VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D378/2007

CATCHWORDS

Domestic building, compliance with terms of settlement, self executing order, costs

APPLICANTS	Sami Hanna, Hala Samaan
FIRST RESPONDENT	Henley Properties Group of Builders
SECOND RESPONDENT	Vero Warranty
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	2 September 2010 and 21 September 2010 (on site)
DATE OF ORDER	1 October 2010
CITATION	Hanna & Anor v Henley Properties Group of Builders & Anor (Domestic Building) [2010] VCAT 1628

ORDER

1 The proceeding is struck out.

2 There is no order as to costs.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicants	in person
For First Respondent	Mr A. Clark
For Second Respondent	Mr Hui, Solicitor

REASONS

1 The question is whether the applicants ("Owners") have fulfilled their obligations under the terms of settlement of 14 May 2008 ("ToS"). They say they have. The first respondent ("Builder") and the second respondent ("Vero") say they have not. The significance is that if the Owners have not fulfilled their obligations, their proceeding is struck out in accordance with a self-executing order of 16 April 2010.

HISTORY

2 The Owners commenced this proceeding against both respondents in 2007, claiming that the slab was out of level, articulation joints needed to be installed and that there were cracks in the plaster-board walls. As described by solicitors for Vero in a letter to the Tribunal dated 3 August 2007, the defects could be characterised as movement distress. Further, Vero had accepted most of the Owners' claims in a decision of 23 May 2007 and ordered the Builder to rectify them - an order that was not appealed by the Builder.

3 A compulsory conference was conducted on 6 February 2008 after which it was ordered that the parties arrange for their expert engineers to file a joint report. There were five points in the report, which was undated but apparently of 4 May 2008. The first two were:

> 1. Drainage of concrete pathways
>
> Pathways sloping towards the dwelling will contribute to the amount of water penetrating into the founding soils adjacent to the dwelling.
>
> Pathways and pavements which are currently sloping toward the dwelling are to be reconstructed or resurfaced away from the dwelling.
>
> 2. Garden area to front of dwelling of dwelling
>
> This are is to be treated either
>
> a) Draining area with agricultural drains connected to storm water
>
> or alternatively
>
> b) Pave over area with concrete sloping away from the dwelling.

4 The ToS included a number of recitals, including:

> H The [Builder] agreed to (and did) install a new storm water drain at the side of the dwelling and an agi drain at the back of the house and agreed to undertake plaster repair works and install articulation joints upon a monitoring period (rectification works).
>
> I A dispute remained about the impact of the landscaping works performed by the [Owners] around the perimeter of the dwelling, which landscaping works consisted of concrete paving and garden beds.

5 The operative provisions included:

1. The [Owners] will, at their own expense, by 15 August 2008 (with the [Owners] having the right to request the [Builder] for an extension of time, which consent the [Builder] shall not unreasonably withhold), obtain a resurfacing design … and arrange… rectification in accordance with the design … of items 1 and 2 of the joint report.

…

3 The [Owners] are to advise [the Builder] and their own expert when the landscaping rectification works have been [completed]. The [Owners are to, at their expense, and the [Builder] at its expense, require their respective experts to sign off the landscaping rectification works as having been performed in accordance with the design referred to in paragraph 1 … and provide [the Builder] with a copy of their expert's sign off.

…

6. The Respondent [sic] shall within 1 month of receipt of notice of completion of items 1 and 2, which completion shall include evidence of sign off by both experts, rectify the internal plaster …

7. Within 18 months of receipt of the sign off mentioned in paragraph 3 herein, the [Owners]will, at their costs, and the [Builder] will at its cost, require their respective experts to prepare a joint report in relation to [whether it is necessary to install articulation joints in the plaster].

8. The [Builder] agrees to be bound [regarding possible plaster articulation works] and perform the works, if any, within 2 months of receipt of the [new] joint report.

6 The proceeding was then struck out. On 19 December 2008 the Owners wrote to the Tribunal asking for an extension of time to undertake concreting works (landscaping) and also seeking an order that their engineer undertake certain work for them; however their engineer has never been a party to the proceeding.

7 On 19 February 2009 there was a directions hearing and the following orders were made:

1. The proceeding is reinstated.

2. By 30 April 2009 the Applicants must:

(a) comply with paragraphs 1 and 2 of the Terms of Settlement;

(b) test the storm water pipe down the west and south of the property where the concrete was removed.

3. By 30 May 2009 the Applicants must comply with paragraph 3 of the Terms of Settlement.

4. For the purposes of complying with these orders and the Terms the Applicants may engage a suitably qualified engineer in place of Mr Dalgleish.

5. In default of compliance with paragraphs 2 and 3 of this order, this proceeding will be struck out.

6. Reserve costs.

8 On 16 April 2010 both respondents sought orders that the proceeding be struck out, with no order as to costs. On 16 June 2010 I made the following orders:

1. The Tribunal notes the statement on behalf of the respondents that the first respondent's engineer Mr Dominic Lopes has approved the landscaping design provided by John Kotowskyj & Associates, the applicants' consulting engineer of 9 March 2010 and further the Tribunal notes that the respondents say this design was approved in or about October 2009.

2. The applicants must now undertake the landscaping rectification work in accordance with clause 1 of the terms of settlement of 14 May 2008. Such work must be completed by no later than 11 August 2010.

3. If the landscaping work is not completed by 11 August 2010 the proceeding shall stand struck out.

4. If the landscaping work is completed in accordance with Order 2 each party is required to, at their own expense, require their respective experts to sign-off the landscaping works as having been performed in accordance with the design referred to in Order 1. Such sign-off is to take place on or before 13 August 2010.

5. If Order 3 does not apply, the proceeding shall return for further hearing before Senior Member Lothian at 10:00am on 2 September 2010 at 55 King Street Melbourne on which date the question of whether the proceeding should be struck out in accordance with the application for directions of 16 April 2010 by the respondents will be further considered.

6. The respondents' costs are reserved.

9 The Tribunal received a letter from the Owners by facsimile dated 15 August 2010 saying that they had finished the work:

> … by the date and under the engineering supervision and he confirmed the work has [been] done according to the plan.

10 On 19 August 2010 the Builder wrote to the Tribunal stating that the works had been inspected by their engineer, Mr Lopez, and that they do not accord with the agreed landscape design and also complaining that the Owners' engineer had not signed off on the work. Attached to the Builder's letter to the Tribunal were two letters the Builder had sent the Owners. The first, of 5 August 2010, reminded the Owners that they needed to undertake the required works by 11 August 2010 and were required to obtain a sign-off

from their engineer by 13 August 2010. Also attached was the report by Mr Lopes who noted the failure to comply as follows:

> 1. The concrete paving near the re-entrant corner of the rear portion of the house (refer area A in plan A attached) slopes towards the house.
>
> 2. The paving drain and paving concrete does not drain correctly. (Refer levels shown in Plan B attached)

11 The matter came before me for a hearing on 2 September 2010 where the evidence about compliance was contradictory. In particular, the Owners' engineer, Mr John Kotowskyj, had reported on 30 August 2010 that:

> Apart from the small area of paving surrounding the hot water service the completed paving was in accordance with the issued drawings. The area of paving surrounding the hot water service is required to be raised or drained to prevent water ponding in this area.

HAVE THE OWNERS FULFILLED THEIR OBLIGATIONS?

Compliance with the design?

12 I heard the matter further on site on 21 September 2010 and allowed both experts to attend. Mr Lopes did not attend. Mr Kotowskyj did. Using a hose, water tests were undertaken to show where water ran to and where it lay.

Re-entrant corner

13 I observed that water did not run into the re-entrant corner. Rather, it drained away from that area. I am not satisfied that the Owners failed to comply with this aspect of the design. I prefer Mr Kotowskyj's evidence on this point to the evidence of Mr Lopes.

Paving drain

14 Mr Lopes took levels along the channel grate along the west and south sides of the paving and came to the conclusion that it does not drain correctly. Although it is possible that some water might lie in the channel grate and not drain completely, the hose test indicates that there are a number of outlets and that water flowing into the channel grate drains efficiently without flowing out the top of the grate. It appears to function properly.

Hot water service

15 As Mr Kotowskyj admitted in his report, there is an area to the south of the hot water service and behind it (to the east) where water can run from the paved area and penetrate to the soil beneath the dwelling. I find that this aspect of the paving undertaken by the Owners does not comply with the design.

Garden area to the front of the dwelling

16 The design makes no mention of the small, curved garden areas at each side of the front of the dwelling, but the Owners were obliged to undertake either drainage work, or have them concreted, in accordance with item 2 of the joint report of the engineers, which was incorporated into clause 1 of the ToS. At the site inspection of 21 September 2010 these areas were not paved, there was no evidence of drainage and no evidence was given by the Owners that they had undertaken drainage work. The areas looked as though they had been prepared for concrete - crushed rock was overlaid by reinforcing laid directly onto the rock. Nevertheless, I find these areas do not comply with the ToS.

Failure to have their expert sign off by 13 August 2010

17 The Owners neither had their engineer "sign off" that work had been done entirely in accordance with the design nor was it done by 13 August 2010. The document they did produce was dated 30 August 2009, although it is clear that the year was mistaken because it referred to an inspection of 27 August 2010. This is another failure by the Owners to do what they were obliged to do in accordance with the orders of 16 June 2010.

CONCLUSION

18 The Owners have had repeated opportunities to fulfil their obligations under the ToS. There have been two self-executing orders – the first of 19 February 2009 and the second of 16 April 2010. I allowed them more latitude than I might have allowed a party whose first language is English, because they seemed to suffer some confusion, but it was also clear that failure to comply was deliberate, albeit caused by their perception that they could not afford to pay the money necessary to comply.

19 Although the Owners have now fulfilled most of their obligations, they have not fulfilled them all, and these failures are not merely trivial. In accordance with order 3 of 16 June 2010 I strike out the proceeding.

COSTS

20 At the on-site hearing of 21 September 2010, Mr Hui, solicitor, for Vero, sought costs against the Owners for non-compliance. Section 109 of the *Victorian Civil and Administrative Tribunal Act* 1998 says in part:

> (1) Subject to this Division, each party is to bear their own costs in the proceeding.
>
> (2) At any time, the Tribunal may order that a party pay all or a specified part of the costs of another party in a proceeding.
>
> (3) The Tribunal may make an order under subsection (2) only if satisfied that it is fair to do so, having regard to-
>
> (a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as –

(i) failing to comply with an order or direction of the Tribunal without reasonable excuse;

(ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;

(iii) asking for an adjournment as a result of (i) or (ii);

(iv) causing an adjournment;

(v) attempting to deceive another party or the Tribunal;

(vi) vexatiously conducting the proceeding;

(b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;

(c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;

(d) the nature and complexity of the proceeding;

(e) any other matter the Tribunal considers relevant.

21 I assume, from the brief discussion on site, that Vero bases its claim on one or more of s.109(3)(a)(i) of the Act.

22 As emphasised by the Supreme Court in the matter of *Vero Insurance Limited v Gombac Group* [2007] VSC 117 at [20], the Tribunal should approach the question of entitlement to costs on a step-by-step basis:

(i) The prima facie rule is that each party should bear their own costs of the proceeding.

(ii) The Tribunal should make an order awarding costs being all or a specified part of costs, only if it is satisfied that it is fair to do so; that is a finding essential to making an order.

(iii) In determining whether it is fair to do so, that is, to award costs, the Tribunal must have regard to the matters stated in s.109(3). The Tribunal must have regard to the specified matters in determining the question, and by reason of (e) the Tribunal may also take into account any other matter that it considers relevant to the question.

23 Had English been the Owners' first language it is likely that I would have made an order for costs against them, but as it is not, I do not consider it is fair to make an order for costs against them. The Owners' submissions that they had complied with the ToS were not entirely without merit - for example I prefer Mr Kotowskyj's evidence about the re-entrant corner and the drainage to that of Mr Lopes. I therefore make no order as to costs.

SENIOR MEMBER M. LOTHIAN