

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D870/2008

CATCHWORDS

Entitlement to retain costs actually expended from deposit upon cancellation of contract

APPLICANT	Clive Witchell
FIRST RESPONDENT	National Builders Group Pty Ltd (ABN 96 092 675 164)
SECOND RESPONDENT	IKO III Building Design Group
THIRD RESPONDENT	Chris Kirby
FOURTH RESPONDENT	St- Wise Pty Ltd
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Small Claim Hearing
DATE OF HEARING	6 February and 13 March 2009
DATE OF ORDER	31 March 2009
CITATION	Witchell v National Builders Group Pty Ltd & Ors (Domestic Building [2009] VCAT 547

ORDER

1. The application is dismissed

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For Applicant	Mr C. Witchell, in person
For First Respondent	Mr B. Tollkuhn, Group Building Manager
For Second Respondent	Mr M. Mignanelli, Director and Mr C. Kirby, Director

For Third Respondent

Mr C. Kirby in person

For Fourth Respondent

Mr M. Waldon, Director in person

REASONS

- 1 In early 2006 Mr Witchell, who owns a block of land in Dingley, contacted National Builders Group. He was interested in developing the site, and wanted to construct three townhouses behind an existing house. National Builders have a number of 'standard' designs and he selected a Townhouse 20. After becoming disenchanted, Mr Witchell cancelled his contract in 2008. National Builders refunded his deposit except for \$5,388 which they retained on account of the costs which they had incurred.
- 2 When the matter first came on for hearing on 6 February 2009, various allegations were made by Mr Witchell about the conduct of the consultants who had been engaged by National Builders to assist him in obtaining the necessary town planning approvals. As I considered their interests would be affected by any decision, and that they should be bound by the decision of the tribunal I joined IKO III Building Design Group Pty Ltd ('IKO') and St-Wise Pty Ltd ('St-Wise') under s60 of the *Victorian Civil and Administrative Tribunal Act* 1998, and adjourned the hearing to 13 March 2009.
- 3 All parties attended on 13 March 2009: National Builders by its group building manager, Brian Tollkuhn; IKO by its directors Michael Mignanelli and Chris Kirby and St-Wise by Mark Waldon.
- 4 As ordered on 6 February 2009, National Builders filed fully itemised particulars of the amount withheld on 16 February. These total \$8,586.00 and were accompanied by two invoices from IKO totalling \$5,630.00 (\$630.00 of which was for a town planning application fee) and \$770.00 for the site survey. The balance is for National Builders' time for a site inspection, the preparation and presentation of quotations, preparation of contracts and correspondence. During the hearing on 13 March, Mr Witchell said that as he had received the soil report and site survey he was reducing his claim to \$4,222.00. The cost of the soil report was \$396.00 and \$770 for the site survey. Mr Tollkuhn confirmed during the hearing that National Builders was not claiming any additional amount over and above the \$5,388.00 which it had retained before refunding Mr Witchell's deposit.

Mr Witchell's position

- 5 Mr Witchell said that after he paid a deposit in May 2006, National Builders forwarded his file to Chris Kirby of IKO to assist him in obtaining a town planning permit. He said the first time he met with him, Mr Kirby threw three cut-outs of the townhouses he had chosen, on the site plans and said 'can't be done'. Mr Witchell said he refused to accept this because he knew that three townhouses with double garages were achievable.
- 6 Some months later, Mr Kirby provided him with a second set of plans which he said were unsuitable as they included a tandem garage which he

did not want. He said he had always made it clear that he wanted double garages for each townhouse and believed and expected they would be moved around on the land to achieve this. He says he was then presented with a further set of plans which were also unsuitable although he says he is unable to remember why. Time went by and he says he was told by Mr Kirby that the plans were with council and as soon as they were through council a 'stick and placard' would be placed on the site. He said he did not review the third set of plans before they were submitted to council because he expected they would be right.

- 7 In July 2007 Mr Witchell says he contacted Chris Kirby and was told the plans were with council and they were holding things up. He made a second call a few weeks later, and said that after getting the same response in September 2007 rang the Kingston Council, only to be told that the file had been closed in April because certain requested information had not been provided.
- 8 Mt Witchell said he then contacted National Builders, and told them that he was not interested in dealing with Mr Kirby any longer and insisted they arrange for another consultant to assist him. The file was then referred to Mr Waldon of St-Wise who contacted him to tell him he was taking over. He says he heard nothing further until Mr Waldon turned up at his front door one day to tell him that he had just erected the placard on site. He said that Mr Waldon then sent him what he described as 'three odd sheets' from the plans which had been submitted to council and he discovered they were not what he was asking for: despite his instructions, they included a single garage and carport for one of the units. He said there was also a mock-up of the internal layout of the existing house on the site, which was completely wrong.
- 9 He advised National Builders that these were not what he wanted, cancelled his contract with them and expected a full refund of his deposit.
- 10 Mr Witchell said he has since engaged another architect. When initially giving his evidence, Mr Witchell said that the plans were with council and he expected town planning approval shortly. He later changed his evidence and said that the plans were still with his architect who was finishing them off, and that he expected them to be lodged with council within the next week or so, and finally said that he had accepted the plans, and they were going through the process and that might well be with council already.
- 11 He did not bring a copy of the new plans with him, but revealed that unlike the National Builders' plans, the new plans do not include internal passages.
- 12 After hearing the evidence of the other parties, Mr Witchell said that at one stage when Mr Kirby had indicated two tandem garage only were achievable, in desperation, he agreed to a single garage.

National Builders' position

- 13 Mr Tollkuhn gave evidence on behalf of National Builders. He confirmed that Mr Witchell first contacted them in 2006 and paid a deposit in May 2006. National Builders have approximately 1,500 standard designs from which owners can choose, and Mr Witchell selected the Townhouse E20. Mr Witchell was provided with copies of quotations for the basic design. After he accepted the third quotation and contracts were prepared in November 2006. The file was then forwarded to Chris Kirby of IKO to obtain town planning approval.
- 14 In September 2007, Mr Witchell contacted National Builders to advise that he was unhappy with the service provided by Mr Kirby. National Builders contacted IKO who advised that Mr Witchell had not been prepared to comply with council requirements and had refused to compromise. On 3 October 2007 National Builders wrote to Mr Witchell setting out three options (Mr Witchell conceded he had received this letter):
1. Continue working with Chris Kirby to complete your council application; or
 2. Utilise the services of Mark Waldon to complete your council application. Chris Kirby has agreed to release documentation to Mark Waldon and pay for Mark's services to you. Note: Upon receipt of Planning Permit and Endorsed Plans we then revisit your project to determine the price review necessary. If it is established that Chris Kirby contributed to a period of delay that is not related to council requirements, then we will consider that component of time when determining your price review; or
 3. Termination your agreement with National Builders Group and we will refund monies paid to date less expenses incurred.
- 15 Mr Witchell advised National Builders that he wished to proceed. On 12 February 2008 National Builders were advised by St-Wise that council required a landscape design for approval. On 28 February 2008 a planning permit was issued containing a number of permit conditions including landscaping, fencing and windows to be approved by council. On 13 March 2008 Mr Witchell contacted National Builders advising he was not impressed with the landscaping requirements, demanding that National Builders prepare or obtain a landscaping plan. National Builders arranged for Zenith Designs to prepare the landscape plan and invoice Mr Witchell direct. On 20 March 2008 National Builders wrote to Mr Witchell advising:
- I remind you that it is not the practice of National Builders Group to seek out alternative service providers for clients who refuse to use our recommended provider for projects. We have already done so in Mark Waldon's services. For the final time we do so again in order to assist you with your town planning project. I remind you that you were offered various alternatives as outlined in previous

correspondence and none of them involved National Builders Group extending our service to this level.

Zenith Concepts have agreed to complete your landscaping design plans to submit to council for final approval and endorsement of project plans. Zenith Concepts will invoice you directly in relation to their service fees. As providing landscape designs has never been included in town planning fees via IKO III Building Design Group or National Builders Group, these are an additional cost to clients where this is a council requirement.

- 16 On 11 June Mr Witchell advised National Builders he was going overseas for a month, on 17 July he advised he was in hospital and on 5 September advised he wanted to cancel. Despite having told him they required written notice of cancellation which Mr Witchell failed to provide, National Builders sent him a refund on 15 September 2008. They retained \$5,388 although they have paid out \$6,400.00 for town planning services, soil test and survey.

IKO's position

- 17 Mr Kirby gave evidence on behalf of IKO. He said the relationship with Mr Witchell had been difficult from the start, primarily because Mr Witchell refused to accept his advice as to the requirements of res-code and council by-laws. He referred me to a letter dated 27 September 2007 to National Builders in which he set out a chronology of his dealings with Mr Witchell. It is helpful to set that out in summary form:

30 May 2006	IKO received file from National Builders
30 May 2006	IKO site visit and check council overlays. Mr Kirby records that Mr Witchell was abusive when he relayed this information to him.
14 June 2006	First scheme accepted by Mr Witchell who instructed IKO to proceed and forward to National Builders.
6 August 2006	Mr Witchell sought further changes to layout – on being advised by Mr Kirby of his concerns about turning circles, private open space etc. IKO record that Mr Witchell said he would pursue VCAT if necessary [in the Planning and Environment List]. IKO included a disclaimer on its drawings “subject to council approval”.
18 September 2006	Instructions to proceed received from National Builders.
19 September 2006	Res-code survey ordered.
15 November 2006	IKO sent Mr Witchell town planning documentation for appraisal.

- 24 November 2006 Mr Witchell requested further changes.
- 11 December 2006 Mr Witchell gave IKO permission to proceed with application for planning permit. IKO invoiced National Builders for lodgement fee on 11 December but with Christmas closedown this was not received until 31 January 2007.
- 6 March 2007 Application lodged – IKO notified Mr Witchell, who Mr Kirby records was abusive, about IKO and National Builders.
- 27 March 2007 Letter from Council expressing concern about the turning circles. Mr Kirby records that when he advised Mr Witchell he was abusive and indicated he would go to VCAT. Extension obtained until 15 June 2007.
- 21 June 2007 IKO notified that the application had lapsed. Mr Kirby records that he advised Mr Witchell who was abusive and once again said he would go to VCAT [the Planning and Environment List].
- 18 Mr Kirby confirmed that he had sent town planning documents to Mr Witchell on 15 November 2006 and received verbal approval to apply for town planning permit based on those plans. After receiving payment of the town planning application fee from National Builders he lodged the town planning application on 6 March 2007, which he conceded was a bit slow.
- 19 Mr Kirby's said that contrary to Mr Witchell's evidence he had a number of discussions with him about the council requirements for turning circles and private open space but that Mr Witchell refused to compromise. He referred the file to St-Wise and agreed to pay St-Wise to make the further application for planning approval because of his good relationship with National Builders.

St-Wise's position

- 20 Mr Waldon gave evidence on behalf of St-Wise. He confirmed that he used the plans he was given by Mr Kirby and that he obtained the planning permit with the three conditions referred to above.

Discussion

- 21 It is apparent that the relationship between Mr Witchell and National Builders, and Mr Kirby of IKO has been fraught with communication and other difficulties. Mr Witchell seems to have taken an uncompromising position insisting that National Builders and IKO achieve what he believed was possible on the site. He was reluctant to listen to and take their advice. Mr Witchell appeared selective in his evidence and at times contradicted himself. He did not bring copies of any relevant documents with him to

either hearing and was dismissive of National Builders' position and attempts to satisfy his requirements during the town planning process.

- 22 For instance, Mr Witchell failed to mention that he had selected a standard National Builders' design – the Townhouse E20 to be modified to suit his land and requirements. My distinct impression on hearing Mr Witchell's evidence at both hearings was that he had given National Builders a brief and they had engaged IKO (Mr Kirby) to prepare plans and obtain town planning approval and that there had been limited consultation with him. During the first hearing in response to a question from me, Mr Witchell indicated he had not seen any plans at all before they were submitted to council, although he had clearly seen the Townhouse E20 plans – the design he selected.
- 23 Despite Mr Witchell's protestations to the contrary I accept that he and Mr Kirby discussed the issue of the turning circles. Mr Witchell was adamant that irrespective of any indication to the contrary he knew there was sufficient room for '9.4 turning circles'. Because this was finally approved, after Mr Waldon became involved, he refuses to accept it was ever an issue.
- 24 A town planning permit was obtained with conditions on 28 February 2008. Mr Witchell did not cancel the contract with National Builders until September 2008, more than six months later. I am satisfied that the retention of \$5,388.00 of the deposit was very fair, in circumstances where it has paid \$6,796.00 for a soil report, site survey and town planning services. I will therefore dismiss this application.

DEPUTY PRESIDENT C. AIRD