

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING & PROPERTY LIST

VCAT REFERENCE NO. BP65/2019

CATCHWORDS

Domestic building contract – deposit paid – works did not proceed and contract terminated as building permit not issued within 60 days – Master Builders Association of Victoria contract clause 4.2 – the builder is entitled to retain a ‘reasonable sum’ from the deposit for ‘services lawfully performed and expenses incurred’.

FIRST APPLICANT	Alan Le
SECOND APPLICANT	Bao Van Tran
RESPONDENT	Calibre Built Developments Pty Ltd ACN 140 859 785
WHERE HELD	Melbourne
BEFORE	Senior Member S. Kirton
HEARING TYPE	Hearing
DATE OF HEARING	24 July 2019
DATE OF ORDER	30 July 2019
CITATION	Le v Calibre Built Developments Pty Ltd (Building and Property) [2019] VCAT 1133

ORDERS

1. The respondent must pay to the applicants \$6203.34.
2. The respondent must reimburse the applicants the filing fee of \$212.50.

SENIOR MEMBER S. KIRTON

APPEARANCES:

For the Applicants

Mr A. Le, Ms B. V. Tran, in person

For the Respondent

Mr S. Saglam, Mr D. Lento, in person

REASONS

1. The applicants (the owners) entered into a domestic building contract with the respondent (the builder) for them to construct a dwelling house for them on their land in Kensington. They paid a deposit of \$38,883.00 to the builder. For various reasons (which I do not need to go into here) the building works did not eventuate and the building contract was terminated. The builder has repaid a portion of the deposit to the owners but denies any obligation to repay the balance, being \$12,283.54. The owners concede that the builder is entitled to keep some part of the deposit, but say that they are entitled to a refund of a further \$8161.34.
2. During the hearing, Ms Van Tran and Mr Li each gave evidence. The builder was represented by an advisor, Mr Saglam, and its director, Mr Lento. Each party provided copies of the contract, photographs, invoices and receipts as well as correspondence passing between them.
3. The contract was a standard form Master Builders Association of Victoria contract. The parties agreed that it was terminated under clause 4.2, on the grounds that the building permit had not been issued within 60 days of the contract date. In those circumstances, the contract provides that the builder is entitled to retain “a reasonable sum” from the deposit, for “services lawfully performed and expenses incurred”. The exact wording of the relevant clauses is as follows:

Clause 4.2: A party may terminate if necessary permits not obtained within 60 days

If the necessary building and/or planning permits are not obtained within sixty (60) Days of the date of the signing of this Contract, then either party may give written notice to the other party terminating this Contract without liability to the other, except only that the Builder shall be entitled to be paid a reasonable sum for services lawfully performed and expenses incurred under this Contract to the date of termination, and this amount shall be a debt due and payable by the Owner to the Builder and shall be recoverable accordingly.

Clause 4.3: Excess amount from deposit to be refunded to Owner on termination

If the Builder has received payment of the Deposit from the Owner and that amount is in excess of the amount payable to the Builder under Clause 4.2, the Builder will refund any excess to the Owner within seven (7) Days of termination of this Contract under Clause 4.2.

4. Accordingly, the question to be decided is what is a reasonable sum for the services lawfully performed and expenses incurred by the builder under the contract, and how much of the deposit should the builder refund to the owners?

5. The builder said they are entitled to retain the balance of \$12,283.54 by relying on the following:
 - a. An invoice from Daniels Constructions P/L for \$4500 for “mach and truck hire for site cut ... Price includes 8T mach (float), truck hire, tip fees”.
 - b. An invoice from ATF Services Pty Ltd for \$671 for temporary fence hire for 12 months.
 - c. Invoices from Aim Hire Pty Ltd for toilet hire for \$660 for the period 16 June to 5 October 2017.
 - d. An invoice from the builder for \$1254 for a total of 19 hours of Mr Lento’s time in carrying out supervisory works on site.
 - e. An alleged entitlement to charge a builder’s margin of 15% on the deposit, being \$3203.34.
6. In response, the owners said:
 - a. They dispute that the reasonable cost of the site cut was \$4500, and said \$1500 would be a more realistic price for the work that was actually carried out.
 - b. They should not be required to pay for the fence hire for 12 months when they asked for the balance of the 12 months hire to be transferred into their name following termination of the contract, and the builder failed to make those arrangements. Further, they suggested that the fence had been put on to the site prematurely.
 - c. They should not be required to pay for the toilet hire when it was put on to the site prematurely.
 - d. They do not accept the 19 hours claimed by Mr Lento. However they concede that half that amount would be reasonable.
 - e. There is no entitlement under the contract for the builder to charge a builder’s margin on the deposit.

MY FINDINGS

7. For the reasons set out below, I accept that the owners are entitled to a refund of the following amounts from the balance of the deposit held by the builder:
 - a. \$3000 for site clean
 - b. \$3203.34 for builder’s margin.

8. As a result, I will make an order that the builder must pay the owners \$6203.34. The builder is entitled to retain the balance of the deposit.

The site cut

9. As I said earlier, the test I must apply under the contract is whether the amount claimed by the builder is “a reasonable sum”, for “services lawfully performed and expenses incurred”. I am not satisfied that the amount of \$4500 is a “reasonable sum” for the site works carried out. I accept that the builder has produced an invoice from Daniels Constructions which show a total cost of \$4500. Mr Lento said that this amount included a site cut, with three truckloads of fill, soil and rubbish being taken to the tip. He was unable to provide any evidence to substantiate that this amount of soil was cut and removed.
10. The builder bears the onus of substantiating the amount they claim. They must satisfy me that it is more likely than not that three truckloads of fill, soil or rubbish were cut and removed. Mr Lento’s recollection of what was carried out is contradicted by contemporaneous documents, including photographs, an invoice and an email:
 - a. There is no evidence in the photographs taken before and after the alleged site work was carried out that three truckloads has been removed from the site. By comparing the before and after levels against the existing brick wall and fences, the levels do not appear to have changed. The builder suggested that the site was contoured and so comparing it to the boundaries was not an appropriate measure. However neither party was able to produce a site plan showing the contours and as the before photograph showed the site to be level, I do not accept the builder’s argument.
 - b. Further, I note that Mr Lento described the work carried out by Daniels Construction in his invoice dated 4 October 2017 as “stripping grass and removal of excess dirt dumped on site from other people”. That description is not consistent with his evidence during the hearing.
 - c. Further, in an email dated 5 October 2017 Mr Lento described the work as “site clean and grass removal”. Again, that description is not consistent with his evidence that three truckloads of material was removed.
11. On the basis of that evidence, I am not satisfied that it is more likely than not that the amount claimed is a reasonable sum. I accept the owners’ submission that a reasonable value for the work would be \$1500.

The fence hire

12. I accept the builder’s submission that it was reasonable for them to fence the site prior to the building permit being issued. This is a standard part of

preliminary works which may be carried out without a building permit. I also agree with Mr Lento that a prudent builder should act to protect the site from rubbish or dumping. I do not accept the owners' contention that the builder should have waited before installing the temporary fence.

13. Further, I do not accept the owners' argument that the builder should provide them a refund because they failed to have the hire agreement transferred to the owners after the contract was terminated. There was no legal obligation on the builder to approach ATF Services. Further, and more importantly, even if they had made that approach, they had no power to compel ATF Services to agree to transfer the hire agreement. On that basis, I am not satisfied that the owners are entitled to a refund of the fence hire.

Toilet hire

14. Similarly to the fence hire claim, I accept the builder's submission that it was reasonable for them to arrange for toilet hire at the time they fenced the site. At that time, they were preparing for site works to start and arranging for a toilet is part of a builder's usual preliminary works. I do not accept the owner's contention that the builder should have waited before hiring the toilet. Accordingly I am not satisfied that they are entitled to a refund of the toilet hire.

Mr Lento's time

15. Mr Lento's claim is for 19 hours he spent on site, for work including meeting the temporary fence contractor for placement of fencing, meeting the screw pile contractor for test holes of screw piles, supervision of stripping grass and removal of excess dirt, meeting Aim Hire for placement of temporary toilet, and meeting the screw pile contractor to see if access would suit. He said that his hourly rate is \$66, making a total of \$1254.
16. The owners concede that the builder is entitled to half that amount, but said that the 8 hours claimed for supervising the stripping of grass and removal of dirt is excessive. They also said that it was not necessary to spend 3 hours meeting each of the fencing or toilet contractors.
17. I accept Mr Lento's evidence that he spent the number of hours on the preliminary works that he has set out in his invoice. I am satisfied that it is more likely than not that Mr Lento, as a prudent builder, would want to be present while the preliminary site works were being undertaken. It would have been necessary to travel to the site in order to meet each of the separate contractors, and that time should be included in the hours claimed by Mr Lento. Although the applicants were advised by other contractors that they need not meet them on site, that advice does not mean that Mr Lento did not act reasonably when he performed these works. I am satisfied that the amount of \$1254 claimed is a reasonable sum for the services performed by the builder.

Builder's margin

18. The builder referred to a special condition in the contract which entitles them to charge 15% margin on extra works. They applied this 15% margin to the deposit and claimed to be entitled to retain \$3203.34.
19. The builder's interpretation of the contract is incorrect. The special condition entitles them to charge a margin on extra works, such as variations. Payment of the deposit is not a variation, nor is it extra work. The amount of the deposit is set out in the contract and is 5% of the contract price. There is no contractual entitlement to a further 15% margin on the deposit. I also note that s 11 of the *Domestic Building Contracts Act 1995* (Vic) prevents a builder from charging any more than 5% of the contract price for a deposit, so even if the special condition had the meaning that is contended, I would find it is invalid by virtue of s 11.

FINDING REGARDING REIMBURSEMENT OF FILING FEE

20. As the owners have been substantially successful in their claim, they are entitled under s 115B of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) to an order that they be reimbursed by the builder the filing fee paid, in the sum of \$212.50.

ORDERS

1. The respondent must pay to the applicants \$6203.34.
2. The respondent must reimburse the applicants the filing fee of \$212.50.

SENIOR MEMBER S. KIRTON