

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D281/2007

CATCHWORDS

Domestic Building List; Claim for damages by builder against owner for repudiation of domestic building contract; Amounts claimed already paid for under preliminary agreement or unjustified; Balance unpaid under preliminary agreement awarded; Claim otherwise dismissed

APPLICANT	JAJ Lohman Pty Ltd (ACN 005 307 871)
1ST RESPONDENT	Patrick O’Kane
2ND RESPONDENT	Heather O’Kane
WHERE HELD	Melbourne
BEFORE	M.F. Macnamara, Deputy President
HEARING TYPE	Small Claim Hearing
DATE OF HEARING	22 June 2007
DATE OF ORDER	22 June 2007
CITATION	JAJ Lohman Py Ltd v O’Kane (Domestic Building) [2007] VCAT 1236

ORDER

The respondents must pay the applicant the sum of \$200. Application otherwise dismissed.

M.F. Macnamara
Deputy President

APPEARANCES:

For Applicant

Mr Dolf Reichert

For Respondents

Ms Draz Stanko, Advocate

REASONS

- 1 This proceeding relates to a contract for the erection of a new weatherboard home at Lot 44 Hamilton Way, Lockwood South. This contract was signed by the parties on 6 February 2007. The builder nominated in the contract is JAJ Lohman Pty Ltd, the applicant in the proceeding and the proprietors named in the contract are Mr & Mrs O’Kane, who are the respondents.
- 2 It seems that Mrs O’Kane who had recently married Mr O’Kane, though both are of mature years, did not wish to live in the residence previously occupied by the late Mrs O’Kane who had died of cancer. As a result the O’Kanes were making investigations as to how they could acquire a new house. Mr O’Kane said that his plan was to have a kit home erected at a relatively modest price. Mrs O’Kane investigated a number of publications and eventually made contact with Yarra Valley Homes Pty Ltd which is a company associated with the applicant JAJ Lohman Pty Ltd. Yarra Valley whose principal is Mr Reichert is, if you will, the design arm providing designs which JAJ Lohman Pty Ltd erects.
- 3 Mr Reichert arranged for the O’Kanes to view a house which JAJ Lohman Pty Ltd had erected on a Yarra Valley Homes plan at Pilchers Bridge which is near Bendigo.
- 4 Then in late January, perhaps on Australia Day this year, the O’Kanes paid the sum of \$2,000 so that matters might be progressed by Lohman and Yarra Valley Homes Pty Ltd. This \$2,000 seems to be the lion’s share of a \$2,200 fee payable under a preliminary agreement with Yarra Valley Homes Pty Ltd. Yarra Valley signed this agreement though it appears the O’Kanes did not. It is clear however that the \$2,000 was paid as part performance of an owner’s obligation under the preliminary agreement and Mr Reichert issued a \$2,000 receipt on the letterhead of Yarra Valley Homes on 26 January 2007 describing the payment as ‘*deposit on prelim agreement*’. The rationale for the preliminary agreement appears to be that there is certain preliminary work that needs to be undertaken before a building project can be put underway and contract signed and Yarra Valley Homes Pty Ltd seeks to be compensated for those preliminaries whether the transaction proceeds or not.
- 5 Paragraphs 1(a) and 1(b) of the agreement mention a number of these preliminary matters; site visits, levels and pegging out of site, preparation of site plans, soil tests, working drawings and specifications and so forth. At the foot of this preliminary agreement the following appears in an NB section, amongst other things:

Costs for Part 1(a) and 1(b) shall be [printed] \$1,800 [struck out and amended in pen] \$2,200 and deductible from contract less costs of 1(a).

6 The new home contract which was signed is in the standard form published by the HIA and described as '*Plain English Contract for Domestic New Homes*'. The document was prepared and tabled by Mr Reichert. Mr O'Kane who signed the contract says that he had a mere 10 minutes to look at it. He did not take the opportunity of removing the document to read it or to obtain legal advice. He says that he was pressured by Mr Reichert to sign. Mr Reichert says that the pressure was coming from the O'Kanes who, first, desired to have a house in Romsey, secondly, desired to have a house at the location mentioned in the contract, namely, Lockwood South, though ultimately it appears they purchased land at Romsey which Mr O'Kane says is now being offered for sale without a house ever having been erected upon it. The contract at Schedule 4, Special Conditions, includes the following words added in biro:

Subject to finance costs [or it may be loss] to be covered

7 Mr O'Kane says that he did not regard '*subject to finance*' as referring to a finance application to a lending institution but rather to obtaining finance by way of selling his existing house.

8 Mr Reichert says that his discussions with the O'Kanes indicated that what they had in mind was to obtain bridging finance with a view ultimately to selling their existing house at Pyalong. This house has proved difficult to sell and in fact has not sold. Given that the Romsey land is being offered for sale I assume that the Pyalong house will be retained.

9 In accordance with the provisions of the *Domestic Building Contracts Act* 1995 the contract included a cooling off period for five clear business days. If the O'Kanes were aware of that cooling off period they did not avail of it. Mr Reichert says that things were not progressing and after a number of phone calls and discussions he was ultimately informed on 19 February that the recently married O'Kanes had separated and that as far as they were concerned the transaction was not going on. As a result the present claim has been brought.

10 Mr Reichert as I understand the way he put his case, is saying that even if we regard the contract which was signed on 6 February as having been discharged because of the failure of the finance special condition, the words which he added, namely '*costs to be covered*' contemplated that if the contract did not proceed, then the amounts which are now claimed in the name of Lohman would in fact be payable. Alternatively I suppose, having looked at all the evidence, one might conclude that the issue of finance had not been properly pursued by the O'Kanes and that they had in effect just dropped the ball. Ms Stanko who represents them, said in opening that an application had been made to the ANZ Bank for finance but summarily dismissed. Mr O'Kane in his evidence from the witness box said that no application had ever been made, the only finance application made which was successful was for the money to purchase a house site at Romsey and he never at any time contemplated borrowing money for the erection of a

new house from the ANZ Bank or anyone else. If one were to take the view that the finance special condition bore its usual meaning, namely, subject to moneys being borrowed such clauses are typically regarded as carrying with them the implication that a finance application will be made and diligently pursued. If all those assumptions are made then it would seem the O'Kanes did not take those steps and what they have done might amount to a repudiation of contract. Certainly, Mr Reichert as at 19 February appears to have accepted that the deal was off. The builder would in those circumstances be entitled to recover damages for repudiation.

- 11 Ms Stanko says that the contract should not be regarded as binding upon the O'Kanes. She says it was obvious to Mr Reichert when he obtained the signature on the contract that the O'Kanes were in a difficult situation, did not own the site on which the relevant property was to be erected and that it was in all the circumstances unconscionable and contrary to Section 8A of the *Fair Trading Act* 1999 to obtain their signatures on the contract and now to seek to enforce the contract. As this narration will indicate, what in one way is a relatively straightforward transaction has the potential to raise a number of intractable legal issues. As it is however, I think it is unnecessary for me to explore every possible permutation and combination because ultimately I think there is a relatively straightforward answer to the present dispute. The answer I think resides in what has been described as the preliminary agreement. Even although it seems the O'Kanes did not enter into the agreement in the sense of having subscribed to it, it is clear that they entered into the arrangement contemplated by it, namely, that they would pay \$2,000 or perhaps \$2,200 to enable a series of preliminary steps to be carried out. When one looks at those preliminary steps and compares them with the invoice for \$11,054.52 minus \$2,000 paid leading to a claim of \$9,054.52 it is clear I think that for the most part indeed for almost the entire part, the matters that are claimed for are matters that are dealt with in the preliminary agreement. The largest element in the invoice is 'drawings' and design 62 hours at \$75 per hour. Mr O'Kane said that he was provided with a set of plans on the day that he paid the \$2,000. They were handed to me and I have not taken the opportunity of attempting a comparison between them and the plans which were included in the specifications which were provided in association with the text of the building contract; however there is no reason to think that they are in any way different. Certainly the soil test seems to have been more expensive but only because it was obtained by way of some urgency. Title searches for instance were needed for the purposes of pegging out which is clearly amongst the things contemplated by the preliminary agreement. There is a charge JAJ Lohman administrative and lodging which I was told Mr Lohman could tell me about but whilst Mr Lohman was present in the early part of the hearing he was not called as a witness and gave no evidence. The sum of \$350 is claimed for phone calls and no satisfactory explanation has been given as to where that figure came from apart from a reference to \$1700 in legal costs which is scarcely an explanation of \$350 in phone calls. [The site visit to

Lockwood South is clearly covered by the preliminary agreement. It is difficult to see how an amount claimed for a site visit to Romsey can relate to the breach of a contract to build a house at Lockwood South. No proper basis is shown for a \$3,000 claim for 40 hours to draw the building contract. The contract consisted of a printed HIA booklet with some variables completed in pen, the plans and soil test (covered by the preliminary agreement) and seven pages of fairly standard specifications.]

- 12 In the circumstances therefore I am not satisfied that this invoice is other than a doubling up on what the respondents have already been billed for in accordance with the preliminary agreement. That preliminary agreement stipulated a payment of \$2,200 and there has been a short payment of \$200 for that amount. In my view the application should succeed for the short payment of \$200.
- 13 So far as the preliminary agreement is concerned, one can understand the rationale for it and as a claim for \$2,200 I am not satisfied that it is an unconscionable agreement or that it was unreasonable for such a thing to be stipulated. So far as the larger agreement is concerned, I have heard no evidence which would establish loss or damage under its terms separate from the matters that I believe were covered by the preliminary agreement. Whether or not if evidence of those further losses had been forthcoming the O'Kanes would have been found liable under the contract having regard either to the finance condition or to the allegation of unconscionability I need not consider.
- 14 Accordingly, I will order that the respondents pay the applicant the sum of \$200 but otherwise dismiss the application.

MFM:RB