## Construction Law Section

Case notes by Caroline Kirton

### *Cardona & Anor v Brown & Anor* [2010] VSC 368
### (Unreported, Pagone J, 23 August 2010)

This case provides valuable lessons for practitioners advising owners on the termination of a domestic building contract.

**Facts**

The appellant owners ('the Owners') engaged the Respondent builder ('the Builder') to construct a brick veneer house on the Owners' land at Boolnarra for the sum of $245,245. The HIA Plain English Building Contract for Domestic New Homes October 2004 ('the Building Contract') was used by the parties. The Builder commenced the work and on 4 December 2006 requested payment for the frame stage progress payment, which was paid by the Owners. On 14 February 2007 the Owners received from the Builder a claim for the lock-up stage progress payment in the sum of $85,835.75, which they refused to pay because of disputes which had arisen between the parties. On 6 March 2007 the Builder suspended the works on the basis of the Owners' failure to pay the lock-up stage progress payment.

The Builder issued proceedings in the Victorian Civil and Administrative Tribunal. The Tribunal held that the Owners had repudiated the Building Contract. The Owners were ordered to pay the Builder $125,431.17 together with costs ([2009] VCAT 910, Unreported, Deputy President MacNamara, 26 May 2009). This sum included the lock-up stage progress payment claim of $85,835.75, interest pursuant to the Building Contract and the *Penalty Interest Rate Act 1983 (Vic),* damages for delay and payment for some additional works. The Owners appealed and sought to set aside the Orders made by the Tribunal.

There were four main areas of dispute between the parties on appeal.

**The Frame Stage**

The Building Contract contained a schedule incorporating the table prescribed by Section 40 of the *Domestic Building Contracts Act 1995 (Vic).* This table sets out the percentage of the contract price that may be claimed as a progress payment claim for each of the specified construction stages. The Owners argued that they were justified in not making the lock-up stage progress payment because the frame stage had not in fact been reached. In support of this argument the Owners relied on *Prately Constructions v Racine* ([2004] VCAT 2035, Unreported, Senior Member Young, 29 October 2004). The Tribunal concluded however that each stage was separate and that a progress payment claim for one stage may become payable even if an earlier stage had not been completed.

The Supreme Court (Justice Pagone) agreed with the Tribunal. His Honour said that the contractual entitlement to make a claim and the corresponding contractual obligation to pay

the claim, did not require that an earlier stage in the sequence first be completed, claimed for and paid. His Honour held that "the contractual entitlements have their separate definitions" and should not therefore be construed with "an implied condition precedent which is not expressly stated" (at [7]).

**Lock Up Stage**

The Owners also argued that the Builder's entitlement to make a claim for the lock-up progress payment had not arisen, because the works had not reached lock-up stage within the meaning of the definition of "lock-up stage" in the Building Contract.

The Building Contract and Section 40 of the *Domestic Building Contracts Act 199*5 define "lock-up stage" to mean:-

> "the stage when a home's external wall cladding and roof covering is fixed, the flooring is laid and external doors and external windows are fixed (even if those doors or windows are temporary)".

The Owners argued that the lock-up stage had not been reached because some external wall cladding was not fixed and left an area unsecure between about head height and the roof. The plans did not provide for that particular area to be sealed, as the relevant wall bordered the end of the house and the garage. The house and the garage were to eventually have a ceiling, which would seal the area and the garage was also to have doors and roller doors (which were not installed at the time). The Owners contended that the Builder should have temporarily sealed the gap between the relevant wall and the roof and should have installed temporary doors to the garage.

The Tribunal did not accept the Owners' submissions and took the view that the lock-up stage had been achieved. The Tribunal held that the definition of "lock-up" did not require the structure to be "impregnable". The Tribunal noted that the "definition of lock-up stage appearing in the Act does not mention the concept of locking-up at all" (at [10]). The Court found no error in this aspect of the Tribunal's decision. His Honour stated that:-

> "What the definition relevantly requires... is that the home's external wall cladding and roof covering be fixed. It does not require any greater security or completion" (at [10]).

**Suspension**

The Owners argued that the Builder's suspension of the works for non-payment of the lock-up progress payment claim was premature and therefore ineffective. The progress claim certificate for the lock-up stage required payment by 27 February 2007. On 6 March 2007 the Builder gave notice of suspension of the work on the basis of the Owners' failure to pay the lock-up stage progress payment.

The Builder accepted that it had prematurely suspended the works by one or two days, depending upon how the calculation was made. The Owners argued that the Building Contract required strict compliance and that as the Builder had not suspended the works after the time permitted, the Builder was in substantial breach of the Building Contract.

The Tribunal took the view that the premature suspension of the works by the Builder was not material (at [14]). His Honour accepted the Tribunal's reasoning and said that the relevant clauses were not to be given "a narrow or pedantic construction provided that what each is intended to achieve is satisfied on the facts of any case" (at [15]). His Honour said:-

> "Building contracts, like other commercial agreements, should be construed by reference to the commercial objectives to be achieved and the reasonable understanding of the parties...The condition upon which the builder was entitled to suspend the works may not have been satisfied on 27 February 2007 but, for the purposes of this argument, was satisfied no later than two days later. The builder's entitlement thereby crystallised and there is no reason to deny the builder's entitlement which had then accrued." (at [14]).

**Repudiation**

The Owners also argued that the Builder had repudiated the Building Contract by insisting upon an incorrect interpretation of the definition of the lock-up stage in the Building Contract. It was argued that by reason of the Builder's continued adherence to an incorrect interpretation of the Building Contract, the Builder did not intended to be bound by the Building Contract. Both the Tribunal and the Court rejected this argument. His Honour said that he had "no reason to assume the parties were not each genuinely willing to perform the building contract upon the basis of the interpretation which each maintained" (at [16]).

The Court accordingly agreed with the Tribunal's conclusion that the Owners had repudiated the Building Contract. This was by reason of the Owners' purported acceptance of what they had asserted to be the Builder's repudiation, being the Builder's continued adherence to its interpretation of the definition of "lock-up stage".

The Owners' appeal was therefore dismissed. The Owners have filed an appeal to the Court of Appeal.

## ***Roads Corporation v Love*** **[2010] VSC 253**
## **(Unreported, Vickery J, 10 June 2010)**

This case serves as a warning to practitioners about the mistakes which can be made when managing expert witnesses at the pre-trial stages of proceedings.

The decision was a ruling in relation to legal professional privilege, given during the course of a trial. The ruling relates to communications at meetings between expert witnesses retained by the Respondent and also correspondence arising from those meetings. These experts were subsequently called by the Respondent to give evidence at the trial of the proceeding.

On 14 March 2006 the Respondent's experts and lawyers had a meeting. The Respondent said that the purpose of the meeting was to provide a briefing for the Respondent's experts in relation to the proceeding. At the time of the meeting the experts' reports had not been finalised. During the trial the Respondent objected to cross examination relating to communications between the Respondent's experts at the meeting on 14 March 2006.

The Respondent also objected to admitting into evidence documents relating to and arising from an earlier meeting of the Respondent's experts on 14 December 2004. These documents included draft reports which were subsequently exchanged between the experts via the Respondent's solicitors and between the experts themselves.

The objections were made by the Respondent on the ground that the communications at the meetings and the documents were the subject of legal professional privilege.

The Applicant argued that the Respondent had lost the legal privilege by reason of the operation of Section 122(2) of the *Evidence Act 2008 (Vic)*. This section provides that the privilege may be lost if a party has acted in a way which is inconsistent with a claimed legal privilege. Section 122(3) provides that the privilege may be lost where a party knowingly and voluntarily discloses the substance of the evidence to another person (Section 122(3)(a)) or where the substance of the evidence has been disclosed with the express or implied consent of a party (Section 122(3)(b)).

The Court held that the Respondent had lost the legal professional privilege pursuant to Section 122(2) of the *Evidence Act 2008 (Vic)* for two reasons.

Firstly, his Honour held that by calling the experts to give evidence it would be:-

> "...both unfair to the applicant, and contrary to the interests of justice, to insulate the relevant witnesses from a full examination of all the information which they took into account and the various influences to which they were exposed in preparation of their evidence" (at [26]).

The Applicant was therefore held to be entitled to cross examine about the communications between the experts at the meetings on 14 December 2004 and 14 March 2006. The Applicant was also held to be entitled to tender the documents which were in issue.

Secondly, the Court held that the independence of the experts had been compromised at the meeting which took place on 14 March 2006. His Honour held that this meeting was improper and "compromised the overriding duty of the expert to provide independent assistance to the Court on matters relevant to their area of expertise" (at [45]).

His Honour reviewed the obligations and duties of expert witnesses at common law and as developed by the rules of Court. His Honour noted that meetings between experts "for the purpose of ensuring a "common line" in the case" had a "number of vices" (at [36]). The independence of the witnesses was compromised, with the evidence in danger of becoming a "team presentation". Difficulties also arose in relation to the testing of the evidence and information depended upon by the experts, causing the credibility of the experts to be diminished.

His Honour however noted that there are situations where the pre-trial meetings of expert witnesses is not improper (at [40]). These situations are where:-

(1) Draft reports are exchanged between experts where the opinion of one expert depends upon information to be provided by others. In such cases successive drafts may be called for and cross examined upon at trial.

(2) Meetings are held for the purpose of providing lawyers with information which is then provided to a party with legal advice. Such communications may retain legal professional privilege.

(3) The Court directs that the experts for all parties meet and confer pursuant to Rule 44.06 of the Supreme Court Rules, for the purpose of identifying areas of agreement and disagreement.

However in this case His Honour held that the meeting on 14 March 2006 went beyond the mere provision of factual information to the Respondent's experts and was thereby improper. His Honour warned that even if a meeting was convened simply to convey factual information to a party's experts, it would "run the significant risk of bringing into question the independence and credibility of the experts who may attend such a meeting and would otherwise risk compromising their duties to the Court" (at [38]).

His Honour made no adverse finding that the independence of the Respondent's expert witnesses had been compromised at the meeting on 14 December 2004, due to insufficient evidence.