some or all of the certificates and the reason given on each occasion was to enable the relevant building surveyor to issue the occupancy permit.

7 The Builder relied on an affidavit of its solicitor, Vin Eddy, dated 15 September 2015. The affidavit includes the following:

- 4. As to paragraph 4 [of Dimitra Iatrou's affidavit] I am instructed by the Applicant that:
 - a) the alleged special condition specified at paragraph 4(e) did not form part of the building agreement. It was part of a subsidiary agreement between the parties that was not enacted [sic]
 - b) there was no substantial delay on the part of the Applicant ...
 - c) the purported determination of the building agreement ... was invalid or otherwise ineffective;

- d) in any event, the Respondent evinced an intention not to perform its obligations under the building agreement by refusing to pay any stage claim in full;
- e) the conduct of the Respondent described ... above constitutes a repudiation of the building agreement, such repudiation being accepted by the Applicant, entitling the Applicant to bring the building agreement to an end;
- f) the Applicant has not refused or otherwise neglected to provide the relevant building surveyor with compliance certificates.
 - i. Prior to the building agreement coming to an end there was no request from the building surveyor to supply or sight any compliance certificate;
 - ii. The obligation of the Applicant to provide compliance certificates to the building surveyor does not crystallise until the Applicant applies for the occupancy permit;
 - iii. The obligation referred to in paragraph 4(f)ii above is a future obligation which the Applicant has been discharged from performing by virtue of the building agreement coming to an end.
- g) The Applicant denies it has prevented the Respondent from obtaining the occupancy permit and says further that the Respondent has not taken any steps to mitigate its purported losses.

5. As to paragraphs 5 and 6, the Applicant agrees that it did not respond to any correspondence because the requests for provision of the certificates were without foundation. [Emphasis added]

8 At the interlocutory hearing on 18 September 2015 Mr Hellyer said that despite the Builder's failure to supply certificates, he had been advised the day before that the occupancy permit issued a week before, on 11 September 2015.

9 I did not receive a satisfactory answer to my enquiry about why the interlocutory application remained relevant. Mr Hellyer said that he thought it might be necessary to have the certificates to enable the units to be sold, but I note that Ms Iatrou's affidavit referred only to letting the properties, not to selling them, and there was no evidence on oath as to the need for the certificates to enable the properties to be sold.

10 Further, Mr Hellyer said that lists of documents must be exchanged by 12 November 2015, which would necessarily include any certificates that are in existence. The parties are entitled to photocopy each other's discovered documents and Mr Hellyer said he thought the photocopies would be adequate for the Developer's purposes.

- 11 Mr Eddy, solicitor, appeared for the Builder. He submitted that the Developer's application is analogous to an injunction. Mr Hellyer agreed, and obtained instructions to give the usual undertaking as to damages, should the order be made to hand over the certificates before the proceeding is finally determined.
- 12 Mr Eddy submitted that the Builder is not contractually obliged to hand over the certificates and that damages are an adequate remedy for failure to hand over the certificates, should the Builder eventually be found to be obliged to do so.
- 13 Mr Eddy referred to paragraph 38.0 of the building contract which provides in part:

When the Owner pays the Final Claim the Builder must hand over Possession of the Land to the Owner together with ... certificates ...
- 14 Mr Eddy therefore reasoned that the certificates sought did not have to be handed over until the Builder received final payment or, given that both parties agree the contract is at an end, the parties settle their differences or the Tribunal makes a determination.
- 15 If Mr Eddy's submission is correct the result is potentially anomalous. Under clause 36.1 the Builder is not entitled to make the final claim until the occupancy permit is issued. If the Developer's allegation is correct - that without the listed certificates, the occupancy permit cannot be issued - then unless the Builder obtains the occupancy permit, the precondition for obtaining the certificates will never arise. It would be surprising if this were the true interpretation of the building agreement, because it contemplates circumstances in which the Builder does not complete the work.
- 16 Further, in answer to my question, Mr Eddy agreed that there would never be circumstances where, after the conclusion of the dispute between the parties, the Builder would retain the certificates.
- 17 Mr Hellyer and Mr Eddy disagreed whether it was practical for the Developer to obtain certificates from other tradespeople, without the assistance of the Builder. Neither provided affidavit evidence about this issue and I do not take it into account.
- 18 I do not have regard to the four page document that includes the "special condition" because, on its face, it appears that the contract presented to the Developer's bank might have been inconsistent with the true relationship between the parties. Without evidence from the signatories I cannot be sure of its meaning or import.

Conclusion

- 19 Both parties' submissions are unconvincing. The Builder's desire to retain certificates (assuming they have been issued) is not obviously logically based. However, it is the Developer's obligation to prove its case as the applicant for the purpose of this interlocutory application. The basis for the

Developer's application – the need to obtain an occupancy permit – is no longer current, and no other basis for the application has been supported by evidence. The application for the certificates is therefore dismissed.

Costs

- 20 Costs are reserved with liberty to apply, but the parties' attention is called to s109(1) of the *Victorian Civil and Administrative Tribunal Act 1998*.

SENIOR MEMBER M. LOTHIAN