

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D485/2006

**CATCHWORDS**

Domestic Building Contracts Act 1995 - major domestic building contract – contract not in writing as required by s.31 - payment of deposit in excess of 5% in breach of s.11 – contract of no effect – s.31(2) – contract avoided by owner – builder failing to repay deposit – order for return of deposit – matter referred for investigation

<b>APPLICANT</b>	Lynda Knell
<b>RESPONDENT</b>	Darren Rucusic
<b>WHERE HELD:</b>	Melbourne
<b>BEFORE:</b>	Senior Member R. Walker
<b>HEARING TYPE:</b>	Small Claim Hearing
<b>DATE OF HEARING:</b>	18 September 2006
<b>DATE OF ORDER:</b>	18 September 2006
<b>CITATION</b>	Knell v Rucusic (Domestic Building) [2006] VCAT 1964

**ORDER**

1. Order the Respondent to pay to the Applicant the sum of \$13,930.60, plus interest of \$776.70, making together the sum of \$14,707.30.
2. Further order the Respondent to pay the Applicant's costs of this proceeding, fixed at \$526.30.
3. Direct the Registrar to provide a certified copy of this order to the Applicant.
4. This proceeding is referred to the Director of Fair Trading for investigation.

**SENIOR MEMBER R. WALKER**

## **APPEARANCES:**

For the Applicant	In person
For the Respondent	No appearance

## **REASONS**

1. On 17 March 2006 it was agreed between the Applicant and the Respondent that the Respondent would build a dwelling house on the Applicant's land at Lot 4 Scott Street, Essendon for a price of \$268,512.00. The Respondent gave the Applicant a signed written quotation setting out what was included in the price but no written contract was entered into and no plans and specifications were provided to the Applicant.
2. Notwithstanding the absence of these documents, upon the Applicant accepting the quotation, the Respondent requested a deposit from her of \$15,000.00 which she paid by cheque. The said sum is in excess of the 5% maximum deposit permitted by s.11(1)(a) of the Domestic Building Contracts Act 1995.
3. After paying the money the Applicant was concerned at the lack of any documentation so she withdrew her funds from the bank so that the cheque would not be met and contacted the Respondent and informed him she had done so.
4. Following a further discussion, the Respondent gave the Applicant two sheets of plans and an unsigned and uncompleted form of contract. The Applicant then paid him \$13,930.60, being 5% of the contract price, for which the Respondent provided a receipt.
5. Paragraph 1 of this document says that the deposit is for "pre-work – Building plans engineering works and permits etc." but it was plainly intended to be the deposit for the contract to build the house. That is clear from paragraph 2, which says that the amount of the deposit is based on a price of \$278,612 but: "...the quote is subject to price variance due to quote requiring to be fixed whilst awaiting outstanding product and service exclusions...". According to the Applicant's evidence, which is supported by the earlier signed quotation, the scope of the work had been agreed. Paragraph 3 says that the deposit was fully refundable prior to signed contracts, except in regard to certain costs that may have been incurred. It does not appear from the evidence that any of those costs were incurred.

6. The two sheets of plans are a simple floor plan without any sections or elevations. There were no specifications provided. They were quite inadequate for the purpose of applying for a permit and no permits were obtained.
7. After hearing nothing from the Respondent the Applicant attempted to contact him but his telephone number had been changed. After obtaining his new number and ringing him he agreed to refund the deposit and has agreed to do so since but she has received nothing.
8. After these proceedings were served the Applicant rang the Respondent who said that he had received the papers and would repay the deposit but had trouble getting the money. He did not appear at the hearing.
9. By s.31(1) of the Act, a builder must not enter into a major domestic building contract unless it is in writing and in accordance with that section. To do so is an offence. By s.31(2), such a contract is of no effect unless it is signed by both parties. She demanded the return of her money through her solicitor but the letter was returned.
10. It is unclear from the evidence whether the Respondent is a registered builder. If he is not that is a further, more serious offence. It seems likely there is no domestic building insurance. It appears that the Applicant has none of the protection the legislation intended her to have and she may well have lost her money. In these circumstances I will refer this proceeding to the Director of Fair Trading for investigation and, if appropriate, prosecution.
11. I will order the return of the deposit and, pursuant to s.53(2) of the Act, I will also award interest on it at the statutory rate. The Applicant seeks an order for her costs. Orders for costs are not usually made in small claim hearings. However this claim has been made necessary because of what appears to be a total disregard by the Respondent of his obligations under legislation which was intended to protect people such as the Applicant so I think an award of costs is appropriate. I will order the Respondent to pay the Applicant's costs which I fix at \$526.30.

**Rohan Walker**  
**Senior Member**