

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D807/2007

CATCHWORDS

Domestic Building, breach of terms of settlement, applications to adjourn, interpretation of terms of settlement, quantification of loss, costs.

APPLICANT	Scott Williams
FIRST RESPONDENT	BT Construction and Landscapes Pty Ltd
SECOND RESPONDENT	AH Building Supplies Pty Ltd
THIRD RESPONDENT	Abram Hazan
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	30 March and 3 June 2009
DATE OF ORDER	7 July 2009
CITATION	Williams v BT Construction and Landscapes Pty Ltd & Ors (Domestic Building) [2009] VCAT 1127

ORDERS

- 1 I record that I ordered on 3 June 2009 that the hearing listed for that day was not adjourned.
- 2 The First Respondent must pay the Applicant \$3,839.91.
- 3 The Second and Third Respondents must pay the Applicant \$55,706.83 and are jointly and severally liable to do so.
- 4 The Respondents are jointly and severally liable to pay the Applicant a further \$500.00.
- 5 All payments must be made forthwith.
- 6 The Second and Third Respondents are jointly and severally liable to pay the Applicant any costs thrown away by him by virtue of the adjournment of 30 March 2009, on an indemnity basis.

- 7 The Respondents are jointly and severally liable to pay costs of and since reinstatement of the proceeding on 8 July 2008, (except as ordered in order 6) to be agreed.
- 8 Should the parties fail to agree the amount of costs payable by 3 August 2009, they are to be assessed by the Principal Registrar under section 111 of the *Victorian Civil and Administrative Tribunal Act 1998* under order 6 on an indemnity basis and under order 7 on a party-party basis on County Court Scale D. I certify for Mr Forrest of Counsel at \$3,000.00 a day.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant	Mr J Forrest of Counsel
For First Respondent	No appearance
For the Second Respondent	Mr A Hazan and Mrs Hazan on 30 March 2009 and Mr R Lindnall, solicitor, on 3 June 2009
For the Third Respondent	In person on 30 March 2009 and Mr R Lindnall, solicitor, on 3 June 2009

REASONS

- 1 The Applicant, Mr Williams, owns a home in Bentleigh. Mr Williams commenced proceedings against each of the respondents arising out of allegedly defective and incomplete work. The First Respondent (“BTC”) is a company operated by Mr Bartczak, although Mr Bartczak’s partner or wife, Ms Tania Zielak, recently took over as director.
- 2 BTC and Mr Williams negotiated the work to be done, and the building contract of 10 December 2006 was between Mr Williams and “BT Constructions”. According to the Third Respondent, Mr Hazan, he and his company, the Second Respondent (“AHB”) became involved because Mr Bartczak could not register Mr Williams’ job with a warranty insurer. On 6 December 2006 BTC was registered as a company. Both Mr Bartczak and Mr Hazan were then directors. Mr Bartczak held 99 shares and Mr Hazan held one. Two days later the contract was signed by Mr Williams, and by Mr Bartczak and Mr Hazan on behalf of the builder. Mr Hazan was noted as the “builder” and a registered building practitioner on the building permit and also on the certificate of warranty insurance.
- 3 Work was done under the contract and there was at least one variation to extend decking and roof it, to convert it to a veranda or outdoor entertaining area. A dispute arose about the adequacy and completeness of the work.
- 4 On 16 April 2008 a compulsory conference was held and terms of settlement were entered between all four parties to this proceeding (“ToS”). Separate terms were also, apparently, entered into between the respondents that obliged Mr Bartczak and/or BTC to pay money into trust to enable building materials to be purchased, but there is not now nor have there been proceedings at VCAT between the respondents. After both sets of terms of settlement were signed, this proceeding was then struck out with a right to apply for reinstatement.
- 5 The ToS required AHB and Mr Hazan to undertake all works described in a report by Mr Allan Sherrard of Alan Nicholas and Associates of 28 October 2007 with the exception of a few minor items. Mr Sherrard is Mr Williams’ expert witness.
- 6 The work was to commence by 30 April 2008 and be completed by 30 June 2008. In addition, BTC was obliged to pay \$3,465.00 into its solicitor’s trust account by 31 May 2008 and all the respondents were jointly obliged to pay a further \$500.00 into the same trust account by the same date.
- 7 None of the work was done.
- 8 Mr Williams successfully applied to have the proceeding reinstated on 8 July 2008. His points of claim of 8 October 2008 seek damages for breach of the ToS. He seeks \$55,706.83 in accordance with Mr Sherrard’s report of 23 March 2009. Other sums were included in the ToS, which he claims: \$3,465.00 was to enable Mr Williams’ furniture to be moved to and from

storage and stored while the repair works are undertaken. \$500.00 was to contribute to the cost of inspection by Mr Sherrard to ensure the works are properly undertaken. \$274.91 was to buy a ladder that BTC was obliged to replace. The total claim is \$59,946.74 plus costs.

LEGAL REPRESENTATION FOR AHB AND MR HAZAN

- 9 Excluding this hearing, there have been eight occasions when the parties have appeared at the Tribunal. I conducted a compliance hearing on 15 January 2009 and suggested to Mr Hazan that because of the grave risk he faced and the size of the claim against him, it could be wise to seek legal advice. On the first morning of this hearing, 30 March 2009, Mr Hazan appeared alone to represent himself and AHB. After lunch Mrs Hazan also appeared. She is both a director and the secretary of AHB. After Mr Sherrard had given his evidence in chief and in the course of his cross-examination, Mrs Hazan said that AHB and Mr Hazan now sought legal representation. Mr Forrest of counsel for Mr Williams resisted her application for an adjournment. I asked questions of Mr Sherrard and gave Mr and Mrs Hazan the opportunity to cross-examine him, then I adjourned the hearing to 3 June 2009 to enable the respondents to file and serve proper defences and to enable AHB and Mr Hazan to arrange for legal representation. There was no appearance for BTC on 30 March 2009.
- 10 Mr Lindnall, solicitor, appeared for the AHB and Mr Hazan on 3 June 2009. No further defence had been filed for any of the Respondents. Mr Lindnall said that neither AHB nor Mr Hazan had the means to honour their obligations as BTC had not honoured its obligation to them to pay for materials. He said that he did not oppose the application for the orders made by Mr Forrest on behalf of Mr Williams. Mr Lindnall mentioned that Mr Hazan lacks some knowledge of English, but he did not seek to adduce any evidence or make submissions regarding Mr Hazan's limited English and any effect it might have had on the agreements he entered on his own behalf and on behalf of AHB.
- 11 When I allowed the adjournment sought by AHB and Mr Hazan, I said that this was a ground upon which another party could seek an order for costs.

BTC'S APPLICATION TO ADJOURN ON 2 JUNE 2009

- 12 On 27 March 2009 a letter from BTC dated 19 March 2009 was received at the Tribunal. It gave BTC's address as PO Box 8154, Carrum Downs, Victoria 3201. On 6 April 2009 the orders of 30 March were sent to that address.
- 13 On 1 June 2009 the Tribunal received a facsimile letter from a person I now understand is Ms Taisa Zielak, director of BTC. The letter, excluding the formal parts, states:

Due to an urgent emergency/ closest family member has passed away / I was forced to leave Australia and currently staying in Poland until 22 July 2009. I am placing kindly request to adjourning Hearing

which is scheduled on 03/06/2009 due an event which was beyond my control.

I am ready to defend my company before VCAT at any time after 22/07/2009. [sic]

- 14 In consequence of this letter, at approximately noon on 2 June 2009 I ordered:

1. In circumstances where the director of the First Respondent has informed the Tribunal that he [sic] is absent from Australia due to the death of a family member, the hearing listed for 3 June 2009 is adjourned to 14 August 2009 at 10.00 am at 55 King Street Melbourne.

2. The Principal Registrar is directed to send a copy of these orders and the First Respondent's facsimile of 31 May 2009 to the other parties by facsimile marked "urgent" now.

The order was successfully faxed to Mr Williams but not to the other parties.

- 15 At 3.00 pm the Tribunal received a facsimile from Mr Williams which states, excluding the formal parts:

Dear Senior Member Lothian,

I have contacted VCAT today and have been informed respondent one has entered [a] request for adjournment yesterday which has been granted.

I oppose this request and this decision to adjourn is unfair for the following reasons:-

- Director of respondent one has changed to his wife, they have used this excuse before, they have repeatedly delayed the hearing dates and did not turn up to the previous two hearings
- Respondent one is in strike off process by ASIC's as failure to comply with necessary paperwork
- It is unfair to adjourn as the applicant has not been given [the] right to oppose request

Please contact me urgently to discuss.

- 16 In consequence I made the following orders (without contacting Mr Williams):

I refer to the earlier orders of today and note that the Applicant has objected to the adjournment of tomorrow's hearing where the Applicant asserts that the First Respondent's director has changed to the previous director's wife and that the excuse for non-attendance has been used before. In consequence:

1. The proceeding is listed for hearing tomorrow, being 3 May 2009, commencing at 10.00 am at 55 King Street Melbourne.

2. The Applicant must first provide proof of the assertion made by him regarding the First Respondent's failure to appear.
 3. The Principal Registrar is directed to send this order by facsimile to the Applicant immediately and to use best endeavours to contact the Respondents by telephone.
- 17 At the commencement of hearing on 3 June 2009 Mr Williams gave evidence about the matters asserted in his facsimile of the previous day. I accept his evidence that:
- a he has attended the Tribunal on numerous occasions when there has been no attendance on behalf of BTC,
 - b the relevant witness from BTC is the previous director, Mr Bartczak,
 - c there has been no defence from BTC since the proceeding was reinstated and BTC was ordered to file and serve a defence by 31 October 2008,
 - d on 11 January 2008 BTC's then solicitors advised the Tribunal that a mediation could not progress until after 3 March 2008 because Mr Bartczak was in Poland following his father's death, but a witness, Ms Vickie Marshall, swore a statutory declaration to say that she saw Mr Bartczak at 17 Burnell Road, Seaford, Victoria on 2 February 2008, and
 - e a further order of 15 January 2009 allowed BTC until 16 January 2009 to file and serve a defence and other documents and set down the hearing for 30 March 2009. Mr Williams personally served this order on Mr Bartczak, but BTC still failed to file or serve points of defence or other documents and neither appeared at the hearing of 30 March 2009 nor provided a reason for failure to appear.
- 18 I accept the submission of Mr Forrest that BTC failed to demonstrate why the hearing should be further delayed to allow Ms Zielak to attend, in circumstances where it could have been represented by another person, even if only for the purpose of seeking an adjournment. I note that the address on her letter was given only as "Krakow, Poland" and provided no means whatsoever of contacting her or any other person who might have been able to act on behalf of BTC. I accept Mr Forrest's submission that BTC has repeatedly breached the Tribunal's orders. I am inclined to agree with Mr Forrest's conclusion that Ms Zielak's letter is an attempt to delay the proceeding further, in circumstances where BTC could be de-registered before the proceeding is determined. I agree with his conclusion that the entitlement of a party to be heard does not mean that another should be denied justice and that a further adjournment would almost certainly create injustice for Mr Williams that could not be cured by an order for costs.
- 19 For these reasons, I did not adjourn the hearing on 3 June 2009.

TERMS OF SETTLEMENT

- 20 On 3 June 2009 Mr Lindnall said that he could not resist Mr Williams' application. In addition, I am satisfied that ToS were entered and not complied with by any of the respondents. On 30 March 2009 Mr Hazan said that there was disagreement about precisely what was to be done. For example, Mr Williams believed that the obligation to rectify certain skirting boards meant that they had to be removed and replaced, whereas Mr Hazan said that installation of quad along the bottom would be adequate to provide an acceptable finish. I accept Mr Sherrard's evidence that installation of quad would not give a finish that appears to be reasonably workmanlike.
- 21 Even were I to prefer Mr Hazan's evidence regarding the skirting boards, I accept the evidence of Mr Williams that on or about 21 May 2008 Mr Hazan refused to do any work at all until BTC had paid an amount for materials into BTC's solicitor's trust account. As mentioned above, the respondents' terms of settlement is not a contract to which Mr Williams was a party. I accept Mr Williams evidence that he pointed out to Mr Hazan that he was not a party to the agreement between the respondents and that it did not affect AHB's or Mr Hazan's obligations to Mr Williams. He said Mr Hazan said he was willing to provide the labour, but as to the cost of materials "not one cent".

INTERPRETATION OF THE TERMS OF SETTLEMENT

- 22 Mr Forrest said in opening that the claim is not apportionable under Part IVAA of the *Wrongs Act* 1958. I accept this submission, however I note that the ToS appears to impose some obligations on BTC alone and some on only AHB and Mr Hazan.
- 23 Mr Forrest submitted that all the obligations under the ToS are joint and several, and therefore the orders I make should reflect this. He bases his submission on the interest of each party in obtaining a settlement. He suggested that if one of the Respondents did not fulfil the ToS, the others would be obliged to enforce that obligation. He also pointed out that the ToS does not state that the obligations are several only.
- 24 Mr Forrest did not point to a provision in the ToS that the obligations are joint. They appear on their face to be several. Neither did he direct me to a principle of contractual interpretation that would assist this interpretation. As the ToS expressly divides the obligations between the parties, I interpret it in this manner. The only obligation which is shared between all three respondents is the obligation to pay \$500.00 into the trust account of BTC's lawyers.
- 25 I find that as between themselves, Mr Hazan and his company bear their obligations jointly and severally in accordance with the plain meaning of the ToS.

QUANTIFICATION OF LOSS

- 26 As the ToS has been breached by the Respondents, the measure of Mr Williams' loss is the amount it costs to put him in the financial position he would have occupied if the ToS had been fulfilled. BTC was obliged to pay \$3,465.00. I accept Mr Williams' evidence that this amount was to compensate him for the cost of moving out of his home, storage of his furniture and moving back in when work was complete. I accept his evidence that he has had a quotation from Strickland Removals for this amount and that it is reasonable.
- 27 Under clause 8 of the ToS the Respondents were collectively obliged to pay \$500.00 into the trust account of BTC's solicitor to contribute towards the cost of inspection of AHB's and Mr Hazan's work. This sum is not necessary for the purpose for which it was to be provided, however I accept Mr Forrest's submission that it is to be expected that Mr Williams will have to pay further sums for inspection consequent upon the failure of the Respondents to fulfil the ToS. The Respondents are jointly and severally liable to pay \$500.00 to Mr Williams.
- 28 BTC was also obliged to replace the ladder which it did not do. I accept the evidence for Mr Williams that the cost of providing the ladder referred to in the ToS is \$274.91.
- 29 Mr Sherrard's evidence is that the cost of having another builder complete the work that AHB and Mr Hazan were obliged to do is \$55,706.83, which takes into account an amount of \$11,981.82 which has already been paid by Mr Williams to rectify the pergola. In the absence of other evidence about the reasonable cost to undertaken this work, I order that AHB and Mr Hazan pay Mr Williams the rectification cost of \$55,706.83.
- 30 In summary, BTC must pay Mr Williams \$3,839.91, AHB and Mr Hazan must pay Mr Williams \$55,706.83, and BTC, AHB and Mr Hazan are jointly and severally liable to pay Mr Williams a further \$500.00.

COSTS

- 31 I indicated that Mr Williams had succeeded in his claim after Mr Forrest concluded his submissions on the substantive claim, and invited him to address me on costs. Mr Williams seeks costs from the Respondents of the proceeding as a whole, and costs thrown away from the Second and Third Respondents for the adjourned hearing of 30 March 2009.
- 32 Clause 20 of the Terms of Settlement provides:
- In default of these Terms of Settlement the Applicants have [sic] the right to make application to the Tribunal to reinstate the proceedings and seek damages arising from the default.
- 33 An obvious consequence of the default is that Mr Williams has incurred costs that he would not otherwise have incurred and I find, in accordance with clause 20, that they are included in the class which is damages arising

from the default. In the alternative, I find that the under s109(3)(a)(vi) of the *Victorian Civil and Administrative Tribunal Act 1998*, the Respondents' behaviour in refusing to comply with the ToS is vexatious conduct, that under s109(3)(b) they have unreasonably prolonged the time taken to complete the proceeding and that under s109(3)(c) the Respondents have put forward no credible defence to their failure to comply with the ToS.

- 34 With the exception of any costs thrown away by virtue of the adjournment of 30 March 2009, I find that the Respondents are jointly and severally liable to pay Mr Williams' costs of and since reinstatement of the proceeding on 8 July 2008. The ToS did not contemplate other costs or damages arising before that date and neither did it contemplate that Mr Williams might re-agitate the whole of his claim. I make no order for costs before that date.
- 35 As to the adjournment of 30 March 2009, I find that AHB and Mr Hazan are jointly and severally liable to Mr Williams for any costs thrown away on an indemnity basis. When the proceeding was set down for 30 March 2009, it was listed for a period of three days and was adjourned to 3 June at approximately 3 pm on the first day. The hearing on 3 June concluded in the morning.
- 36 Should the parties fail to agree the amount of costs payable by 3 August 2009, they are to be assessed by the Principal Registrar under section 111 of the *Victorian Civil and Administrative Tribunal Act 1998* on a party-party basis on County Court Scale D, with the exception that the costs thrown away by reason of the adjournment on 30 March 2009, which are on an indemnity basis. I certify for Mr Forrest of Counsel at \$3,000.00 a day.

SENIOR MEMBER M. LOTHIAN