

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL CLAIMS DIVISION**

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP760/2016

CATCHWORDS

DOMESTIC BUILDING: Claim by owners for reimbursement of deposit paid to builder.

FIRST APPLICANT	Ms Silvia Ireland
SECOND APPLICANT	Mr Trevor Ireland
RESPONDENT	Pro-Struct Property Group Pty Ltd (ACN 088 049 727)
WHERE HELD	Melbourne
BEFORE	B Thomas, Member
HEARING TYPE	Hearing
DATE OF HEARING	31 August and 16 November 2016
DATE OF ORDER	15 December 2016
CITATION	Ireland v Pro-Struct Property Group Pty Ltd (Building and Property) [2016] VCAT 2122

ORDER

1. The Respondent Pro-Struct Property Group must pay the Applicants Ms Silvia Ireland and Mr Trevor Ireland the sum of \$7,950.00.
2. The Applicants having succeeded in their claim against the Respondent, pursuant to section 115B (1) of the *Victorian Civil and Administrative Act 1998*, the Respondent must reimburse to the Applicants the application fee of \$174.10.

NOTE: The total sum payable by the Respondent to the Applicants is \$8,124.10.

B Thomas
Member

APPEARANCES:

For the Applicants

Mr Trevor Ireland

For the Respondent

Mr Darren Coghlan, Director

REASONS

BACKGROUND

1. On 4 April 2014 the Applicants (the Owner) signed a HIA Victorian New Homes Contract (the Contract) with the Respondent (the Builder) for the construction of a residence on land in an estate at Officer (the Building Works).
2. The contract price was \$159,000 including GST. A deposit of \$7,950.00, being 5% of the contract price, was paid by the Applicants.
3. The Owner alleges that the Builder has failed to commence the building works and claims reimbursement of the deposit from the Builder.
4. The hearing commenced on 31 August 2016. I ordered that by 14 September 2016 the Respondent must file and serve Points of Defence to the Applicants Points of Claim, specifying the material facts relied upon. The Respondent failed to comply with this order. The hearing was completed on 16 November 2016. I reserved my decision and I now publish my decision and reasons.

THE CONSTRUCTION PERIOD

5. The construction period stated in the Contract was 215 days. Clause 10 of the Contract required the Builder to commence the building works within 21 days after the Builder receives –
 - a) the essential information from the Owner;
 - b) all necessary building permits and planning approvals; and
 - c) payment of the deposit.
6. Mr Ireland deposed that the deposit was paid on 4 April 2014 and that all essential information had been provided to the Builder. This was acknowledged by Mr Coghlan. However, Mr Coghlan said he was unable to commence the building works as the plans and colour selections were not approved by the developer of the estate, National Pacific Properties, until 14 August 2015.

THE EVIDENCE

7. Mr Ireland produced a series of emails from the builder commencing with an email from David Gully on behalf of the Builder dated 17 August 2015. This email stated –

Approved plans, just received. Copy for your records attached.

I will now forward on to the office so we can move towards a building permit.

Permit should not be more than a couple of weeks.

8. On 23 September 2015, Mr Ireland received an email from Ms Michele Gully on behalf of the Builder stating –

Following on from our conversation, I have established that the site for your home is booked in for next week with the Drainage (sic) and slab pour to follow on shortly from then.
9. On 14 October 2015, Mr Ireland received an email from Ms Gulley stating –

...I have just prepared your file for the slab preparation and the pour to begin on the week starting November 16th.
10. On 14 December 2015, Mr Ireland sent an email to Ms Gully stating –

I am requesting more info on what is happening as nothing has happened at the block.

Ms Gully replied –

...I am chasing up some dates and further details regarding your build at the moment ...

Mr Ireland replied –

I thank you for your response, but getting very sick of excuses and delays as this has been going on since April.

...

Without sounding rude, but you were chasing dates over 3 months ago and every time I contact you that is the answer.

Getting the site cut was only a delay measure to shut us up for a little time, we are getting sick of it.
11. On 16 December 2014, Ms Gully replied –

I am terribly sorry about the delays, however we have tried to lay as many slabs as possible over the last few months and unfortunately yours was not one of them. All I can say is we will be starting back next year with much enthusiasm and you should see results early in the year with your home completed quickly in around 4 months time from slab pour.
12. On 28 January 2016, Mr Ireland received an email from Ms Gully stating –

I have just spoken to the Director and we will be doing the site-cut for your home at Barrow Court next week.
13. On 11 February 2016, Mr Ireland's daughter Maddison (for whom the house was to be built) received an email from Ms Gully stating –

...Our conversation (with Mr Ireland) was productive and will result in the building process finally moving forward, which we are all happy about.
14. Mr Ireland said that having received no further communication from the Builder, he consulted his solicitors, Anthony Raso & Associates. A letter from those solicitors to the Builder dated 17 March 2016 stated –

Please be advised that we act for Trevor and Sylvia Ireland.

The terms of the Contract stated that Clause 10.00 that commencement of the building works would begin within 21 days from receipt of the planning approvals and payment of the deposit. Both of these were provided to you by 17 August 2015.

The terms of the Contract at Clause 10.2 stated further that the Builder will do everything that is reasonably possible, to ensure that the building works will start as soon as possible.

The Contract at Schedule 1 allowed 215 days in order for the building works to be completed. It is now being 211 days since the planning permit and the deposit were received by you, but no works have been undertaken whatsoever.

There has been no request for any extension of time.

Consequently, our clients instruct us that pursuant to clause 43.1 and 43.2 of the Contract if the works do not commence, and reach a satisfactory level, within 10 days from the date of this notice, then the Contract is considered to be repudiated by you as the Builder.

In the meantime, we would be pleased if a copy of the building permit could be forwarded to our office as soon as possible.

15. On 4 April 2016, Mr Ireland received an email from Ms Gully which stated-

I am pleased to update you with the following regarding the construction of your home.....

The set – out has been completed late last week.

The drains will be laid on Tuesday next week.

I will continue to update you on a fortnightly basis as the home progresses.

Mr Ireland within the hour replied stating –

.....I gather this was not meant to be for me as our Solicitor has ceased our contract with your company.

Ms Gully replied later that day stating –

... . The letter from the Anthony Raso & Associates does not state that the Contract is cancelled, I understand it to be requesting work to commence within 10 days of the letter dated 17/03/2016.

Therefore, I am updating you as to what was completed last week and then consequentially what is to be completed this week.

THE SHOW CAUSE NOTICE

16. On 4 April 2016, the Owner's solicitors wrote to the Builder stating –

We refer to our letter to you dated 17 March 2016.

In that letter we informed you that if the building works did not commence within 10 days from the date of that letter and it to a

satisfactory level, then the Contract would be considered repudiated by you as the Builder.

We also requested a copy of the building permit be provided to our office.

No works were carried out on the building site within 10 days of our letter being sent to you. You have also not provided us with a copy of the building permit.

Consequently, the Contract has now been repudiated by you as the Builder effective from 27 March 2016.

From 27 March 2016, any works carried out by you will require reinstatement.

You are now required to repay our client's deposit of \$7950 in full and without set-off in the next 7 days.

17. No reply was received from the Builder to that letter.

CONFIRMATION OF TERMINATION OF THE CONTRACT

18. On 6 April 2016, the Owner's solicitors wrote to the Builder stating –

We refer to our letter to you dated 4 April 2016.

In that letter we informed you that the Contract between your Company and our clients is now repudiated.

Consequently, we inform you that access to the building site is not permitted by you or any of your agents or contractors. Any such attempted access will be considered trespassing by our client and appropriate action taken.

We would be pleased to receive a reply acknowledging that the contract is at an end and when and how our clients will be refunded their deposit.

No reply was received from the Builder to that letter.

19. On 20 April 2016, the Owner's solicitors wrote to the Builder stating –

We refer to our letters to you dated 4 April 2016 and 6 April 2016.

In those letters we informed you that the Building Contract between your Company and our clients is now repudiated and we request a full refund of the Deposit paid to your Company by our clients, which totalled \$7950.00.

We have not had a reply to this request.

Consequently, we place you on notice that if the Deposit of \$7950.00 is not returned to our clients via our Trust Account in the next 14 days, then we are instructed to initiate proceedings for recovery of the Deposit and Legal costs in either VCAT or the Magistrates Court, without further notice to you.

THE CONTRACT

20. **Clause 10** of the Contract states –

10.0. **Commencement** must occur within 21 **Days** after the **Builder** receives

- the essential information from the **Owner** (Refer to Clause 13);
- all necessary building permits and planning approvals. (Refer to Clause 19); and
- payment of the deposit under Clause 9.

10. 1. The **Building Period** starts on the actual day of **Commencement**.

10. 2. The **Builder** will do everything that is reasonably possible, to ensure the **Building Works** will start as soon as possible.

21. **Clause 13** states –

The **Owner** must give the **Builder**, written evidence of the following within 30 **Days** of the date of this Contract to enable **Building Works** to commence:

- satisfactory evidence of the **Owner's** title to the **Land**;
-

22. **Clause 19.0** states –

The **Owner** is responsible for obtaining and paying for any planning approval that is required. Unless stated otherwise in Item 4 of Schedule 1. Item 4 states that the Owner (IF APPLICABLE) is responsible for obtaining and paying for planning approval within 21 days of the date of the Contract.

23. **Clause 43** states –

43.1 The **Builder** is in substantial breach of this Contract if the **Builder**:

- suspends the carrying out of the **Building Works** otherwise than in accordance with Clause 35;
- ;
- is otherwise in substantial breach of this Contract.

43.2 If the **Builder** is in substantial breach of this Contract the **Owner** may give the **Builder** a written notice to remedy the breach:

- specifying the substantial breach;
- requiring the substantial breach to be remedied within 10 **Days** after the notice is received by the **Builder**; and
- stating that if the substantial breach is not remedied is required, the **Owner** intends to and this Contract.

43.3 If the **Builder** does not remedy this, a substantial breach stated in the notice to remedy the breach within 10 **Days** of receiving that notice, the **Owner** may end this contract by giving a further written notice to that effect.

24. Apart from Clause 10 which has been referred to, the following clauses of the Contract are also relevant to this dispute –

25. **Clause 1.00** of the Contract states –

Commencement means the day on which the **Building Works** commence on the **Building Site**.

Days means calendar days.

26. **Clause 9.0** states –

The **Owner** must pay to the **Builder** the deposit set out in Item 3 of Schedule 1 on the later of:

- the signing of the Contract; or

...

THE BUILDER'S ARGUMENTS AS TO WHY THE OWNERS DID NOT HAVE GROUNDS TO TERMINATE THE CONTRACT

27. In an apparent endeavour to illustrate that work had commenced within 10 days of the Notice to Show Cause dated 17 March 2016, Mr Coghlan said that the site scrape was undertaken on 21 March 2016 and the site was set out on 23 March 2016. In support of this claim, he produced a tax invoice from Eastern House Setouts dated 23 March 2016, which simply stated "Lot 210 Barrow Officer \$300". The invoice gave no details of the works carried out or when they were carried out.

28. Mr Ireland disputed the site scrape or set-out occurred in March. He said that within a week of 23 September 2015, he inspected the site and observed a number of pegs in the ground. Mr Coghlan produced 3 photographs, one of which appears to show a site scrape and three pegs in the ground. Mr Ireland claimed that the site scrape was carried out on 17 November 2015. Mr Coghlan conceded that this could have been the case. Mr Ireland said that Mr Coghlan was not aware that the site had been scraped in November 2015 until he told him in early 2016. I accept Mr Ireland's evidence on this point.

29. Mr Coghlan raised a further argument that although the Builder did not commence the building works within 21 days after receiving the deposit and planning approval, Mr and Mrs Ireland did not become the owners of the site until 18 April 2015. Mr Ireland admitted that this was due to a delay on the part of the developer. However, Mr Coghlan's explanation for not then applying for a building permit was that he was too busy in the period leading up to Christmas 2015 and there was difficulty in engaging subcontractors. Having received the letter from the Owner's solicitors dated 17 March 2016, despite claiming that set out was completed March 2016,

he considered there was no point in applying for a building permit. I accordingly find that the Owner is not responsible for the failure of the Builder to obtain a building permit in a timely fashion.

30. Mr Coghlan said that he considered the 215 day construction period commenced on 17 November 2015, the day the site scrape was allegedly carried out. I question how this comment is consistent with Clause 10 of the Contract.
31. I do not accept that the tax invoice of Eastern House Setouts and the photographs produced by Mr Coghlan are evidence that the site was set out on 23 March 2015. Firstly, the invoice does not state when the set-out was undertaken. Secondly, Ms Gully in an email dated 4 April 2016, stated that the set-out was completed "late last week". This must mean that it was completed in the week commencing Monday 28 March 2016. In other words, the 10 day limit by the Owner's Show Cause Notice dated 17 March 2016 had expired.
32. The Builder did not suggest that the Owner had not paid the deposit, or with the exception of their delay in obtaining title to the land, had not provided the essential information. However, Mr Coghlan's first contention was that it was not until 30 April 2015, that the Owner provided evidence of title. Neither party provided evidence of this fact. I consider this allegation to be irrelevant, as the plans prepared by the Builder were not approved by the developer until 14 August 2015. As it was not possible for the Builder to apply for a building permit before that date, any delay on the part of the Owner in providing evidence of title is immaterial.

CONCLUSION

33. The email exchange between the parties between 17 August 2015 and 4 April 2016 clearly demonstrates a total failure on the part of the Builder to apply for a building permit. Mr Coghlan's explanation was simply that he was too busy up until Christmas 2015. However, both before Christmas 2015 and as late as 4 April 2016, Ms Gully in numerous emails to Mr Ireland, was saying that work was due to commence. It never did.
34. If, as Mr Coghlan submits, the site scrape and the set out are evidence that building work had commenced, they are actions performed in connection with the construction of a building. As a building permit had not issued in November 2015, it is work which was carried out in contravention of the *Building Act 1993*.
35. I find that Clause 10.0 of the Contract required the Builder to commence the building works by no later than 7 September 2015. In failing to do so, I find that the Builder is in breach of Clause 10.2 of the Contract, in that it has failed to ensure that the building works started as soon as possible.
36. I therefore find that the Builder was in substantial breach of the Contract and the Owner was entitled to serve a notice pursuant to clause 43.2 of the Contract. I find that the letter from Anthony Raso & Associates to the

Builder dated 17 March 2016 constitutes a notice pursuant to clause 43.2. The Builder having not responded to that letter, I find that the letter from Anthony Raso & Associates dated 6 April 2016 terminated the Contract between the Owner and the Builder.

37. I will therefore order that the Respondent must refund the deposit of \$7,950.00 to the Applicants.

B Thomas
Member