VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST **VCAT REFERENCE NO. D77/2005**

CATCHWORDS

Agreement for work preliminary to construction, major domestic building work, deposits, termination of agreement, appropriate costs

FIRST APPLICANT	Mahmudul Karim
SECOND APPLICANT	Rizwana Karim
RESPONDENT	Englehart Homes
WHERE HELD	Melbourne
BEFORE	Senior Member R J Young
HEARING TYPE	Hearing
DATE OF HEARING	8 April 2005
DATE OF ORDER	28 June 2005

[2005] VCAT 1264

ORDER

1. The respondent pay the applicants the sum of $5,284.00 on the claim; such sum to be paid within 30 days of the date of these orders.

2. Subject to no party making a written submission to the Tribunal to the contrary within 28 days of the date of these orders, there are no orders as to costs including any reserved costs.

SENIOR MEMBER R J YOUNG

APPEARANCES:

For 1st Applicant	In person
For 2nd Applicant	In person
For Respondent	Mr R. Hart, Director

REASONS

1. This small claim (i.e. less than $10,000.00) has been bought by the owners of a dwelling at 56 Normanby Road, Kew Vic 3101, Mahmudul Karim and Rizwana Karim, seeking an order for the return of monies paid by them to the respondent, Englehart Homes. Being a small claim the parties represented themselves and as such they could not characterize their actions or their contractual relationship in legal terms. As the applicants seek the return of all the money they paid to the respondent their claim can be characterised as reimbursement for a complete failure of consideration.

2. The main witness for the applicants was Ms R Karim who gave evidence that after discussions with her husband they decided to install a self-contained unit at the rear of their property; such that the property would become a dual occupancy. They also decided to install a carport adjacent to or near the existing house at the front of the allotment. To this end Ms R Karim discussed the proposed renovation with a salesman of the respondent. On 7 September 2004, she and her husband signed two preliminary agreements with the respondent for the respondent to carry out the preliminary works prior to entering a construction contract and actually commencing physical building work.

3. The basis of these preliminary agreements was to prepare the proper documentation and arrange for planning and building approval prior to the physical work commencing. Both agreements were signed on the 7 September 2004. The first agreement related to the preliminary work in arranging for the carport and renovation for a consideration of $15,000.00, a deposit of $2,500.00 was required upon signing the agreement. The second agreement was for the construction of the dual occupancy unit on the subject property, the consideration for the preliminary work in the second agreement was $28,000.00, a deposit of $4,500.00 was required upon signing the agreement. The applicants paid the two deposits on signing the agreements.

3. Both preliminary agreements acknowledge that a significant amount of the preliminary work is domestic building work and therefore the preliminary agreements are domestic building contracts which must comply with the requirements of the *Domestic Building Contracts Act* 1995 ("the Act"). Sub-section 11(1) of the Act requires that:-

> *"A builder must not demand or receive a deposit under any domestic building contract of more than –*
>
> *(a) 5% of any contract price that is $20,000 or more;*
>
> *(b) 10% of any contract price that is less than $20,000 –*
>
> *before starting any work under the contract."*

Sub-section 3 holds that:-

> *"If a builder does not comply with sub-section (1), the building owner may avoid the contract at any time before it is completed."*

4. This statutory requirement would limit the deposit on the first preliminary agreement to $1,500.00 instead of the $2,500.00 paid and on the second agreement it would limit the deposit to $1,400.00 instead of the sum paid of $4,500.00. The contract has not been completed, but it has been terminated at the request of the applicant owners; therefore, I do not consider that sub-section 3 applies to the circumstances of this proceeding.

5. The relationship between the parties broke down when the respondent, after numerous attempts, failed to secure planning approval from the City of Boroondarra to site the carport at the front of the property, that is near the Normanby Road frontage. The applicants gradually lost confidence in the respondent and withdrew their instructions for the respondent to proceed to seek planning and building approvals. They sought a refund of the deposits they had paid. The respondent replied with its invoice of 22 December 2004 stating that of the $7,000.00 the applicants had paid, $5,304.20 had been expended by the respondent; the two largest items being administration of $2,212.00 and architectural design and drafting of $1,400.00.

6. I do not consider that the applicants can claim that there has been a total failure of consideration but I do consider that the respondent's position is similar to an unsuccessful party in tendering cases, for instance *Sabemo Pty Ltd v North Sydney Municipal Corporation* [1977] 2 NSWLR 880 where a tenderer is awarded recompense for wasted expenditure in preparing tenders or preliminary work for a development that does not proceed. I consider such a principle would apply to this case, but there is also an implied obligation in every building contract that such costs incurred must be fair and reasonable. I quote from the decision of His Honour Mr Justice Byrne in *Holland-Stolte Pty Ltd v Princess Theatre Holdings Pty Ltd* in relation to a cost plus building contract but which legal principles I consider to be equally applicable in these circumstances, at page 9:-

> *"…in the case of a cost plus building contract the contractor must show that the costs incurred for which reimbursement is sought were honestly and reasonably incurred in the performance of its work and that they were reasonable in their measure. To the extent that they do not in whole or in part met this standard, reimbursement will be denied."*

7. I consider that this principle is applicable in this case. I consider that where the sums incurred are not fair and reasonable I do not consider that they should be allowed to the Respondent.

8. It was common ground between the parties that the respondent's first task was to obtain planning approval to the proposed development at the subject site. What was needed to make application for planning approval would be sketches of the proposed development together with the site analysis and some discussions with the planning department of the responsible local authority, being the City of Boroondarra.

9. The respondent's tax invoice of 22 December 2004 detailed all of the preliminary work the respondent claims to have undertaken and its costs. I will consider each

head of preliminary work claimed in the light of what I consider to do necessary work to obtain the planning approval. I consider the site analysis for $370.00 is appropriate. Whilst not essential, I consider the soil test of $390.00 is appropriate and I will allow the disbursements of $50.00.

10. In relation to the architectural design and drafting of $1,400.00 I do not consider that all of this sum is appropriate, as I have noted previously I consider that a sketch plan of the proposal incorporating the site analysis is all that is required for an application for planning approval and I will only allow $300.00 of this amount, which I consider to be one day for a relatively junior draftsman. The estimating sum of $400.00 I do not consider appropriate.

11. I do not consider an administrative charge of $2,212.00 is appropriate. The charge is purportedly for:-

> *"Site inspections, specification preparation, telephone calls to various authorities, contracts, supervision of drafting and estimating, preparation of estimate, etc."*

As the first thing is to get planning approval I consider most of the tasks described above are premature until planning approval is obtained. Therefore, I would only allow $450.00 for a site inspection and liaising with the planning department of Boroondarra.

12. This means that I consider the respondent is only entitled to $1,560.00 for the works, or $1,716.00 including GST. The owners paid deposits totalling $7,000.00; therefore, the respondents should refund $5,284.00. And, I will order that the respondents pay this amount within 28 days of the date of the orders.

13. The respondent in its letter enclosing the invoice of 22 December 2004 offered to refund $1,800.00 but as I understand the parties evidence this was not accepted by the applicants and no actual funds have been refunded from the respondent to the applicants and the full amount of my finding, $5,284.00, remains outstanding.

14. In relation to the applicant owners' claim for their fee to the new builder, this is not something the respondent is responsible for and this claim must fail.

15. As this claim was under $10,000.00, it is unlikely that the Tribunal would make an award of costs in this proceeding; and, therefore, unless a party makes a contrary submission in writing within 28 days of the date of these orders, seeking a reconsideration by the Tribunal, there shall be no orders as to costs including any reserved costs.

SENIOR MEMBER R J YOUNG