

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP21/2015

CATCHWORDS

Building and Property List – Domestic Building Contracts Act 1995; written and oral agreement

APPLICANT	Mr Carlos Olivera
RESPONDENT	Google Homes Pty Ltd (ACN 135 966 022)
WHERE HELD	Melbourne
BEFORE	Member D Calabrò
HEARING TYPE	Hearing
DATE OF HEARING	22 April 2015
DATE OF ORDER	11 June 2015
CITATION	Olivera v Google Homes Pty Ltd (Building and Property) [2015] VCAT 835

ORDER

1. The application is dismissed.

MEMBER DOMENICO CALABRÒ

APPEARANCES:

For the Applicant	Mr Carlos Olivera and Gustavo Olivera
For the Respondent	Mr Dung Tran, Director

REASONS FOR DECISION

Background

- 1 The applicant, a pensioner and owner of land in Clayton sought a refund of \$7000.00 paid to the respondent, for development plans.
- 2 The applicant and respondent entered into an agreement for the respondent to prepare development plans to develop the applicant's land. The applicant paid the respondent \$9200. The applicant says that the agreement was subject to the respondent obtaining finance for the development.
- 3 The respondent says that the agreement was for plans to develop the land only, and the applicant was to pay for all development costs. The applicant still owes him \$8700.00 plus GST for the plans.

The hearing

- 4 The matter came before the Tribunal for hearing on 22 April 2015 for a 90 minute hearing.
- 5 Mr Carlos Olivera (the applicant) appeared in person and his son Gustavo Olivera appeared on his father's behalf. Mr Dung Tran (director) appeared on behalf of the respondent company.
- 6 The Tribunal heard the evidence of the applicant and the respondent on the day of the hearing and give its decision orally at the end of the hearing.
- 7 On 23 April 2015 the applicant wrote to the Tribunal seeking written reasons for its decision.

The Evidence

Mr Gustavo Olivera, for the Applicant

- 8 The applicant's case is summarised as follows:
- 9 In April 2014, the applicant's son contacted the respondent about developing his father's property to build three units. A friend referred him.
- 10 The applicant's son told the Tribunal that he and his father met with the respondent. They told him that the applicant was a pensioner and that he could not afford the project. The respondent told him not to worry, that the project could be done without any money up front as he had contacts.
- 11 It was agreed that the respondent would seek loan finance on behalf of the applicant from a bank. The value of the entire investment would be more than enough to cover the loan.
- 12 The applicant's son approached another friend, who was a finance broker who advised that a bank would loan the money to his father if the respondent supplied information about the project. The respondent did not provide this information to the financial broker and the applicant could not obtain a loan.

- 13 The respondent continued with work on the plans even though he did not provide the information required by the finance broker. He invoiced the applicant even though he did not have a loan.
- 14 The applicant's son told the Tribunal that he and his father were led to believe that all respondent's expenses were to be covered by a loan from a bank that the respondent would facilitate.
- 15 He told the Tribunal that they did not receive any documents from the respondent until November 2014. He said that the agreement was signed on 9 July 2014. When his father signed the document he did not obtain advice from a solicitor. He acknowledged that there was no reference to a joint venture between the parties or that the respondent would obtain or facilitate a loan to enable the applicant to develop the property.
- 16 The applicant's son told the Tribunal that his father understood that he would have to pay the respondent money but it would not have to be paid 'up front', this money would be covered by the loan. He felt that his father would not have to start paying bills or interest until the units were sold as this was common practice.
- 17 The applicant's son said that he asked the applicant to stop work last year because the respondent did not send any documents to his father's financial advisor.
- 18 In October 2014 (in a café) he told the respondent that he did not want him to continue with the work. Two weeks prior to the meeting the respondent confirmed his father did not have to pay any money but at the meeting he denied having said this.
- 19 When the applicant's son asked for a copy of the contract or a receipt for the money the respondent told him that the applicant owed him more money.
- 20 The applicant paid a total of \$9400 to the respondent. He is seeking a refund of \$7000. He acknowledged the remaining amount was to pay for a surveyor who charged \$2400. The applicant is seeking a refund because he did not have the money. The property is for sale, as he can no longer afford to continue with the development.
- 21 The applicant told the Tribunal that during the whole process he was led to believe that the respondent would do everything for him. He said that he told the respondent he did not have the money and was told not to worry he the respondent knew someone who would finance the development and then seek reimbursement when the units were sold.
- 22 He told the Tribunal that the respondent produced drawings a couple of times for him to sign, and was told not to worry. He then said that he did not sign any documents didn't sign any papers, I believed in him, that was my mistake. He asked for more money because he was going to put it to the council. I told him I didn't have the money and he got upset.

- 23 On 11 November 2014, we were under the impression that this was the normal process, he was always asking for money. He said to us we had to pay him \$13K we did not have the money, we never did have the money.
- 24 The applicant's son told the Tribunal that the applicant was not disputing that the respondent has done the work but that it was agreed that they were not to be billed for the work.

Mr Tran, for the Respondent

- 25 The respondent's case is summarised as follows:
- 26 He confirmed that he met with the applicant and his son to discuss a development of the applicant's property. There was no agreement between them that he would obtain finance for the project or that any amounts owing were to be paid once the property was sold.
- 27 He told the Tribunal that he had completed 98 per cent of the work to lodge plans with council and produced two architectural drawings that were signed by the applicant.
- 28 He told the Tribunal that the last time he met the applicant and his son was on 28 October 2014 and he was ready to lodge plans with the council. He was not told by the applicant or his son to stop any work. He was told to hold onto the plans and documentation.
- 29 He confirmed that the plans were not lodged with the council because the applicant has not paid any monies owing. He said it was part of the contract that the applicant had to pay money before anything was lodged.
- 30 On cross-examination by the applicant, he denied that he told the applicant or his son that they did not have to pay any money. He said he was told by the applicant to go ahead with town planning application. He told the Tribunal that there was a discussion with the applicant about whether he had money for town planning and was told that he did and to go ahead with the work.
- 31 He confirmed that he did have a discussion with the applicant's finance advisor but he was not asked for any documents. He denied that he was to arrange finance or an offset loan for the applicant.

DISCUSSION OF THE EVIDENCE AND FINDINGS

- 32 The applicant must prove his case on the balance of probabilities.
- 33 Is it more probable than not that the agreement occurred as described by the applicant? Barwick CJ in *Reifek v McElroy* [1965] HCA 46; (1965) 112 CLR 517 at 521-2 said that:-

“The standard of proof to be applied in a case and the relationship between the degree of persuasion of the mind according to the balance of probabilities and the gravity or otherwise of the fact of whose existence the mind is to be persuaded are not to be confused. The difference between the criminal standard of proof and the civil standard of proof is no mere matter of words; it is a matter of critical substance. No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably

satisfied and has not with respect to any matter in issue in such proceeding to obtain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge.”

- 34 The applicant has the burden of proof and to be successful he must demonstrate that the facts on which he relies to establish that his claims that he was promised that the respondent would arrange for finance for the project and that he would not be liable for payment until the development was sold or finance could be obtained.
- 35 The applicant claims that there was an oral agreement that the respondent would arrange or facilitate finance. The respondent disputes this. The agreement signed by the parties is clear in that it is an agreement about a proposed development at 75 Kanooka Grove Clayton. It is a fee proposal to provide planning and building documentation and clearly sets out the work to be done and the payments required at each stage.
- 36 The applicant at a meeting in November 2014 signed the drawings.
- 37 The project did not progress further because there were outstanding accounts.
- 38 The Tribunal finds that applicant and respondent are parties to a written agreement for the respondent to provide plans to develop the applicant’s property. This is evidenced by the written agreement signed on 9 July 2014 and payment by the applicant to the respondent of \$9400.
- 39 The respondent’s architect completed two sets of drawings that were signed by the applicant on or about 28 November 2014.
- 40 The difficulty that the applicant faces is that there is no written agreement that the respondent would arrange finance for the project. While I accept the evidence of both parties that there were ongoing discussions about the project, there is conflicting evidence on whether there was an oral agreement for the respondent to arrange the finance.
- 41 Both parties gave conflicting evidence about oral discussion. The applicant contends that the respondent has said he would arrange or knew someone who could arrange finance and the respondent told the Tribunal that he did not give any such guarantee or that he would arrange the finance for the project. He said it was up to the applicant to do so.
- 42 The applicant’s son said that he had contacted a friend (a finance broker) to advise him on financing the project but the respondent did not supply the information to him and that is why the project did not progress.
- 43 He said that it was only after the respondent sought more money and after the plans had been signed that the applicant and his son told the respondent they did not wish for him to continue. I accept that the applicant sought advice from a finance broker on the funding of the project and it was clear on the evidence before me that it was the applicant who sought the finance for the project. On balance I am not satisfied that there was an oral agreement between the parties for a ‘joint venture’ or that the agreement

was conditional on the respondent being able to find finance or introduce someone to the applicant to finance the project.

- 44 The applicant paid the respondent the sum of \$9400.00 but sought an order for the refund of \$7000.00. The balance of \$2400.00 was not sought because the money was used to pay a surveyor. This is contradictory; in effect the applicant acknowledged that he is liable for the payment to the respondent for the surveyor but is not liable for the rest of the money he paid the respondent. While it is up to the applicant to seek any amount from the Tribunal, I need to consider his assertion that he should be refunded part of the money he paid to the respondent and yet consider himself liable for the remainder, even though the money paid relate to the same written contract and as he asserts the reassurance by the respondent to arrange finance.
- 45 The respondent says that the sum of \$8700 (plus GST) is outstanding for drawings and other work. Two architectural drawings were completed and they were not submitted to local government for approval because of the outstanding amount. The respondent did not lodge a counterclaim.
- 46 I accept that the respondent was entitled to retain the drawings given that there was an outstanding invoice and that the applicant had terminated their agreement at the meeting in November 2014. I note that the applicant approved the drawings and signed one on the day he stated that he told the respondent not to proceed with the work. I find the actions of the applicant contradictory on the one hand approving and on the other hand on the same day and at the same meeting terminating the agreement orally.
- 47 The written agreement dated 9 July 2014 does not refer to any condition that the respondent would facilitate a loan or obtain a loan for the applicant. The written agreement supports the evidence of the respondent. I accept and for this reason prefer the evidence of the respondent to that of the applicant. The applicant's son in contacting a finance broker supports the respondent's version that the applicant was to arrange finance for the project.
- 48 The written agreement between the applicant and respondent is clear in its intention that is for the respondent to prepare drawings and applications for plans to be submitted to council for a planning permit and beyond that, subject to approval to proceed to plans to obtain a building permit. The evidence from the applicant lacked detail and at times was contradictory. He did not call his finance broker to give evidence regarding discussions with the respondent or financial arrangements.
- 49 On the evidence before me and based on the findings above I am satisfied that the applicant's claims are unproven.
- 50 The applicant's claim is dismissed.

MEMBER DOMENICO CALABRÒ