

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO BP 799/2014

CATCHWORDS

Domestic building; formation of contract; agency; identity of builder

FIRST APPLICANT	Mr Chris Theodor
SECOND APPLICANT	Ms Suzanne Theodor
RESPONDENT	Patrick Noonan
WHERE HELD	Melbourne
BEFORE	Member C Edquist
HEARING TYPE	Hearing
DATE OF HEARING	3 August 2015
DATE OF ORDER	4 September 2015
DATE OF REASONS	4 September 2015
CITATION	Theodor v Noonan (Building and Property) [2015] VCAT 1390

ORDERS

- 1 I find and declare that the Respondent did enter into a building contract with the Applicants, as alleged in paragraph 3 of the Applicants' Points of Claim.
- 2 I find and declare that the Respondent was the builder of the *building works* referred to in paragraph 4 of the Applicants' Points of Claim.
- 3 **The proceeding is listed for a directions hearing at 9.00 am on 24 September 2015 at 55 King Street, Melbourne, before Member Edquist, with an allowance of one hour.**

MEMBER C EDQUIST

APPEARANCES:

For Applicants

Mr P Lithgow of Counsel

For Respondent

Mr P Cott, solicitor

REASONS

BACKGROUND

- 1 Merrijig, on the Mt Buller Road, is near popular snowfields. It is there that the applicants Chris Theodor and Suzanne Theodor have had a holiday house for some years. They have conducted a holiday accommodation business in and around the township since 2005.
- 2 In mid-2010, the Theodors decided to extend their existing holiday house by constructing additional accommodation with a view to meeting increasing demand from holiday makers.
- 3 On 31 October 2011, they entered into a contract ('the contract') in respect of the building works. The builder named in the contract is Patrick Noonan. The Theodors signed the contract. A Mr Russell Prendergast signed on behalf of Mr Noonan.
- 4 The contract did not go well, and ultimately it was terminated by the Theodors.
- 5 The Theodors have completed the contact works, and have come to the Tribunal seeking damages from Mr Noonan.
- 6 Mr Noonan denies that he ever entered into the contract with the Theodors. He admits that the contract was signed by Mr Prendergast, but denies that Mr Prendergast had authority to bind him.
- 7 On 18 May 2015, Senior Member Riegler listed the proceeding for a preliminary hearing to consider the following questions:
 - (a) did Mr Noonan enter into a building contract with the Theodors as alleged in paragraph 3 of the Points of Claim?
 - (b) was Mr Noonan the builder of the *building works* referred to in paragraph 4 of the Points of Claim?

THE HEARING

- 8 These preliminary issues were heard before me on 3 August 2015. The Theodors were represented by Mr P Lithgow of Counsel. Ms Theodor and Mr Theodor gave evidence. Mr Noonan was represented by his solicitor Mr P Cott. Mr Noonan gave evidence.
- 9 At the end of the hearing I reserved my decision.

OVERVIEW

- 10 In late 2010, the Theodors came into contact with Russell Prendergast, a builder who lived in Merrijig. Mr Prendergast was interested in their project but explained that as he was a registered commercial builder, he would have to project manage the work for someone with domestic building registration. He suggested Patrick Noonan.
- 11 After a delay of many months, the Theodors decided to proceed with Mr Prendergast and Mr Noonan. Mr Prendergast arranged for Mr Noonan to take out the required domestic building insurance for the works. On or about 31 October 2011, Mr Prendergast executed two copies of a completed HIA domestic building contract on behalf of Mr Noonan. Mr and Ms Theodor also signed both contracts. The Theodors had not met Mr Noonan at this point.
- 12 The building project did not keep to the agreed program. By April 2012, communication with Mr Prendergast was breaking down. The Theodors' solicitor issued a notice of intention to terminate the contract on 13 April 2012, and sent it to Mr Noonan. The contract was terminated on 3 May 2012.
- 13 Mr Prendergast died in a motorcycle accident in 2013.
- 14 The Theodors, in November 2014, made demand of Mr Noonan for damages totalling \$160,979.41 including the cost to complete the works, and lost rent of \$73,163.75, and experts fees incurred.
- 15 A Mr Peter Noonan, through solicitors, has denied liability on the basis that he had no knowledge or recollection of having had any dealings with the Theodors.¹ The mis-description of Mr Noonan in his solicitor's letter is immaterial as at the hearing Mr Patrick Noonan confirmed his affidavit in which he had said he was the respondent.

THE ISSUES

- 16 The central issue in this case is whether Mr Noonan authorised Mr Prendergast to execute the contract on his behalf.
- 17 If the Tribunal finds that Mr Noonan did authorise Mr Prendergast, the first question must be resolved against Mr Noonan, and he will be held to the contract. On the other hand, if Mr Noonan did not authorise Mr Prendergast to execute the contract on his behalf, Mr and Ms Theodor will have to look to the estate of Mr Prendergast or to any applicable insurance in order to recover their alleged losses.

¹ Letter Plaiche & Martin Lawyers dated 4 December 2014, exhibited as ST10 to Ms Theodor's affidavit.

THE THEODORS' EVIDENCE

- 18 Prior to the hearing, Ms Theodor filed an affidavit she had sworn on 31 July 2015. She confirmed the evidence contained in the affidavit in her oral evidence. Mr Theodor gave brief evidence in which he confirmed the evidence provided by Ms Theodor. He also gave evidence about his involvement in the execution of the building contract.
- 19 The relevant evidence from Ms Theodor concerning the initial relationship between herself and her husband and Mr Prendergast and Mr Noonan is as follows:
- (a) Mr Prendergast was suggested to her as a builder by a metropolitan builder by the name of Terry Harris.
 - (b) Ms Theodor first spoke to Mr Prendergast in late 2010 and arranged a meeting.
 - (c) The first meeting took place in early 2011 at the Theodors' home in East Brighton. Mr Prendergast gave Ms Theodor a business card which noted he was a project manager and registered commercial builder. Ms Theodor made some notes at the time. These notes refer to Mr Noonan and Mr Prendergast as 'Partner in jobs; Patrick Noonan as Dom; Russell –Commercial'. The notes also disclosed:

Patrick Noonan is the registered domestic Part. Normal way to bizza [word truncated]. Many jobs for each other. Russell Registers the Commercial jobs. (sic)²
 - (d) Mr Prendergast expressed interest in tendering for the Theodors' project and said that he undertook building work of this sort with Patrick Noonan, and that he could project manage the work under Mr Noonan's DBU registration.
 - (e) Ms Theodor deposed in her affidavit that during the course of these discussions she received the impression from Mr Prendergast that he was currently working with Mr Noonan on a multi-lot residential project. Mr Prendergast sent photographs of this project and invited the Theodors to visit the project.
 - (f) The Theodors decided to work with Mr Prendergast and Mr Noonan. They asked if they could meet Mr Noonan and were told that this was not necessary, but a meeting could be arranged if they wished. However, Mr Prendergast specifically said that it was not common for clients to meet the registered builder and gave the example of a client of a large volume builder who would never meet the registered building practitioner involved.
 - (g) Ms Theodor says in her affidavit:

² Copies of the notes that Ms Theodor made and the business card are included in Exhibit ST1 to Ms Theodor's affidavit.

We were left with the clear impression that both Prendergast and Noonan were in the 'building-business' together and were experienced in this kind of building work.³

- (h) After this meeting with Mr Prendergast, Mr Theodor checked the (then) Building Commission website to check Mr Noonan's registration and confirmed that he was a registered domestic builder.
- 20 The evidence of Ms Theodor regarding the preparation of the contract is as follows:
- (a) Over several months Mr and Ms Theodor arranged planning and building permits, engineering drawings and working drawings.
- (b) In early 2011, they sought quotes from a number of builders, including Mr Prendergast.
- (c) In August or September 2011, they met again with Mr Prendergast in East Brighton and discussed with him the likely length of the project and the need to have the works completed by no later than 12 May 2012. This date was relevant because of the need to furnish the property in readiness for the opening of the 2012 ski season on the Queen's Birthday weekend.
- (d) In late October 2011, they received a certificate of domestic building insurance from VMIA/QBE. The certificate stated that Mr Noonan was the builder. It was dated 24 October 2011.⁴
- 21 Ms Theodor and Mr Theodor both say that on 31 October 2011 Mr Prendergast presented them with two standard form HIA domestic building contracts in blank. Mr Theodor completed the contracts in accordance with Mr Prendergast's directions. The contract as completed named the Theodors as the owners and Patrick Noonan DBU 1251 as the builder. Mr and Ms Theodor signed both contracts. Mr Prendergast signed the contract 'by or on behalf of the builder', and Mr Theodor witnessed his signature.
- 22 Ms Theodor added that after execution, Mr Prendergast took both originals with him and promised to send a copy to the Theodors. He never did.
- 23 In respect of the progress of the works, Ms Theodor says:
- (a) The work started in late November 2011.
- (b) By mid-January 2012 the block work was completed.
- (c) She and Mr Theodor visited the property in early January 2012 to check the progress of the work.
- (d) During February and March 2012 the works continued, but became progressively slower. She and her husband became very concerned that the work would not be completed by the critical date of 12 May 2012.

³ Ms Theodor's affidavit, paragraph 14.

⁴ Exhibited as ST3 to Ms Theodor's affidavit.

- (e) On 13 March 2012, they met with Mr Prendergast at the site to discuss their concerns about the slow progress of the project. Mr Prendergast became angry and told them to communicate with him in the future only by email. He then stormed off.
- (f) By early April 2012, things had not improved, and the works had not progressed in any significant way.
- (g) On 19 April 2012, they informed Mr Prendergast that they were engaging Eastern Building Inspections Pty Ltd ('EBI') to inspect the works.
- (h) In early April 2012, they met with Mr Prendergast at the site with EBI. Mr Prendergast refused to speak with EBI.
- (i) After this, they instructed their solicitor to issue notices under the contract. On 13 April 2012, a notice of intention to terminate the contract was issued to Mr Noonan.⁵
- (j) On 19 April 2012, they received an email from Mr Prendergast stating that Mr Noonan had received a notice ending the contract on 18 April 2012.⁶
- (k) On 23 April 2012, their solicitor sent an email to Mr Noonan clarifying that the notice did not end the contract, and that the contract was still on foot.⁷
- (l) Their solicitor did not receive any response to the email of 23 April 2012 and on 3 May 2012 the solicitor sent a notice of termination of the contract to Mr Noonan.⁸
- (m) No response was received from Mr Noonan to the notice of termination.

MR NOONAN'S EVIDENCE

- 24 In anticipation of the hearing, Mr Noonan had sworn an affidavit on 24 July 2015. He tendered this in his evidence at the hearing.
- 25 With respect to the formation of the contract, Mr Noonan says as follows:
- (a) he had a discussion with Russell Prendergast on or about 10 October 2011 in which he discussed the possibility of entering into a joint venture to undertake building works at the Theodors' land in Merrijig;
 - (b) as a result of this 'proposed joint-venture' with Mr Prendergast, and in anticipation of undertaking building works on the Theodors' land, on

⁵ Exhibited as ST5 to Ms Theodor's affidavit.

⁶ Exhibited as ST6 to Ms Theodor's affidavit.

⁷ Exhibited as ST 7 to Ms Theodor's affidavit.

⁸ Exhibited as ST8 to Ms Theodor's affidavit.

or shortly after 21 October 2011, he applied for domestic building insurance;⁹

- (c) on or about 24 October 2011, he had a face to face meeting with Russell Prendergast. Mr Prendergast dropped in to the site where he was working. They spoke for ‘about a minute’. At that meeting, Mr Prendergast reimbursed Mr Noonan for the insurance premium by handing over a cheque for \$2,400.¹⁰ This sum represented the premium plus a small margin.

26 Mr Noonan also says in his affidavit:

After I had obtained the domestic building insurance for the building works proposed by the Applicants, the joint-venture agreement between Russell and I broke down, and the building project at the Applicants land did not proceed as far as I was concerned. I heard nothing at all further from Russell or anyone else about the project and I did not follow up with any communications to him. I did not then turn my mind to the project any further nor did I communicate with Russell in that period at all.

Russell Prendergast of R E Prendergast Builders, seemed to have entered into a contract with the Applicants for the building works at the Applicant’s land without my express knowledge or permission.¹¹

27 In his affidavit Mr Noonan says that the Theodors’ claim against him is misconceived for these reasons:

- (a) he had never met or spoken to the Applicants;
- (b) he did not sign nor enter into a building contract with the Theodors and he did not sign any other documentation at all (except the insurance application) in respect of the building works;
- (c) he did not receive any payments for the building works;
- (d) he did not carry out any of the building work, nor did he authorise any of the building work to be carried out, and whilst the building work was being carried out, he was not aware that it was occurring;
- (e) he is not the relevant builder who is liable for Russell Prendergast’s failure to complete the building works nor for the alleged defective works.¹²

28 In support of his position, Mr Noonan says that the contract with the Theodors did not contain his address. Also, it did not use his “business name” Too Squared Pty Ltd, which he says he uses in his business dealings. And, he says, the document is not in his handwriting.¹³

⁹ A copy of the insurance certificate obtained from VMM/QBE was exhibited by Mr Noonan to his affidavit as PN1.

¹⁰ A copy of the cheque was exhibited by Mr Noonan to his affidavit as PN2.

¹¹ Mr Noonan’s affidavit, paragraphs 7 and 8.

¹² Mr Noonan’s affidavit, paragraph 19.

¹³ Mr Noonan’s affidavit, paragraph 10.

29 Mr Noonan also says that without his knowledge or permission Russell Prendergast listed his domestic builder's (registration) number on the building contract, and used the domestic building insurance that he had previously applied for to obtain a building permit.¹⁴

CROSS-EXAMINATION OF MR NOONAN

30 Mr Noonan was vigorously cross-examined by the Theodors' Counsel. In response to questions put to him, Mr Noonan conceded that:

- (a) he had been a domestic builder for many years;
- (b) he was familiar with domestic building insurance;
- (c) he had completed the application for domestic building insurance, which was appended to Ms Theodor's affidavit, on 21 October 2011;
- (d) the application for insurance nominated him as the building entity;
- (e) he was aware that one cannot make an application for insurance without a signed building contract;
- (f) the application stated that a building contract had been signed with his name on it;
- (g) he signed the application for insurance, and in doing so declared that there was a building contract with his name on it, that it had been signed, and that the details were true and correct;
- (h) the home owners described were Sue and Chris Theodor;
- (i) the site location was 2583 Mount Buller Road, Merrijig;
- (j) the work was described as:

Two-storey extension. Klip lock roofing, timber cladding. Render finish, some natural stonework.
- (k) the completion date was 12 May 2012.

31 Notwithstanding these concessions, Mr Noonan under cross-examination continued to dispute that he was bound by the contract with the Theodors. He said that he had signed the application based on an 'assumption'. He conceded the application was based on 'false information' which had been supplied by Mr Prendergast. He insisted that he had not signed the building contract and that Prendergast had no authority to sign on his behalf.

32 As to his relationship with Mr Prendergast, Mr Noonan says:

- (a) he had been friends with Russell Prendergast for 10 years;
- (b) they had previously had a joint-venture at Bairnsdale;
- (c) this joint-venture was not in writing;

¹⁴ Mr Noonan's affidavit, paragraph 11.

- (d) the arrangement on that project was that the party providing the building registration got 5% of the contract price.
- 33 Regarding the joint-venture, Mr Noonan's oral evidence is that there was one initially, but that it came to an end. In saying this, he was consistent with the position he had articulated in his affidavit¹⁵, which was that the joint-venture agreement broke down *after* he had obtained the domestic building insurance.
- 34 Mr Noonan conceded that although with respect to the Theodors' project no joint venture agreement with Mr Prendergast had been reduced to writing, his expectation was that he would get 5% of the contract sum. He also conceded that he paid an insurance premium of \$2,284 for the Theodors' job, but was reimbursed \$2,400, and that the uplift of \$116 represented 5% of the premium paid.
- 35 In respect of the alleged termination of the joint venture agreement, Mr Noonan's evidence is that he did not follow up with Russell Prendergast as he had 'lost interest'. He also had become busy with a residential project at Nar Nar Goon. He did not refer to any communication to Mr Prendergast to the effect that the project was not proceeding. On the contrary, he agreed under cross-examination that he did not tell Mr Prendergast that the joint venture was over. He further agreed under cross-examination that he did not tell the Theodors, the insurer, the council or the building surveyor that the joint venture was over.

MR NOONAN'S SUBMISSIONS

- 36 Mr Noonan's lawyer submitted:
- (a) Mr Prendergast had no authority to sign the contract. In particular, he said that the arrangement between Mr Prendergast and Mr Noonan was too loose for it to bind Mr Noonan. It did not have enough terms.
 - (b) Making a false statement to the insurer did not make Mr Noonan liable under the contract.
 - (c) No payments were received from Mr Noonan.
 - (d) He did not adopt the transaction entered into by Mr Prendergast.
 - (e) He did not know the joint venture was proceeding.
 - (f) If he had initially clothed Mr Prendergast with ostensible authority to sign the contract, that authority had expired by the time the contract was signed.

DISCUSSION

- 37 It is surprising that Mr Noonan could not point to any evidence at all that the joint venture had broken down. One would have expected there would

¹⁵ Mr Noonan's affidavit, paragraph 7.

have been some communication, even oral, to Mr Prendergast and the Theodors, if a breakdown of the joint venture had occurred. The absence of any such communication throws into question Mr Noonan's evidence on the matter.

38 When asked why he did not cancel the insurance after the joint venture had broken down, he said it was because he was a builder and was very bad at paperwork. This defies credibility, having regard to the significant consequences of the joint venture remaining on foot.

39 When he received the notice of intention to terminate the contract from the Theodors' solicitor on 18 April 2011, Mr Noonan did not contact that solicitor and dispute the fact that he had a contract with the Theodors. Rather, his evidence is that he contacted Mr Prendergast and asked him:

What the hell is going on here? I know nothing about this. You need to sort this out.

40 I consider that this statement by Mr Noonan to Mr Prendergast is consistent with the continued existence of a joint venture pursuant in which Mr Noonan was a silent party, and Mr Prendergast was the active participant who conducted the works and communicated with the clients.

41 Furthermore, it is agreed by the parties that when the actual notice of termination was issued, Mr Noonan did not respond to the Theodors' solicitor.

42 Again, this failure by Mr Noonan to dispute the existence of a contract to which he was a party is suggestive of the fact that *at the time* he was well aware that he was in contract with the Theodors.

FINDINGS

43 As Mr Noonan agrees a joint venture came into operation, I find that a joint venture was formed on or about 10 October 2011 between Mr Noonan and Mr Prendergast regarding the construction of building works for the Theodors' project at 2583 Mount Buller Road, Merrijig.

44 Mr Noonan says that the joint venture came to an end after the insurance policy was issued. However, Mr Noonan agreed under cross-examination that the joint venture was still on foot when Mr Prendergast signed the contract.

45 I note that there is no evidence that the joint venture did come to an end shortly after the insurance policy was issued, or at all. In the absence of an act terminating the joint venture, it is hard to understand how Mr Noonan can say that the joint venture came to an end, before the building contract was terminated.

46 Furthermore, Mr Noonan's behaviour when the notice of intention to terminate the contract was issued in April 2012 strongly suggests that, in his mind, the joint venture was on foot and that the building contract was binding upon him.

- 47 I find that the joint venture was on foot when the contract was executed by Mr Prendergast on Mr Noonan's behalf on 31 October 2011.
- 48 This finding is critical because I consider that, in forming the joint venture with Mr Prendergast to construct the Theodors' project, Mr Noonan armed with Mr Prendergast with authority to sign a contract in his name for the purposes of the project.
- 49 Mr Noonan said repeatedly under cross-examination that he expected to sign the contract and that Mr Prendergast had no authority to sign the contract on his behalf. I think Mr Noonan lacks insight into the nature of the arrangement he had entered into with Mr Prendergast.
- 50 Mr Noonan formed a joint venture with Mr Prendergast to perform the Theodors' project in circumstances where he knew Mr Prendergast:
- (a) could not sign a domestic building contract in his own name;
 - (b) could not get a building permit without domestic building insurance; and
 - (c) could not carry out domestic building work on his own account.
- 51 In these circumstances I consider that Mr Noonan did authorise Mr Prendergast to sign the contract on his (Mr Noonan's) behalf. On this basis, I consider that Mr Prendergast had express authority to enter the contract on Mr Noonan's behalf.
- 52 If it can be doubted that Mr Noonan had given express authority to Mr Prendergast to sign the contract, in my view there can be no question that Mr Noonan gave Mr Prendergast ostensible authority to do so when he, on 21 October 2011, signed the application for domestic building insurance which declared that he had made a contract with the Theodors. His evidence was that he did so on the basis of advice from Mr Prendergast that a contract naming him as builder had been signed. He personally had not signed such a contract with the Theodors, so it follows that he was adopting a contract naming him as builder signed on his behalf by Mr Prendergast.
- 53 In my view, it does not matter that on 21 October 2011, when Mr Noonan signed the application for insurance, or on 24 October 2011, when the insurance certificate issued, that the contract was not signed. The key points are that Mr Noonan declared in the application for insurance that there was a contract signed which named the Theodors as owners and himself as builder, and that he provided the certificate of insurance to Mr Prendergast.
- 54 Not only did the signing of the insurance declaration constitute a representation to the insurer about the existence of a contract naming Mr Noonan as builder, but it evidenced to the Theodors the existence of a joint venture between Mr Noonan and Mr Prendergast. I consider the existence of the joint venture was confirmed to the Theodors by the delivery of the certificate of insurance dated 24 October 2011. The delivery of the

certificate of insurance facilitated the issuing of a building permit and hence enabled the project to go ahead. The Theodors would reasonably have formed the impression that Mr Prendergast had Mr Noonan's authority to contract on his behalf with them.

- 55 For these reasons, I consider Mr Prendergast clearly had ostensible authority to sign on behalf of Mr Noonan, even if he did not have express authority to do so.
- 56 I accordingly find that Mr Prendergast had authority to sign the contract with the Theodors on behalf of Mr Noonan.
- 57 It follows, and I find, that Mr Noonan did enter into the contract with the Theodors. This was the contract referred to in paragraph 3 of the Points of Claim.
- 58 This finding disposes of the first preliminary question raised in the hearing.
- 59 The second question to be considered is: was Mr Noonan the builder of the building works referred to in paragraph 4 of the Points of Claim? Those building works are the reconstruction on the Theodors' land of a log cabin and an extension to an existing log cabin.
- 60 I consider that the finding that Mr Noonan formed a contract with the Theodors disposes of this second issue. Mr Noonan is a registered domestic builder. He entered into a domestic building contract drafted in accordance with the *Domestic Building Contracts Act 1995* (Vic). He is bound by the contract as the builder.
- 61 Section 31(e) of the *Domestic Building Contracts Act* requires that a major domestic building contract (which for present purposes can be defined as a contract for the construction of a home with a value of more than \$5,000) must state the names and addresses of the parties. It may be true that the contract was slightly defective in form insofar as Mr Noonan's address was not stated. However, this of itself does not make the contract invalid. There is no doubt as to the identity of the builder. Patrick Noonan is identified by name as the builder and by his DBU registration number.
- 62 The corollary of s 31(e) is that as the named builder, Patrick Noonan must accept responsibility for the works performed under the contract. This is fundamental to the efficacy of the Act.
- 63 It does not matter, in my view, that Mr Noonan did not personally perform or direct the works. If this was a defence, then the ability of a homeowner to enforce the statutory warranties implied into every domestic building contract by s 8 of the *Domestic Building Contracts Act* might be severely impaired.
- 64 I accordingly find that Mr Noonan is the builder under the contract and accordingly is responsible for the building works performed under the contract. These are the building works referred to in paragraph 4 of the Points of Claim.

65 I will make declarations to reflect my findings. I will also order that the proceeding come back to me for directions.

MEMBER C EDQUIST