By Andrew Whitelaw, Partner, Rigby Cooke Lawyers

Variations: To Be or Not to Be?

Whether a builder can claim the costs of a variation and whether the owner is required to pay is an issue often contested before the Victorian Civil and Administrative Tribunal ("VCAT").

A builder who changes the contract works and expects to get paid must comply with the contract and the *Domestic Building Contracts Act 1995* (the "Act").

All domestic building contracts must contain clauses which set out when the costs of a variation to the work can be claimed and who must bear the costs.

Section 38(2) of the Act states that when an owner requests a change to the building works the builder *may* carry out the variation if it does not require an amendment to a permit, will not cause delay and will not increase the contract price by more than 2%.

In all other circumstances the builder *must* in accordance with Section 38 give the owner a "notice" that states:

a) what effect the variation will have on the works;

b) whether an amendment to any permit is required;

c) if the variation will result in any delays and how long;

d) the cost of the variation; and

e) what effect (if any) it will have on the contract price.

The builder *must not* give effect to a variation unless the owner gives the builder a signed request attached to a copy of the builder's notice.

If the builder carries out "extra works" but has not followed this process and the owner then refuses to pay, the builder will be hampered in recovering the costs. Section 38(3) of the Act states the builder must satisfy a two part test namely there are "exceptional circumstances" or that the builder will suffer "significant and exceptional hardship" *and* that it would not be "unfair" to the owner for the builder to recover the money.

The burden is on the builder to justify why they should get paid.

Senior Member Lothian – in the recent decisions of *Sayed Rustom v Daghistani (Domestic Building)* [2008] VCAT 115 (25 January 2008) and *Caldwell v Cheung (Domestic Building)* [2008] VCAT 853 (7 May 2008) – confirmed that the test is an onerous one for a builder.

Builders should ensure that all variations are in writing and have the variation notices signed by the owners before variation works are undertaken. To do otherwise may be a costly exercise.

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