

Lock-up – what does it mean?

The decision in *Brown v Cardona & Ors (Domestic Building)* [2009] VCAT 910 on 26 May 2009 has cast some uncertainty over when a “Lock-up Stage” progress payment may be payable under domestic building contracts.

Section 40 of the *Domestic Building Contracts Act 1995* (“the Act”) defines “Lock-up” 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 only temporary).”

The builder claimed lock-up in February 2007 seeking \$85,835.75. The owners refused to pay, stating the frame works were incomplete and the construction had not reached lock-up as the builder had not installed two roller doors to the garage. At trial, the owners also alleged the builder had failed to seal an open gable end which meant a person on a ladder might pass through the gap into the ceiling of the property. The owners argued “lock-up” meant the premises were to be “locked-up”, secure and only accessible by “unlocking the doors”.

The builder suspended the works for non-payment. The owners terminated the contract stating the builder was in breach in seeking lock-up payment when it was not due and for suspending the works.

The question for VCAT was whether the works were at “lock-up” and consequently whether the owners or the builder were right in refusing to pay or carry out works respectively.

VCAT previously considered this issue in *Bobo’s Fashion Pty Ltd v MJF Property Developments Pty Ltd* [2004] VCAT 1090. Senior Member Young held an “owner was justified in not making a lock-up stage payment when a unit had not been secured against entry as the garage doors had not been installed”.

In *Brown*, Deputy President McNamara distinguished the *Bobo’s Fashion* case and provided an alternative view: “the definition of lock up stage ... in the Act does not mention the concept of locking-up at all (and) ... a structure could have reached lock-up stage if secured by door fixed (sic) not by a lock but merely by a bent nail. If I regard the definition of lock up stage from its very name as necessarily importing some concept that the structure must be locked, this does not ... (require) the structure to be impregnable except via access through a locked door.”

The owners were found to have breached the contract in refusing to pay and for having terminated the contract. They were ordered to pay the “lock-up” claim plus penalty interest and delay damages.

Notwithstanding this decision, builders should ensure works are “secure” at “lock-up” if only to protect their works from theft or vandalism and should consider excluding “garage doors” from the definition section in the contract.

This article contains general information and should not be acted upon without specific professional advice based on your own circumstances.



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