VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D904/2011

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic Building Contract – proposed termination by owner – application by builder to restrain termination – relevant considerations – no real question to be tried – balance of convenience – damages adequate remedy

APPLICANT	Tibor Pollack Construction Co Pty Ltd (ACN: 076 236 425)
RESPONDENT	Oakleigh Development Pty Ltd (ACN: 132 263 319)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Injunction
DATE OF HEARING	26 October 2011
DATE OF ORDER	26 October 2011
DATE OF REASONS	20 January 2012
CITATION	Tibor Pollack Construction Co Pty Ltd v Oakleigh Development Pty Ltd (Domestic Building) [2012] VCAT 71

REASONS FOR DECISION PROVIDED PURSUANT TO THE REQUEST OF THE RESPONDENT

This matter came before me on 26 and 27 October 2011 upon the hearing of an application by the Applicant for an injunction. I refused to make the order for reasons given orally. I have now been requested for written reasons.

The following is an edited version of the reasons that I gave at the time.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr E.W. Alstergren of Counsel
For the Respondent	Mr M.A. Robins of Counsel

REASONS

The application

1 This is an application by the Applicant ("the Builder") for an injunction to restrain the Respondent ("the Developer") from terminating a building contract.

2 The contract is to renovate and remodel a former motel in Oakleigh into thirty four residential apartments. The building permit was issued in two stages. The first stage, issued in July, was for the demolition and stripping out of the units and the second stage, issued on 1 September, was for the actual construction work.

3 The contract makes no differentiation between the two stages and the timeline provided by the Builder as required under the terms of the contract also made no differentiation. That timeline starts with a progress payment schedule that was provided. There was the site establishment, which was to be done on 28 July 2010 at $132,547.77 and the timeline carries right through to the practical completion and hand over, which is said to be intended to occur 12 months later on 28 July 2011.

4 The contract itself states that the construction period is 12 months from the issue of the building permit and I do not think there can be any sensible argument that the period is anything other than that. Despite Mr Alstergren's great eloquence I really cannot see, in the light of this document, that there is any real prospect of establishing that the contract period continued beyond the date that is set out in the contract documents.

5 Of course this is not the final hearing of the matter but an application for interlocutory relief. In the course of dealing with that and I have to see whether there is any serious question to be tried and only to that extent can I go into the merits.

The dispute

6 The application is supported by an affidavit by Mr Pollack who is the principal of the Builder. That affidavit was sworn on 25 October 2011, which was the date upon which this application was issued. The affidavit and the application were prepared when negotiations between the parties had broken down and the Builder's hopes of resolving the matter by agreement had not borne any fruit.

7 The work is substantially progressed. The exact stage it has reached is unclear on the material, but at least since September there has been a dispute between the parties concerning the progress of the work.

8 On 22 September there were a number of notices served and more were served in the following few days. These all purported to be served under the contract and were signed by the superintendent, Mr Berman.

9 It is an architect administered form of contract. In Schedule 1 the architect is identified as "CH Architects" and the representative is said to be Mr

Nathan Byron. However there is a handwritten note on the form of contract to the effect that the term "the Architect" throughout the contract refers to the superintendent. That is on page 28 of the contract, which is exhibited to Mr Pollack's affidavit. During the course of construction various documents were issued by Mr Berman, who carries on business as "RB Building Services Pty Ltd". The claims for payment were submitted to him and were assessed by him and it is not suggested that there was anything untoward about that.

The notice

10 The matter came to head as a result of the service upon the Builder of a notice by the Developer on 13 October 2011. That notice purports to be served under Clause Q(1) of the contract. Clause Q enables the Developer to serve a notice on the Builder requiring it to remedy a default. The clause says that if the Builder fails to meet a substantial obligation under the contract the Developer may give the Builder a written notice requiring the Builder to remedy the fault within ten working days. The notice must specify the default and state that it is given under that clause. If the default is not remedied within the period of ten days or the Builder fails to show reasonable cause why it cannot be remedied within ten days or such additional days as the architect agrees to in writing, the Developer may terminate the agreement.

11 It is a lengthy notice which sets out eight grounds in some detail and concludes by saying that the Builder is required to show cause in writing to the Developer by 5:00 p.m. on 27 October 2011 why the Developer should not exercise its rights under Clause Q(1).

12 It is in order to prevent the termination of the contract based upon that notice that this application is brought.

Argument

13 The principal point taken by Mr Pollack in his affidavit and argued by Mr Alstergren on the Builder's behalf, is that the eight grounds which are set out in the notice have been the subject of a dispute resolution procedure entered into pursuant to Clause P of the contract.

14 The wording of that clause starts by providing that, if a dispute or difference arises in relation to the contract, the parties must nonetheless continue to perform their obligations under the contract. If a dispute arises, then either party may deliver a written dispute notice to the other which requires the representatives of the parties to meet within five working days after the dispute notice is delivered and make a *bona fide* attempt to resolve the dispute or difference. Then, if it is not resolved within five working days, they must meet within ten working days of the dispute notice, that is, within a further five days, and make a *bona fide* attempt to resolve the dispute or difference.

15 Clause P 3 then goes on to provide for mediation but it is quite clear from the wording of that part of the Clause that this procedure is not compulsory; it is optional. It says that the parties may agree, subject to Clause P 2, to resolve their dispute or difference by mediation.

16 In this case, the two periods of five days had expired and the following day this notice complaining about these eight grounds was served.

17 Mr Alstergren submitted that that is an abuse. He said that is not the sort of behaviour the contract contemplated and that the Developer ought not to be able to terminate on those grounds.

The law

18 Counsel have referred me to a number of authorities concerning the granting of interlocutory injunctive relief, including the leading cases of *Australian Broadcasting Corporation v O'Neill* (2006) 229 ALR 457; *Beecham Group Limited v Bristol Laboratories Pty Ltd* [1968] ALR 469. The thrust of these cases is that, in order to restrain the Developer from proceeding to terminate the contract on the basis of the notice, I need to be satisfied:

(a) that there is a real question to be tried;

(b) that the balance of convenience favours the granting of a restraining order; and

(c) that damages would not be a sufficient remedy.

Real question to be tried

19 As to whether there is a real question to be tried, I have to be satisfied that, there is a *prima facie* case that the Builder will be able to establish, at a full trial, that the Developer is not entitled to determine the contract on the basis of service of this notice. The difficulty there is that there are eight grounds in the notice and if any one of them should be valid, the Developer is entitled to determine the contract. I therefore have to be satisfied that there is a serious question to be tried in regard to each of those. Even if it is entitled to rely upon one of them, that is sufficient.

20 Substantial argument was directed to the question whether the work is within time. That would relate to the second ground, which is that the Builder is failing to carry out works with reasonable diligence and the fifth ground, which is that the Builder is failing to carry out works so as to bring them to practical completion under Clause M 1.

21 It does not seem to me that there is a *prima facie* case that the Builder has proceeded with the work with due diligence or that it will reach the practical completion by the required date because it seems to me virtually beyond argument that the time for practical completion has already arrived.

22 In regard to defects it is unclear what the situation is in regard to those. According to the affidavit material there has been a stand-off between the

parties, with agents of the Developer being unable to gain access and its expert, Mr Mladovic, being turned away. The architect was allowed in to assess the works but complained about the conditions under which he was able to do so. Despite the lack of clarity it is not suggested that all of the defects have been rectified.

23 Documentary proof of payments made by the Builder was to be provided and it is said that it was not provided. Certainly there was a declaration signed pursuant to the tri-partite agreement but in regard to the claim the contract requires it to be contained in any claim as well. I am unclear about this ground so I express no view on it.

24 As to the alleged insolvency of the Builder, the interpretation of the tri-partite agreement is open to argument and so I think it is arguable that there is no insolvency event.

25 Although there may be some doubt on some of the grounds, others are beyond doubt. I do not believe that there is a real case to be tried that the Developer will not be entitled to rely upon its notice, particularly in regard to the defects and, more significantly, not carrying out the works with due diligence or so as to reach practical completion on time.

Balance of convenience

26 As to the balance of convenience, it seems to me from the authorities that this must be looked at in terms of where the lesser risk lies. The affidavit material filed on behalf of the Developer says that many of these units have already been pre sold. There is possible prejudice arising from the delay if for any reason the delay should enable the purchasers to avoid the contracts. For so long as the delay persists, the Developer cannot receive the purchase price of these units, the subdivision cannot be done and the titles cannot be issued. It is also unable to recover the amount it has already paid, first for the land and then to have done the work that has been done to date. All of that is a substantial prejudice arising from delay.

27 Mr Alstergren says that there is no reason to suppose that a new contractor will build any quicker than the Builder because the new contractor is going to face the same problems. One cannot predict what will occur in the future but the Builder is substantially over time already and there is no reason to suppose that a new contractor will be dilatory.

28 From the Builder's point of view, if the contract is terminated it will be relieved of its obligation as well as its right to complete the project. There is no evidence to suggest that it will suffer any other inconvenience that I can see and if it is ultimately right it will have its claim in damages.

Would damages be a sufficient remedy?

29 If, despite the foregoing, the Builder should succeed in establishing that the termination is wrongful and in breach of the contract, I cannot see why damages would not be a sufficient remedy. I agree with Mr Alstergren that they might not be easy to assess but it is not easy to assess damages in any

substantial building case. There may well be a dispute as to what is to be done, what value to place on the work that still has not been paid for and so forth, but I do not think that that goes so far as to demonstrate that damages would not a sufficient remedy.

The proposed undertaking as to damages

30 There was a dispute about the adequacy of the Builder's undertaking as to damages. I do not know anything about the financial situation of the Builder but since I am not prepared to grant the injunction it is unnecessary to consider whether its undertaking as to damages would have been sufficient.

Orders to be made

31 The application will be dismissed and I will order that the Builder pays the Developer's costs including reserved costs, to be assessed if not agreed on Scale D of the County Court Scale.

SENIOR MEMBER R. WALKER