HIS HONOUR: Mandie J; Common Law Division. Supreme Court of Victoria at Melbourne. 19th September 2007

Introduction

1 This is an appeal pursuant to s.148 of the Victorian Civil and Administrative Tribunal Act 1998 (Vic) from an order of the Victorian Civil and Administrative Tribunal ("VCAT" or "the Tribunal") in its Domestic Building List and dated 7 July 2006.

2 The applicant in the VCAT proceeding was the building owner, Anthony Vigilante ("the Owner") and the respondents in the VCAT proceeding who now, as plaintiffs, appeal from the Tribunal's order were National Builders Group Pty Ltd ("National Builders Group") and V & M Daniele Constructions Pty Ltd ("Daniele Constructions" or "the Builder").

3 On 19 January 2005, the Owner had made a contract in writing with National Builders Group in relation to the construction of a house at 7 Cornwell Place Bendigo ("the first contract"). Subsequently, on 3 March 2005, the Owner entered a contract in writing (in the form, or one of the forms, of building contract used by the Housing Industry Association) with Daniele Constructions for the construction of a brick veneer, slab, double storey house at the said address for a contract price of $144,203 ("the second contract").

4 After the contracts had been entered into, the Owner obtained information from the council of the City of Greater Bendigo that there was a "*Flood Level*" affecting the land. When this information was conveyed to Daniele Constructions, the Builder required a price increase as a result of a variation in the works that it said was necessary for the construction of the house due to the Flood Level and without which no building permit could be obtained. In short, the height of the slab had to be raised and this involved costs for which the builder had not allowed in the contract price. The Owner refused to agree to any price increase and brought the proceeding in VCAT seeking specific performance of the second contract for the agreed price, alternatively, damages against both National Builders Group and Daniele Constructions and an order for repayment of the sum of $7210 (the deposit paid).

5 The Tribunal heard the matter on 5 and 6 June 2006 and handed down reasons for decision on 7 July 2006. On that date the Tribunal ordered that National Builders Group repay the Owner $7210 forthwith as a refund of the deposit, that National Builders Group and Daniele Constructions were jointly and severally liable to pay the Owner $34,940 as damages for the increase in the cost of building and that Daniele Constructions pay the owner $5400 forthwith as agreed damages for delay.

6 On 9 November 2006 Master Efthim granted the plaintiffs leave to appeal from the above orders. The Master further ordered that a Notice of Appeal be filed and served within 14 days.[1] The questions of law upon which the appeal is brought are as follows:

> "*a. Whether the Tribunal erred in its construction of the contract between the first plaintiff and the defendant ("the first contract") in concluding that it was not a contract to build a house on a concrete slab but simply to build a particular house;*
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> *b. Whether the Tribunal erred in its construction of the contract between the second plaintiff and the defendant ("the second contract") in concluding that it was not a contract to build a house on a concrete slab but simply to build a particular house;*
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> *c. Whether the Tribunal erred in law in not finding that the defendant's entry into the second contract involved the necessary discharge or novation of the first contract and any obligations of the first plaintiff under it;*
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> *d. Whether the Tribunal erred in concluding in respect of the first contract that the first plaintiff was bound by it to construct a building in a manner contrary to that provided for by the contract;*
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> *e. Whether the Tribunal erred in concluding in respect of the second contract that the second plaintiff was bound by it to construct a building in a manner contrary to that provided for by the contract;*
>
> *f. Whether the Tribunal erred in law in rejecting all of the evidence of George Cross as to industry practice and what was practicable conduct in the absence of any challenge or contradiction to that evidence;*
>
> *g. Whether the Tribunal erred in finding that it was reasonably foreseeable to either or both plaintiffs that the building site was in a flood zone;*
>
> *h. Whether the Tribunal erred in law in so construing section 31(1)(d) of the Domestic Building Contracts Act as requiring the plans and specifications to include all of the information which might be required to obtain a building permit.*"

Questions a, b, d and e

7 These questions all involve a contention that the Tribunal erred in law in its construction of the first contract and/or of the second contract. The error of construction contended for is that, whereas the contract was "*to build a house on a concrete slab*", the Tribunal concluded that the contract contained a different obligation, namely, "simply to build a particular house" and that this was contrary to what the contract provided as to the manner of construction. However, as I understand it, the variation for which the Builder sought payment involved no change in the type of foundation, that is to say, the house still would have been built on a concrete slab but the slab would have to have been "*raised to a sufficient level.*"[2] The plaintiffs failed to explain to this Court, despite being asked to do so, how the latter requirement was "contrary to that provided for by the contract" as they contended.

[1] The plaintiffs failed to comply with this order but did file a Notice of Appeal after I had reserved judgment in the afternoon of 11 September 2007 – however I was informed during the hearing that the Notice of Appeal was in the same form as the draft Notice of Appeal which was exhibit "NG-13" to the affidavit of Nick Galatas sworn 11 August 2006.

[2] See para 14 of the witness statement of Vince Daniele that was tendered to the Tribunal.

8 The variation works proposed by the Builder to raise the height of the slab were set out in two documents dated 1 June 2005 that were given to the Owner. These documents were tendered before the Tribunal.[3] One of the documents was headed "Revise floor system due to flood prone" and costed the variation in the sum of $28,050. The other document was headed "Revise floor system due to flood prone (Option 2)" and costed the variation in the sum of $31,039.80. In relation to these variation quotations, Mr Hayes, who appeared as counsel for the plaintiffs, pointed to evidence before the Tribunal,[4] that "[the] issue that subsequently arose and which became the subject of a request for variation...had nothing to do with the type and depth of the foundation included in the building contract but rather, with the fact that the slab had to be raised above ground level due to the...property lying within a flood prone area."

9 Mr Cahill, who appeared as counsel for the Owner, conceded that it was assumed by the parties and by the Tribunal that the work comprised in the proposed "variation" was additional work to that expressly mentioned in the contracts.

10 The central issue before the Tribunal was, accepting that extra works were involved, whether the Owner was obliged to pay for them or whether the Builder had to perform that work as part of the agreed fixed price. In that regard, Mr Hayes argued that the Tribunal had erred in law either in the proper construction of the contracts or in the proper construction of certain provisions of the Domestic Building Contracts Act 1995 ("the DBC Act") and that, on a proper construction either of the contracts or of the Act, the Owner was liable to pay for the variation. It is therefore necessary to consider the relevant provisions of the contracts and of the DBC Act and the reasons of the Tribunal in that regard.

11 The first contract was comprised of two relatively brief documents. The first document was a "fixed price quotation for the construction of your new home" for the sum of $144,203 signed on behalf of National Builders Group, and signed by the Owner on 19 January 2005. That document contained a brief itemisation of the construction work, including "House Type: Townhouse 20E - $134,900" and "Soil Conditions/Slab – Class "P" Engineered Designed slab as per Engineer's Report...- $2928". The second document was an acceptance of the quotation in the said sum and contained an authorisation to National Builders Group to proceed with the preparation of plans, specifications, slab design, and other works required to obtain a building permit "on our behalf" and concluded "the above price is a fixed price, not to be varied unless there is a change to the specifications or working drawings initiated by the owners."

12 The second contract was a document of some 40 pages, in the form of a building contract, with attached "*standard project specifications*".[5] Clause 21 of the second contract dealt with variations and, although there are some other provisions in the second contract dealing with other possible variations, cl. 21 was the only contractual provision that the Builder contended before the Tribunal (or before this Court) was relevant to the present issues. I note that the index to the second contract referred to "*Clause 21 Variations to Statutory Laws*" and that cl. 12 of the second contract provided that the Owner must pay the Builder the contract price but that the Owner might be "*required to pay more*" in a number of enumerated circumstances. These circumstances included such matters as the cost of land surveys, additional building permit fees, agreed variations, prime cost items or provisional sums and so on. However the only circumstances referred to in cl. 12 relevant to the present issues are, as I have said, those referred to in cl. 21. Significantly, the circumstances covered by cl. 21 are described in cl. 12 as "*there is a variation to the costs of complying with changed laws*". Clause 21 relevantly provided:

"If the Plans and/or the Specifications have to be varied to comply with either a change in the law or statutory requirements after this Contract is entered into the Builder must not give effect to any variation unless the following circumstances apply:

- *a building surveyor or other authorised person under the Building Act 1993 requires in a building notice or building order under that Act that the variation be made;*
- *the requirement arose as a result of circumstances beyond the Builder's control;*
- *the Builder included a copy of the building notice or building order in the notice required by the Act; and*
- *the Owner does not advise the Builder in writing within 5 Business Days of receiving the notice required by the Act that the Owner wishes to dispute the building notice or building order."*

13 I interpolate here that Mr Hayes submitted that cl. 21 would have entitled the Builder in due course to claim the cost of the variation because, on its proper construction, it applied to variations arising either from a change in the law or from statutory requirements, even if those statutory requirements had existed before the making of the contract – he contended that the words "*a change in*" referred to the words "*the law*" but not to the words "*or statutory requirements*". This construction was contrary to the view taken by the Tribunal, as is apparent from para. 54 of its reasons in which the Tribunal said that there had been no change of the law and that only the parties' knowledge of their obligations under the law had changed.

14 It is convenient at this point to determine this question of the proper construction of cl. 21 of the second contract. In my opinion the Tribunal correctly construed this provision. Clause 21 applies only in circumstances where the law or statutory requirements have changed after the contract is entered into. This is the ordinary and natural construction of the words "to comply with either a change in the law or statutory requirements after this Contract is

[3] See exhibit "A" in this proceeding.
[4] In para 20 of a witness statement of Merrin Landolina.
[5] The specifications, under the heading "Foundations" stated: "Slab on Ground – Classification "P"".

entered into." *This meaning is confirmed by cl. 12 which refers, in relation to cl. 21, to "a variation to the costs of complying with changed laws.*"

15 It follows that the Tribunal must have been correct in finding no contractual basis, actual or potential, for the Builder to be or become entitled to payment for the cost of the requested variation.

16 There is also a potential basis under the DBC Act for a builder to claim a variation under a "major domestic building contract" (which this contract was). Section 37 of the DBC Act sets out the procedure that a builder must follow to obtain the cost of a variation to plans or specifications. Section 37(2) provides that a builder must not give effect to any variation unless the owner has given a signed consent thereto or:

"*(b) the following circumstances apply—*

(i) a building surveyor or other authorised person under the Building Act 1993 requires in a building notice or building order under that Act that the variation be made; and

(ii) the requirement arose as a result of circumstances beyond the builder's control; and

(iii) the builder included a copy of the building notice or building order in the notice required by subsection (1); and

(iv) the building owner does not advise the builder in writing within 5 business days of receiving the notice required by subsection (1) that the building owner wishes to dispute the building notice or building order."

17 Furthermore s. 37(3)(a)(ii) of the DBC Act provides that a builder is not entitled to recover any money in respect of a variation unless the builder has complied with s.37 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;...*"

18 It is now convenient to refer in some detail to the reasons of the Tribunal.

19 The Tribunal said that the proceeding concerned who was to bear the cost of raising the level of the floor under contracts between the Owner and the other two parties. The Tribunal said that it was "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."

20 The Tribunal noted that National Builders Group appeared to be a broker of building contracts but that the contract between it and the Owner made no mention of any other contract save that there was a reference to a payment being "credited against the contract deposit". The Tribunal then referred to the HIA contract entered into between Daniele Constructions and the Owner.

21 The Tribunal noted that it was common ground that no plans were signed when the building contract was signed.

22 The Tribunal said that the Owner paid National Builders Group the full deposit of $7210.

23 The Tribunal then described the circumstances in which the Owner obtained information as to the specified flood level from the Council and conveyed that to Daniele Constructions and the controversy that followed in relation to the proposed variation.

24 The Tribunal noted that the Owner, in his points of claim, had sought specific performance of the contract by Daniele Constructions, alternatively damages against both parties, repayment of the deposit and interest and costs. The Tribunal further noted that Mr Cahill for the Owner, in his final address, had sought specific performance from either National Builders Group or Daniele Constructions. However the Tribunal also noted that, in his points of claim, the Owner had pleaded a breach of contract by National Builders Group in failing to ascertain that the land was subject to the flood level and to ensure that the quotation took into account construction of the house as affected by the flood level. The Tribunal found in that regard, that National Builders Group was obliged to make all reasonable inquiries, including seeking a council report, before drawings were finalised and a price provided.

25 The Tribunal then considered the Owner's pleaded allegation that National Builders Group had acted in a way that was misleading and deceptive but the Tribunal rejected that allegation. However, in the course of rejecting that allegation, the Tribunal referred to certain expert evidence as to building practice called on behalf of the present plaintiffs before the Tribunal. This expert evidence came from a Mr George Cross whose evidence relevantly was, in substance, that a builder was not obliged to obtain information from a council in relation to such matters as flood levels before the building contract was signed. The Tribunal rejected that evidence and referred to s.31(1)(d) of the DBC Act which provides that a builder must not enter into a major domestic building contract unless, among other things, the contract "*includes the plans and specifications for the work and those plans and specifications contain enough information to enable the obtaining of a building permit.*" The Tribunal emphasised the words "*includes the plans*" and the words "*and those plans...contain enough information to enable the obtaining of a building permit*". As the Tribunal had already stated, there were no plans at all included in either of the contracts.

26 As I have already stated, the Tribunal found that Daniele Constructions had no potential entitlement to payment for the variation under cl.21 of its contract because the entitlement under that clause would have depended on there being a change in the law or statutory requirements after the contract was entered into and there was none.

27 The Tribunal then turned to s.37(3) of the DBC Act and found that: "*[the] need to raise the floor to avoid the flood problem was reasonably foreseeable, because it would have been discovered if [Daniele Constructions] 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 [Daniele Constructions] was not entitled to demand extra money for this variation."

28 Mr Hayes submitted that the Tribunal had misapplied and misconstrued s.31(1)(d) of the DBC Act. He said that the Tribunal had misapplied that provision because a breach thereof (and he conceded that there may have been a breach) subjected a builder to a penalty under the Act but was not otherwise relevant. He further contended that the Tribunal had misconstrued the provision because it required only that the plans and specifications contained enough information "to enable" the obtaining of a building permit and not, as the Tribunal had said, enough information "to obtain" a building permit. Dealing with his second point first, I do not accept it. There is no difference or distinction in this context between information sufficient to enable the obtaining of a building permit and information sufficient to obtain a building permit, nor do I think that the Tribunal intended to say anything more than that Daniele Constructions had not in its contract provided plans containing enough information to enable the obtaining of a building permit. It seems to have been accepted by the Tribunal, correctly in my view, that, as it was necessary to enable the obtaining of a building permit to provide the building surveyor with plans showing how the floor or slab level would be raised to deal with the flood level problem, then it followed that the Builder, having provided no plans at all in the contract, had failed to provide in the contract plans containing sufficient information to enable the obtaining of a building permit. If that is right, then Mr Hayes' first point is also incorrect because, as the Tribunal said, the need to raise the floor to avoid the flood problem was reasonably foreseeable because it would have been discovered if the Builder had done what it was obliged to do. In any event, this conclusion by the Tribunal is a conclusion of fact and, given that there was no misconstruction of s.31(1)(d), no other question of law is involved or raised.

29 Mr Cahill submitted that the conclusion of the Tribunal, that the Builder had no entitlement to be paid for this variation either under contract or under the DBC Act, was correct for another reason. Mr Cahill pointed out that the right to a variation under cl.21 of the second contract would have depended upon the building surveyor or other authorised person requiring that the variation be made in "a building notice or building order" under the DBC Act. Mr Cahill further pointed out that the right to a variation under s.37(2)(b)(i) also depended upon the building surveyor or other authorised person requiring that the variation be made in "a building notice or building order" under the DBC Act. Mr Cahill submitted, and indeed Mr Hayes did not contend to the contrary, that there was never going to be any building notice or building order issued under the DBC Act because either the Builder provided appropriate plans to deal with the flood level problem or a building permit would never issue. Although this matter was not ventilated before the Tribunal, it does not appear to turn on any factual question and appears to flow from a proper interpretation of the Building Act and the regulations thereunder. I consider that Mr Cahill's submission is correct.

Question h

30 This question involves the contention that the Tribunal erred in law in its construction of s.31(1)(d) of the DBC Act in relation to the requirement that the plans and specifications included in the contract contain enough information to enable the obtaining of a building permit. For the reasons already indicated, the Tribunal did not misconstrue this provision.

Question f

31 This question involves the contention that the Tribunal erred in law by rejecting the expert evidence of Mr Cross in the absence of any challenge or contradiction to his evidence. As I have explained, the Tribunal relevantly rejected the evidence of Mr Cross as to industry practice because of its interpretation of the impact of s.31(1)(d) of the DBC Act. For the reasons already given, the Tribunal was entitled to reject the evidence of Mr Cross as being inconsistent with what was required by the Act.

Question g

32 This question involves the contention that the Tribunal erred in finding that it was reasonably foreseeable by the Builder that the building site was in a flood zone. Again, for the reasons already stated, this factual conclusion was open to the Tribunal under s. 37(3)(a)(ii) of the DBC Act in the light of the Tribunal's correct interpretation and application of s.31(1)(d) of the DBC Act.

Question c

33 This question involves the contention that the Tribunal erred in law in not concluding that the Owner's entry into the second contract involved the necessary discharge or novation of the first contract and any obligation of the first plaintiff under the first contract.

34 Although the argument based on "discharge" or "novation" was raised by his clients' points of defence, Mr Hayes conceded that it had not been contended in argument before the Tribunal that the first contract had been discharged or novated by the second contract. It was no doubt in this context that the Tribunal referred to "the absence of any address from the Respondents[6] about how possible remedies should be allocated between them..." In any event, the concept of "novation" seems inapposite to a situation where A enters a type of building contract with B and thereafter enters a more detailed building contact with C in relation to the same or similar works on the same site. The concept of "discharge" of the first contract might be more relevant, if there were evidence of some express or implied consent or agreement by B that its contract would be discharged upon A entering into the second contract with C. However these are questions of fact and were concededly not ventilated

[6] That is, the plaintiffs in this proceeding.

before the Tribunal,[7] save that the Owner gave some vague and unsatisfactory evidence about his belief on the matter (and this aspect was not pressed by Mr Hayes). Accordingly, it is not open to National Builders Group to raise this as a question of law on appeal.

35 It was common ground that the Tribunal granted the remedy of damages to the Owner, not as damages for any breach of contract but as damages in lieu of specific performance. It was not suggested that the Tribunal was not entitled to so award damages against Daniele Constructions in lieu of specific performance, provided of course that the Tribunal was correct in its conclusion that Daniele Constructions was not entitled to be paid for the variation. However I raised with the parties the question whether the Tribunal was entitled to award damages against National Builders Group, in lieu of specific performance, in circumstances where the only building contract that the Owner was in reality seeking to enforce was the second contract with Daniele Constructions. Mr Cahill conceded that there was some force in that proposition but contended that it would have been open to the Tribunal, had that proposition been advanced with success before it, to award damages against National Builders Group for breach of contract (as the Tribunal had indeed referred to breaches by National Builders Group).

36 In my opinion National Builders Group should not be permitted to now contend that the remedy of damages in lieu of specific performance was not available against it because that contention was not raised before the Tribunal and to permit it to be raised now would be likely to cause injustice and prejudice, especially in costs, to the Owner. As Mr Cahill pointed out, the matter would most probably have to be remitted to the Tribunal to further investigate the question, including the quantum, of damages for breach of contract.

37 In all the circumstances, National Builders Group should be confined to the question raised in the Notice of Appeal and, as this was not agitated before the Tribunal, the question cannot be relied upon on appeal.

Conclusion

38 For the foregoing reasons, the plaintiffs have failed to make out a case on any of the questions raised by them and the appeal will be dismissed with costs (including any reserved costs).

Mr P Hayes for the plaintiff instructed by GPZ Legal
Mr P Cahill for the defendant instructed by Peter Cahill

[7] Mr Hayes accepted that the matter proceeded before the Tribunal "*on the basis that they were either both liable or neither liable and there was no attempt to distinguish between them.*"