VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D536/2005

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building, flood prone site, council enquiries, time and party responsible for enquiry, information sufficient to obtain a building permit, variation, variation costs, matter reasonably foreseeable by builder, sections 31(1) and 37(3) of the *Domestic Building Contracts Act 1995*, expert evidence, area of expertise, VCAT Practice Note 2, Tribunal's regard of expert evidence, specific performance, damages for breach of contract, damages in lieu of specific performance.

APPLICANT	Anthony Vigilante
FIRST RESPONDENT	National Builders Group Pty Ltd (ACN 092 675 164)
SECOND RESPONDENT	V & M Daniele Constructions Pty Ltd (ACN 057 792 953)
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	5-6, 8 June 2006
DATE OF ORDER	7 July 2006
CITATION	Vigilante v National Builders Group (Domestic Building) [2006] VCAT 1309

ORDER

1. The First Respondent must pay the Applicant $7,210.00 forthwith as refund of the deposit.

2. The First and Second Respondents are jointly and severally liable to pay the Applicant $34,940.00 forthwith as damages for increase in the cost of building.

3. The Second Respondent must pay the Applicant $5,400.00 forthwith as agreed damages for delay.

4. Interest and costs are reserved.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For the Applicant	Mr Cahill, Solicitor
For the First Respondent	Mr Dickenson of Counsel
For the Second Respondent	Mr Dickenson of Counsel

REASONS

1 This proceeding is about a house which has not been built; not even commenced. It concerns who bears the cost to raise the level of the floor under contracts between the Applicant owner and the two respondents. It is accepted that the floor as designed was too low, because the site was in an area declared flood prone and a building permit could not be obtained unless the design were altered to set the floor level higher.

History

2 The Applicant owns land in Bendigo with two street frontages, Williamsons Street and Cornwall Place. There is a house fronting Williamsons Street, and by a document dated 19 January 2005 he entered an agreement with the First Respondent to arrange for the construction of a new house on the other end of the land, which has a frontage at 7 Cornwall Place.

3 The First Respondent appears to be a broker of building contracts, but this is not the way they described themselves in the advertisement which, the Applicant says, drew them to his attention. The contract which they proffered to the Applicant is very brief and makes no mention of any other contract to be entered by the Applicant, although the "Client Quotation Acceptance" discussed below does make reference to a payment being "credited against the contract deposit."

4 The advertisement stated in part "We're a group of independent building contractors who have joined together to become one of Australia's largest home builders." The written contract was a three page document, curiously entitled "Quotation Offer of Acceptance", dated 10 December, which was signed by the Applicant and Mr Travis Maloney on behalf of the First Respondent and dated beside the Applicant's signature 19 January 2005. The fourth page, entitled "Client Quotation Acceptance" is also dated 19 January 2005.

5 The agreed price on both documents was $144,203.00. The Quotation Offer of Acceptance was addressed to the Applicant and indicated the site address. It then commenced, excluding the formal parts:

> "We are happy to confirm the following fixed price quotation for the construction of your new home as per our standard inclusions list.
>
> House type: Townhouse 20 E"

6 There followed a list of other items, some of which were to be provided by the Applicant and some of which carried an extra price. The document included:

> "3. Soil Conditions / Slab
>
> Class "P" Engineered Designed slab as per Engineer's Report No 861998 performed by Tomkinson $2,928.00
>
> 4. Site Level: Site cut & fill of 400mm and clear vegetation with excess spoil spread on site $1,232.00"

7 The "Client Quotation Acceptance" is in the form of a letter from the Applicant to "The Director" of the First Respondent, but was represented by the Applicant at the hearing as the fourth page of the Quotation Offer of Acceptance. It appears to be a form letter presented by the First Respondent to the Applicant to sign. Excluding the formal parts, the letter stated:

> "I, Anthony Vigilante, accept the quoted price of $144,203.00 as detailed on Quotation Form No 4588W/sh for the construction of our new home.
>
> I hereby authorise National Builders Group to proceed with the preparation of plans, specifications, slab design, Rescode requirements and other works required to obtain a Building Permit on out [sic] behalf so that work may commence.
>
> I understand that this fixed price quotation is valid for a period of 14 days from the date of issue and we are required to pay $2,000.00 deposit (less $750.00 already paid), which will be credited against the contract deposit.
>
> The above price is a fixed price, not be varied [sic] unless there is a change to the specifications or working drawings initiated by the owners."

8 It is found that the "Quotation Offer of Acceptance" and the "Client Quotation Acceptance" (collectively "the Price Agreement") form the written part of the agreement between the Applicant and First Respondent and that regardless of whether they are addressed on their face to the Applicant or to the First Respondent, the terms of both bind both parties.

9 The First Respondent presented the Applicant with a standard-form HIA building contract to sign with a building company, Avoca House. Although

initialled by him, the Applicant did not sign it and no contract was entered with Avoca House.

10 On 3 March 2005 the Applicant did sign a contract in the same form with the Second Respondent, which is also a building company. It is noted that in the subsequent correspondence between the Applicant and First Respondent after the dispute arose, he referred to the First Respondent as the "builder" and the Second Respondent as the "sub-builder".

11 It is agreed by all parties that no plans were signed when the building contract was signed and that the only plans in existence which were relevant to the project were those prepared to obtain planning permission. The plans for the planning permit were prepared by DMC Drafting Designs Services on the instructions of the Applicant. It is accepted that the design was by the First Respondent and that the plans were transmitted to the Applicant by the first Respondent by e-mail, after which they were passed on to DMC Drafting Designs Services. No Australian Height Datum ("AHD") heights appeared on the plans.

12 Consistently with the Price Agreement, the building contract between the Applicant and Second Respondent was for $144,203.00. The building period was 205 days from the date for commencement.

13 The Applicant paid the First Respondent the full deposit of $7,210.00, being 5% of the contract price.

14 In his witness statement, the Applicant said the First Respondent asked him to obtain building information from the Greater City of Bendigo, that he applied for the information and paid the fee of $30.00. He received a letter dated 12 April 2005 from the Council providing answers to various standard questions concerning the site. One of these was that the Specified Flood Level was 222.62 in AHD. He said that this information was not significant to him and that he forwarded a copy of the letter to "Diana" of the First Respondent on 14 April 2005.

15 A copy of an e-mail attached to the witness statement of Mr Daniele (of the Second Respondent) is from "Diana" of the Second Respondent to the Applicant dated 15 March 2005 requesting that he obtain "Property information and stormwater (legal point of discharge) information - To be obtained from the council. Please send me copies of all info." It is concluded that the Applicant obtained the council information at the request of the Second Respondent and forwarded it to the Second Respondent. There is no evidence which calls into question the truth of the Applicant's

statement that the information about the specified flood level was not significant to him.

16 At paragraph 20 of his witness statement, the Applicant said that on 17 May he received a telephone call from "Mr Daniels" [sic] of the Second Respondent who said the plans needed to be revised due to flood levels, and "that the foundation costs would be two or three times greater than that quoted in the Building Contract."

17 There followed a series of increasingly acrimonious e-mails and letters between the Applicant and the First Respondent. The first, on the day following his telephone conversation with Mr Daniele, was to Shirley Humphreys of the First Respondent. At this time he believed that the foundation cost would be only two or three times the cost quoted, therefore the increase in contract price would be up to $9,000.00. He referred in the e-mail to the "19 Step document" of which more will be said later. In particular he said:

> "I would like to know how this could possibly occur when at step two "Soil test and all site information are requested (two - 2 weeks)" of the information page supplied by National Builders "Steps you will go through once you have signed the preliminary agreement" Clearly states that all site information was checked."

18 It is noted that the letter in reply from the First Respondent's Ms Landolina of 20 May 2005 neither queries nor denies the existence of the "19 Step document". It does say:

> "As a matter of course, no investigations involving unreasonable expense are carried out prior to contracts being signed by a client. It the [sic] client's responsibility to inform National Builders Group of any issues outside a normal residential construction site that is relevant to their land prior to quotation and this information would have been available to you."

19 The Applicant wrote to Ms Humphreys (attention Ms Landolina) by e-mail on 23 May 2005 and again made reference to the 19 step document. Ms Landolina sent a letter dated the same day, saying, excluding the formal parts:

> "I have received your email today and respond as follows:
>
> 1. A soil test does not ascertain if a block is classified as flood prone. As stated in my previous letter, unreasonable expense is not allocated to a project prior to contracts being signed and to

ascertain the full classification of any site involves engineering and surveying reports, not only information from Council.

2. As you were aware that your site was flood prone, you had a responsibility to inform us prior to the completion of costing.

3. Your quotation did not include any costs relating to a flood prone site.

4. The builder is not liable for any costs attributable to a client's block.

Your builder, Vince Daniele is currently preparing a quotation outlining all construction requirements relating to your block. Please contact him directly for any enquiries regarding the building of your new home."

20 It is noted in particular that the Respondents neither pleaded nor proved that the Applicant knew that the site was flood prone. References were made in cross examination of the Applicant to the "Section 32" statement that a purchaser of land normally receives, but none was put in evidence. The Applicant said that his then solicitor had acted for both the vendor and the purchaser, and no such statement was provided to him. The Respondents neither sought further discovery of the Applicant nor third-party discovery of the solicitor who undertook the conveyancing, so the Applicant's statement on this point is accepted as accurate. It is therefore not necessary to discover what impact, if any, actual knowledge of a flood-prone site would have had on the relationships between the Applicant and each of the Respondents.

21 More letters and e-mails passed between the Applicant and the First Respondent. The Applicant continued to assert that both Respondents were "builders", continued to refer to the 19 step document and to insist that there be no adjustment to the contract price. Ms Landolina on behalf of the First Respondent continued to insist that provision of site information (other than a geotechnical report and a "site report from our builder") was the responsibility of the owner.

22 In his e-mail of 24 May 2005, the Applicant said, among other things:

"on 9th April 2005 I received an email from Diana of Daniele Homes requesting 'Property information/stormwater information statement from your local council'. This was the first mention of a council property information report to me.

> I applied to council for this and supplied it to Diana via email on 14th April 2005. It cost me $30 and was available within 10 days. This should clearly have been part of step 2 by National Builders Group back in August 2004 … This search was never my responsibility and as a result I had no idea that your design was inadequate. The information meant nothing to me.
>
> …
>
> Regarding the variation:
>
> If you cannot offer a concrete floor to the legal council standards and need to redesign the floor I am willing to consider different structures."

23 On 30 May 2005 Ms Landolina wrote to the Applicant asserting again that the responsibility for costs associated with flood-prone land lay with the Applicant. She concluded her letter:

> "Let me emphasise, that there is no-one responsible for construction costs associated with **your** land other than **yourself**, and should there be no commitment from you regarding all costs associated with the construction of your home then your project will remain on hold until that commitment is assured. Please note all timeframes and penalties as per your contract with Daniele Constructions Pty Ltd will remain and are enforceable."

24 The Applicant said he received a variation to floor system from the Second Respondent by letter of 1 June 2005, which purported to increase the contract price by $28,050.00. He said he "rejected the variation as per my e-mail of 3rd June to both Respondents." A copy of an e-mail of 4 June 2005 is exhibited to the witness statement of Ms Landolina and says in part:

> "I have received your nasty letter of threats dated 30th May 2005 and also the quotation from V&M Daniele Constructions dated 1st June 2005 for the builder generated variation to raise the floor level of my townhouse to meet council requirements that were in place for many years before the HIA contract was signed. I DO NOT ACCEPT THIS VARIATION …"

25 The "variation" is a schedule of works for the revised floor system, less an amount for the concrete slab and the allowance for the "P" class slab as included in the Quotation Offer of Acceptance, giving the net cost of variation as $28,050.00.

The Applicant's claim

26 In his Points of Claim of 12 December 2005, the Applicant sought an order for specific performance of the contract by the Second Respondent, alternatively, damages against both the first and second Respondents, repayment of the deposit of $7,210.00, interest and costs. In his final address, Mr Cahill for the Applicant sought specific performance from either the First or Second Respondent.

27 In his witness statement, as amended by oral evidence, the Applicant said that he sought specific performance and that he had suffered the following losses:

a. Storage fees as a result of demolition of his garage and shed, being 28 weeks from 16/5/2005 to 25/11/2005 @ $30 per week - $840.00.

b. Purchase of shipping container as storage/shed - $1,650.00.

c. Cost of replacement of rear fence removed to allow building to commence - $1,050.00.

d. Cost of replacement of shed/garage $7,365.00.

e. Agreed damages for late completion from 31 December 2005 (estimated completion date) to 5 June 2006 "and counting" 22 weeks - $4,400.00.

f. Increased building costs based on Second Respondent's variation - $28,050.00 plus estimated increase in general building cost on that sum, 4% - $1,122.00

g. Estimated increase in building cost of 4% on $144,203 - $5,768.00. A total of $50,245.00

28 Mr Cahill for the Applicant conceded that if specific performance were ordered, items c, d, f and g could not also be claimed. Mr Dickenson for the Respondents said, under cover of denial that anything was payable by them, that if the Applicant received agreed damages for delay, he could not also seek time-related damages, such as storage fees and the shipping container.

Alleged breach of contract by the First Respondent

29 In paragraph 10 of the Points of Claim, the Applicant pleaded:

"In breach of the Price Contract the First Respondent failed;

(a) To ascertain that the Land was subject to the Flood Level;
(b) To ensure site costs and quotation took into account construction of the House as affected by the Flood Level."

- **Was the First Respondent obliged to ascertain flood levels?**

30 The First Respondent's obligation to undertaken investigations which would reveal, among other things the flood level, is found in the "Client Quotation Acceptance". In the second paragraph the Applicant authorised the First Respondent to do "other works required to obtain a Building Permit" and the last paragraph provides that the price is fixed and "not [to] be varied unless there is a change … initiated by the owners". There were no exceptions, no provisos and no allowance for usual building practice. The Applicant bound himself to pay the quoted price and the First Respondent bound itself to provide the "Townhouse 20 E" on the Applicant's land for that price.

31 Mr Dickenson submitted that the building contract contemplated, in clause 13, that certain matters might be done after that contract was entered that would be inconsistent with the building permit having been obtained first. While the argument has a certain ingeniousness, the First Respondent was not a party to that contract, and the obligation to do the "other works" referred to in the preceding paragraph, places the obligation upon the First Respondent and not the Applicant.

32 It is found that the First Respondent was obliged to make all reasonable enquiries, including seeking a council report, before drawings were finalized and a price provided.

- **Was the First Respondent obliged to ensure the site costs and quotation took into account construction of the house as affected by the flood level?**

33 As between itself and the Applicant, the First Respondent was obliged to ensure that site costs took into account construction of the house as affected by the floods levels, and as mentioned above, the Applicant is entitled to assume that this was done. The Price Agreement is a fixed price contract for the construction of Townhouse 20 E which is yet to be fulfilled, and the Applicant is entitled to recover from the First Respondent for breach of this contract, as described in Remedies below.

34 The question of what would have happened between the parties if the First Respondent had fulfilled this obligation is a matter for speculation. It is assumed that the price of the house would have been higher, or perhaps the services to be provided would have been constrained to keep the price within the Applicant's budget. It is possible that, if the correct price had been named, no contract would have been entered between the Applicant and either respondent.

35 No comment is made about whether the First Respondent owed the Second Respondent a duty regarding flood levels. No evidence or submissions have been put to the Tribunal on this issue.

Alleged misleading conduct by the First Respondent

36 The Applicant pleaded that the First Respondent acted in a way which was misleading and deceptive in that it failed to ascertain all site information including flood levels before the agreement with the First Respondent was entered and "the price included all the costs associated with construction of the House other than those costs agreed to be borne by the Applicant but failed to include any costs of construction as affected by the Flood level."

37 A reasonable reading of the Price Agreement proffered by the First Respondent to the Applicant is that the price agreed does include allowance for all contingencies which could be ascertained by reasonable investigation. It is found that the question of whether the land is flood-prone is, in this proceeding, one of those contingencies, the design provided by the First Respondent should have allowed for it and the Applicant is entitled to assume that such contingencies have been allowed for.

38 Further, the Applicant said in his witness statement that he received the "19 Step document" from Mr Cook, who was then an employee of the First Respondent, before the Price Agreement was signed. If the document could be relied on by the Applicant it would lend additional weight to his contention that he was misled by the First Respondent. In particular at point 5 the document states "Once all site information is received – site costs will be done and combined with existing quote and sent out. (approx 1 week)"

39 Mr Cook said at paragraph 9 of his witness statement that he had never previously seen the document. At paragraph 2 of his witness statement in reply, the Applicant said the document had hand-written notations at the foot that were made by Mr Cook in his presence. In the course of the hearing the hand-writing was compared with another document written by Mr Cook and found to be inconsistent. In his opening Mr Dickenson said that no-one at the First Respondent had seen the 19 Step document before it was produced in discovery by the Applicant. The evidence regarding the document is not particularly satisfactory from either the Applicant or the First Respondent. It has not been taken into account.

40 In his closing address, Mr Dickenson for the Respondents submitted that the Applicant failed to prove that he had relied on any representation of the First Respondent to his detriment. Mr Dickenson's contention would correct if the Second Respondent had done what it was obliged to do and built the house, but it did not do so.

41 In support of their assertion that seeking information about flood level was unreasonable before entering a building contract, the Respondents relied upon the expert evidence of Mr George Cross. Mr Cross's report of 15 May

2006 contained the statement called for by VCAT Practice Note 2 (expert evidence) that he had read the Practice Note, made all desirable and appropriate enquiries and no matters of significance had been withheld from the Tribunal. It is noted that Mr Cross's report did not include a statement regarding any matters which he considered were beyond his expertise.

42 At the hearing the Tribunal questioned Mr Cross about matters in his report which might be beyond his expertise and he said that there were none. Mr Cross's evidence was that the proper time for an investigation about matters such as whether land is flood-prone is after the building contract has been signed, at which time the builder is entitled to a variation and variation costs. On the 9th page of his report he said:

> "It is not feasible for domestic builders to have standard house packages suitable for allotments potentially located in special areas like flood prone zones, bushfire areas, alpine areas or termite zones a [sic] the time a building contract is signed. This is why all the domestic building companies that I am aware of have standard base packages and base costs. If an allotment is actually located in flood zone, bushfire areas, alpine areas or termite zones, then a variation would be sought to cover the additional costs (above the base cost) associated with constructing houses in such encumbered locations."

43 The Tribunal asked Mr Cross how section 31(1)(d) of the *Domestic Building Contracts Act* 1995 ("DBC Act") impacted on his evidence. Section 31 provides in part:

> 31. General contents etc. of a contract
>
> (1) A builder must not enter into a major domestic building contract unless the contract—
>
> (a) is in writing; and
>
> (b) sets out in full all the terms of the contract; and
>
> (c) has a detailed description of the work to be carried out under the contract; and
>
> (d) **includes the plans** and specifications for the work **and those plans** and specifications **contain enough information to enable the obtaining of a building permit**[1];"

44 Mr Cross said that he was "not a contract expert, I'm a technical expert". Mr Cross was offered the opportunity to revise his report to remove any matters beyond his expertise, which he declined. Mr Cross's evidence

[1] Emphasis added

regarding the question of who is responsible to obtain council information, and at what stage, is not helpful. It is clearly beyond his expertise and even if there is wide-spread breaching of the DBC Act as asserted by Mr Cross, it does not excuse the Respondents for doing so. It is indeed regrettable if the Respondents have been encouraged to continue with their defense of the proceeding in reliance upon this report.

45 Mr Dickenson said in his closing submissions that Mr Cross was not cross-examined at any length by the Applicant's solicitor – only three questions were asked and none challenging the content of his report; in particular nothing was not put to him about whether a builder should make a property information request of the local authority before a contract is signed. Mr Dickenson concluded that Mr Cross's evidence was therefore unchallenged on that point.

46 Mr Dickenson's submission regarding the cross-examination of Mr Cross is correct – it was brief – but a failure of a party to cross-examine does not mean that the Tribunal must accept all the expert's evidence. Under section 98(1) of the *Victorian Civil and Administrative Tribunal Act 1998* ("VCAT Act"):

> "(1) The Tribunal—
>
> (a) is bound by the rules of natural justice;
>
> (b) is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that it adopts those rules, practices or procedures;
>
> (c) may inform itself on any matter as it sees fit;
>
> (d) must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of this Act and the enabling enactment and a proper consideration of the matters before it permit."

47 The Tribunal does not always accept the evidence of experts put before it. For example, in *Stiff v Barton* [2005] VCAT 821 Senior Member Young said:

> "11.1 I take the unusual step of making some comments about the quality of the expert evidence, I found much of the expert evidence as presented was unhelpful and in many instances irrelevant, so that rather than helping to clarify issues and resolve factual disputes, it tendered to obscure the real issues and did not contribute in any way to their resolution."

48 Similarly, in *The Gombac Group Pty Ltd v Vero Insurance Ltd* [2005] VSC 442 the Supreme Court found that the Tribunal had not erred in rejecting the evidence of two experts. In particular at paragraph 16:

> "…in my view the Tribunal was entitled to reject this evidence even if both experts are regarded as having given evidence which ultimately supported a similar conclusion with respect to this question. Firstly, such opinion evidence formed part of a body of circumstantial evidence which the Tribunal was required to assess as a whole. Secondly, the Tribunal gave reasons which were open to it for rejecting the opinions of both experts as not properly established."

49 As stated above, Mr Cross strayed beyond his area of expertise. He states at paragraph 5 of his report:

> "The author is an experienced structural engineer and building surveyor in domestic and commercial building projects and has been employed in the government sector (27 years) and the private sector (12 years)".

50 This could well qualify him to say whether the engineering and surveying aspects of the project have been completed properly, but the question of whether either respondent has done all they should with respect to a legal obligation has not been demonstrated to be within his expertise.

51 It is found that the First Respondent's quotation to the Applicant was not misleading because both the First Respondent and the Second Respondent were bound by the quotation.

The Second Respondent

52 The Second Respondent's obligation was to fulfil its duties to the Applicant under the building contract and the law, which includes the DBC Act.

- **Obligations under the contract**

53 The Second Respondent was bound to build Townhouse 20E for $144,203.00, and complete it within 205 days of the date for commencement. The parties agree that this did not occur. The Applicant says this is because the Second Respondent breached the contract. The Second Respondent says it is because the Applicant failed to agree to an increase to the contract price by virtue of a variation to the contract, to which the Second Respondent was entitled.

54 Clause 21 of the building contract contemplates that plans might have to be varied "to comply with either a change in the law or statutory requirement after this Contract is entered into". This is not the case here. The law did

not change; only the parties' knowledge of their obligations under the law changed. Further, the Applicant did not appear to be concerned about the physical change to the floor level. As quoted above, the Applicant said in his letter of 24 May 2005 that he was "willing to consider different structures". It was the price of the variation that was the problem.

55 Clause 23 of the building contract sets out how the parties may request a variation. It is also governed by sections 37 to 39 of the DBC Act. The Second Respondent's notice of 1 June 2005 is in writing and specifies a cost, but otherwise ignores the builder's obligations.

- **Further contractual obligations imposed by the DBC Act**

56 As mentioned above, section 31 of the DBC Act prohibits a builder from entering a contract unless it includes the plans and those plans contain enough information to obtain a building permit. The Second Respondent did not do this. Further, the Second Respondent sought an increase to the contract price when it was not entitled to do so. Section 37 of the DBC Act governs variations sought by the builder. S37(3) provides:

> "(3) A builder is not entitled to recover any money in respect of a variation unless—
>
> (a) the builder—
>
> (i) has complied with this section; and
> (ii) can establish that the variation is made necessary by circumstances that could not have been reasonably foreseen by the builder at the time the contract was entered into;"

57 The need to raise the floor to avoid the flood problem was reasonably foreseeable, because it would have been discovered if the Second Respondent had done what it was obliged to do, and not entered the contract unless there were plans sufficient to obtain a building permit. Having done so in breach of section 31 of the DBC Act, a variation to the plans was necessary in order to obtain the building permit, but the Second Respondent was not entitled to demand extra money for this variation. The demand for an increase in the contract price was a repudiation of the building contract.

58 The Applicant also alleged that the Second Respondent repudiated the building contract by failing to obtain a building permit and undertake the works. The Applicant's submission is accepted.

Remedies

- **Specific performance**

59 Although not dealt with in any detail by the Applicant it is hard to resist the conclusion that the First Respondent is a "builder" as defined by the DBC

Act being "a person who… (b) manages or arranges the carrying out of domestic building work;" The application for specific performance is therefore considered with respect to the obligations of both the First and Second Respondents.

60 Section 108(2)(f) of the *Fair Trading Act* 1999 ("FT Act") gives the Tribunal power to "make an order in the nature of an order for specific performance of a contract" and section 53(2)(g) and (h) of the DBC Act provides:

> "(2) Without limiting this power, the Tribunal may do one or more of the following-
>
> …
>
> (g) order rectification of building work;
>
> (h) order completion of incomplete building work."

61 It is unnecessary to consider whether the power in the nature of specific performance under the DBC Act includes power to order that a house be built from scratch because the power clearly exists under the FT Act. The issue is whether the power should be exercised.

62 In the words of the learned authors, Dorter and Sharkey[2]:

> "Where damages afford an adequate remedy specific performance is generally not granted. In the same way, any decree for specific performance which will require constant supervision by the court will generally not be granted."

63 They went on to quote the words of Sir Melish LJ in *Wilkinson v Clements* (1872) 8 Ch App 96 at 112: "It is settled that, as a general rule, the Court will not compel the building of houses."

64 It was submitted on behalf of the Applicant that in the absence of specific performance the Applicant will have to find another builder, will not be entitled to use the design provided by the First Respondent and that possible "bad blood" between the Applicant and the Respondents should not be taken into account.

65 It is found that damages are an adequate remedy in this proceeding and in the absence of any address from the Respondents about how possible remedies should be allocated between them, and particularly in circumstances where they were jointly represented, it is found that it is fair

[2] *Building and Construction Contracts in Australia*, 2nd edition, Law Book Co Ltd, [1.940]

that they should be jointly and severally liable to the Applicant for damages for the increase in the cost of building, but that the First Respondent should refund the deposit and the Second Respondent should bear the contractual responsibility for damages for delay.

66 The Applicant is entitled to receive from the Respondents an amount which puts him in the financial position he would have occupied if the contract had been fulfilled. These amounts are:

- the deposit of $7,210.00
- the difference between the cost to him of having Townhouse 20 E built now and the amount he contracted to have it built for, and
- agreed damages for delay.

- **The deposit**

67 The First Respondent received the deposit and the Applicant has received no value for it. It is therefore reasonable that the First Respondent repay the deposit forthwith.

- **Damages**

  - **The increased cost of constructing the townhouse**

68 It is assumed that the price offered by the Respondents to construct the townhouse would have been a fair price if there had been no issue with respect to the flood level, therefore, if another builder were contracted to build the same or a similar building, the only difference in price would be the variation to increase the height of the floor and any general increase in building costs. It is noted that neither the Applicant nor the Respondents gave evidence about whether the sum of $28,050.00 was a reasonable amount to add for the cost of the variation, therefore it is accepted that it is.

69 The Applicant sought 4% for the increase in building costs. Neither party gave evidence in chief about the increase. Mr Daniele was asked in cross-examination about the increase in costs in the last year and said that it was 10% to 15%, then when the Tribunal asked a clarifying question, said that it was "0.5% to 1% overall". Mr Cross was also asked in cross-examination about whether he is an expert in costing – he said that he was – and the approximate increase in building costs to which he replied that it was "5% up or down". In the absence of better evidence the Applicant's claim of 4% increase is allowed on the original contract price of $172,253.00 ($144,203.00 plus $28,050.00), a total of $6,890.00.

70 As mentioned above, items c and d of the Applicant's claim – cost of replacement of the rear fence and cost of replacement of the shed/garage - ,

would not have been allowed if there were specific performance and are not allowed where damages in lieu of specific performance are ordered.

71 The total amount for increase in the cost of constructing the townhouse payable by the Respondents is $34,940.00 and they are jointly and severally liable for this sum.

- **Damages for delay**

72 The Applicant claims a, b and e are all in the nature of damages for delay, or time-related damages, although the shipping container was purchased to put an end to the accrual of storage fees. It is noted that under item 9 of schedule 1 the Applicant is entitled to $200.00 per week agreed damages for late completion of the building works. I accept Mr Dickenson's submission that the claim for agreed damages is in substitution for any claim for general damages, and allow the agreed damages only. As the contract is between the Applicant and Second Respondent, the entitlement for damages for delay is against the Second Respondent only.

73 The Applicant seeks agreed damages from 31 December 2005, and given that 205 days from the date of signing the building contract on 3 March 2005, plus 21 days under clause 10 of the building contract takes the date for completion to a date in October 2005, the claim is reasonable. Neither the Applicant nor the Second Respondent took a step to bring the contract to an end, therefore agreed damages are allowed from and including 1 January 2006 to the date of this decision, a period of twenty seven weeks at $200.00 per week, or $5,400.00.

74 It is ordered that the First Respondent pay the Applicant $7,210.00 forthwith as refund of the deposit, that the First and Second Respondent pay the Applicant $34,940.00 forthwith as damages for increase in the cost of building and that the Second Respondent pay the Applicant $5,400.00 forthwith as agreed damages for delay.

75 Interest and costs are reserved.

SENIOR MEMBER M. LOTHIAN