VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION

DOMESTIC BUILDING LIST **VCAT Reference: D845/2004**

CATCHWORDS

Domestic building – claim and counterclaim – costs.

APPLICANTS:	Norman Sandman, Lorraine Sandman
RESPONDENT:	Extension Factory Custom Designers and Builders, A Division Of Extension Designs Of Australia Pty Ltd (ACN 006 286 826)
WHERE HELD:	Melbourne
BEFORE:	Senior Member D. Cremean
HEARING TYPE:	Hearing
DATE OF HEARING:	10 November 2005
DATE OF ORDER:	28 November 2005

MEDIUM NEUTRAL CITATION: [2005] VCAT 2453

ORDERS

1. Claim dismissed.

2. On the Counterclaim, order the Applicants to pay the Respondent $10,481.00. I note such sum is already held by the Respondent.

3. No orders as to costs.

4. Exhibits to be returned.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicants:	Mr P Kistler of Counsel
For the Respondent:	Mr Ted Fennessy of Counsel

REASONS

1. The Applicants commenced this matter by application dated 12 December 2004. There is also a counterclaim dated 31 January 2005.

2. The matter was referred to mediation on 14 February 2005 but did not resolve. Nor did it resolve at a Compulsory Conference held on 30 June 2005. The parties, thus, were given every opportunity to settle beforehand.

3. The matter was heard by me for 3 days from 12 October 2005 and for a further 2 days from 10 November 2005. Each party was represented by Counsel. Considering the amounts involved on the claim and on the counterclaim, a 5 day hearing, in all, can hardly be justified. The parties, acting reasonably, should have settled.

4. At such hearing I heard sworn evidence from each of the applicants and from their daughter and son-in-law. I heard sworn evidence also from Ms La Vaillant and from Mr Brian Clarke. The Respondent called Mr Doug Rogers, Mr Richard Varga and Mr Colin Pavier to give sworn evidence. In all, I heard sworn evidence from 9 persons. Each witness was cross-examined.

5. Essentially the claim of the Applicants is to have a building agreement set aside and for the return of moneys ($10,481.00). The claim of the Respondent is to be able to retain those moneys and for the payment of other moneys on a quantum merit basis.

6. The dispute arises out of a domestic building contract entered into between the parties to carry out renovation works at premises at 38A Chapel Street, East St Kilda. It is the Applicants' case that there were in fact two agreements entered into – a preliminary agreement signed on 1 March 2004 for the Respondent to

prepare a sketch plan and preliminary specifications with respect to the works and a subsequent building contract executed on 22 May 2004. The Applicants allege they have paid the Respondent sums totalling $10,481.00 – a sum of $6,062.00 on 29 March 2004 and a further sum of $4,419.00 on 22 May 2004.

7. In their Amended Points of Claim dated 1 August 2005 the Applicants allege, inter alia, that prior to them entering into such agreements certain representations were made by Mr Rogers on behalf of the Respondent. It is alleged by them that he represented that:

"(i) They [i.e. the Respondent] were a very experienced and professional company;

(ii) There would be little delay and disruption;

(iii) Work would commence prior to June 2004 as the owners' daughter, who resides at the property, was travelling overseas for four weeks;

(iv) He would write 'special' on the file so that it would receive priority treatment".

8. The Applicants allege that, in making these representations, Mr Rogers knew that they would be relying on them and they did in fact do so. They allege that by July 2004 they had ascertained that the works had not been commenced so as to coincide with their daughter's overseas travel. In September 2004 they allege they became aware of an objection by a neighbour to the works (Ms La Vaillant) and that the Respondent's employees were making offers on their (the Applicants') behalf and without their consent. They allege that the Respondent had repudiated the contract with them which they elected to terminate by formal letter on 11 November 2004. They claim they were entitled to terminate the building agreement by reason of the Respondent's conduct. As a consequence, they claim they are entitled to ask that the agreements be set aside and to be refunded the moneys paid.

9. In its Defence, the Respondent admits it made the representations in (ii) and (iv).

However, it says that Mr Rogers explained to the Applicants "that a building permit and a town planning permit from the City of Port Phillip would be required … and that the works could not commence until such permits were issued". The Respondent says the building permit issued on 9 December 2004 and the town planning permit on 26 December 2004. I infer from the evidence that the cause of the delay involved (which was considerable) was the objection by Ms La Vaillant to the town planning permit. She lodged her objection on 19 July 2004 and it was only determined on 22 November 2004 by the Tribunal that the decision of the City of Port Phillip to grant the permit on conditions (relating to the removal of illegal plumbing) was affirmed. The Respondent admits the Applicants purported to terminate the contract on 11 November 2004 but denies they were entitled to do so. Therein lies the claim in quantum merit.

10. It is for the Applicants to prove their case, on the claim, on the balance of probabilities. I listened very carefully to the evidence of Mrs Sandman and Mr Rogers in particular and I am unable to be satisfied, having done so, that the Respondent via Mr Rogers did make the representations alleged which are in issue. Mrs Sandman was adamant that Mr Rogers said that by June 2004 works would be "well underway" and that the premises would be secure. She agreed, however, that the contract documents do not say that the works will start in June 2004. Mr Rogers, however, was equally adamant that he did not say the works would commence prior to June 2004. He said he denied her allegations about a commencement date: he said he could not have promised a commencement date due to the need to obtain approvals. He said the premises could not be put in a "lockable" state until after works were started.

11. It seems to me, therefore, that I have equally competing explanations of what was said at the material time. I am unable to prefer one explanation over the other. Nothing else enables me to do so. The contract signed between the parties is, at best, ambiguous. Stamped on it (p. 14) are these words: "I/We instruct the builder that due to reasons of a need for expediency we hereby instruct and

authorise the builder to progress with the works immediately". But by the Addenda the person nominated as responsible for obtaining the building and town planning permits is the builder and as to the former (on a page signed by the Applicants) it is said: "Builder to obtain building permits within 60 days of date of contract". This means therefore, the contract being dated 22 May the Respondent had until late June to obtain such permit in any event. This does not support the Applicants. How could it be, in such circumstances, that works could be well under way by June 2004?

12. The Respondent admits that Mr Rogers represented he would write "special" on the Applicants' file so that it would receive priority treatment. I consider Mrs Sandman took this to be implying far too much. It was explained to me that this meant a special note would be placed on file – as it was. A "Special Note" was placed there regarding liquidated damages (of $100.00 per week in the event of contractual delay) and regarding the address to which to send correspondence. I was not persuaded I should take the Respondent's admission as signifying anything more. Still, I think there is a need for Mr Rogers to be more explicit.

13. It seems to me, I should observe, that Mrs Sandman had unrealistic expectations about the works. She expected the works to be nearing completion only about a month or so after the contract was signed. This would be near impossible to achieve – especially given the need for planning and building permits. And Mrs Sandman, if she had thought about the matter, should have realised that obtaining these could take quite some time. It is not as if, however, the Respondent delayed making the applications. The contract was only signed on 22 May; yet by 28 May – only 6 days later – the application for a building permit was duly forwarded. Then there was the objection (by Ms La Vaillant) to the planning permit which was not factored in by anyone. However, it would not be reasonable to blame the Respondent for the objector exercising her statutory rights. Again, I would indicate the Respondent should make this quite clear to customers – that an objection could delay a project considerably.

14. It seems to me, therefore, in accordance with well-known principles (see *Carr v J A Berriman Pty Ltd* (1953) 89 CLR 327) that no occasion arose for the Applicants to claim, in November 2004; that they were entitled to say the Respondent had repudiated its obligations under the contract. The Respondent, I consider, was still busying itself about the Applicants' situation. The planning issue was yet to be resolved and the building permit had not by then issued. There was nothing, in my view, that the Respondent could reasonably have done which it failed to do.

15. It follows the termination of the contract by the letter dated 11 November 2004 was wrongful. In such circumstances I cannot hold that the Applicants are entitled to have that contract set aside. It was urged upon me that the Applicants also should have an order for costs made in their favour. No occasion exists for the making of any such order. The Applicants have not succeeded. Further, they are the party which has acted wrongfully by terminating the contract. No basis exists for a costs order in their favour.

16. On the Counterclaim, the Respondent claims to have suffered loss and damage by reason of the Applicants' repudiation. Particulars of such loss and damage are given in a document supplying the same dated 24 May 2005. This includes fees paid to Mr Rogers ($2,617.00); work done by Mr Varga $2,000.00 (being 25 hours at $80.00 per hour); estimating work $2,480.00 (being 31 hours at $80.00 per hour); Mr Pavier $360.00 (being 3 hours at $120.00 per hour) particular fees $4,980.68; and gross margin $3,109.42 (set at 25%). If I add in the $10,481.00 already paid by the Applicants (which the Respondent claims to be entitled to keep) is the total claimed in fact $40,454.10 - if also I include a claim of $24,907.00 made for loss of profits ($16,069.00 margin at 20%) and amount due on obtaining building permit ($8,838.00).

17. I am not satisfied that the Respondent is entitled to anything like the inflated sum

it has claimed. Indeed Counsel pointed out to me, as is correct, that the Respondent cannot claim both in quantum meruit and under the contract. Moreover, Mr Rogers gave evidence to me that he was a sales consultant and not an employee and Mr Pavier said in evidence he did not keep a diary, only an organizer. I was unable to see how he could justify spending 3 hours on the Applicants' file. How would he know? What would he consult?

18. However I did hear expert evidence from Mr Clarke who in his report dated 10 October 2005 said that: "Mr and Mrs Sandman have paid, I am instructed, $10,481.00 already. This sum well covers any costs and expenses incurred by the Builder, with a profit margin". In my view Mr Clarke's evidence was evidence I should accept. He impressed me as very truthful and very experienced. Cross-examination, in my view, made no inroads on his evidence. There was no independent expert evidence called by the Respondent to the contrary.

19. I rely upon Mr Clarke's evidence to hold that the proper quantum I should allow the Respondent is no more than $10,481.00. That sum, based on his evidence, covers not only costs but profit margin as well. I consider that sum to be fair and reasonable based on his evidence. I order the Applicants pay that sum to the Respondent. This means, of course, that I am ordering the Applicants to pay a sum that has already been paid.

20. The Respondent also applied for costs. I rely upon s109 (1) of the *Victorian Civil and Administrative Tribunal Act* 1998 to decline to order any costs in favour of the Respondent. I am not satisfied, having regard to s109 (3), that it would be fair to do so under s109 (2). Several discretionary factors also are relevant. The amount claimed by way of Counterclaim in Particulars given as late as 24 May 2005 was vastly in excess of the Respondent's true entitlement. In my view the Respondent has (and had) an entitlement to no more than the sum *already* paid. It has recovered no more than that amount. Parts of those Particulars, I am satisfied, based on Mr Clark's evidence, were, in my view, quite unsustainable.

Moreover, I was not satisfied that the evidence given on behalf of the Respondent by Mr Pavier was correct in all its detail. I refer to his evidence that there had been little or no contract with Mr Rogers for 12 months or so prior to the hearing. In light of Mr Varga's evidence, I consider that evidence by Mr Pavier to be careless or false. I do not consider, when I am satisfied that it is one or the other, I should order the Respondent to have its costs even if I was satisfied otherwise that that is what I should order.

21. In the circumstances I make no orders as to costs.

22. Exhibits may be returned to the parties.

SENIOR MEMBER D. CREMEAN