

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL CLAIMS DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D840/2005

CATCHWORDS

Whether painting works should be redone – reasonable cost of rectification works – reasonable cost of variations

APPLICANT	Ascoli Developments Pty Ltd
FIRST RESPONDENT	John Chomaniuk
SECOND RESPONDENT	Mark Chomaniuk (Withdrawn from proceeding 19/9/06)
THIRD RESPONDENT	Wladyslawa Chomaniuk
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Hearing
DATE OF HEARING	8 and 9 February 2007
DATE OF ORDER	16 February 2007
CITATION	Ascoli Developments Pty Ltd v Chomaniuk (Domestic Building) [2007] VCAT 269

ORDER

1. The First and Third Respondents shall pay to the Applicant the sum of \$254.00 forthwith.
2. Costs reserved – liberty to apply. Any application for costs shall be listed for hearing before Deputy President Aird.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:

For Applicant	Ms S. Kirton of Counsel
For Respondents	Ms E. Ruddle of Counsel

REASONS

- 1 In February 2005 the Applicant contacted the Respondents, who are painters, requesting a quotation for the painting works on two townhouses it was building in Mont Albert Road Canterbury. The First Respondent, (Jan Chomaniuk) and his son Mark ('the painters') met with Mr Gurvich a director of the Applicant and walked around the townhouses with him. At the time the units were at fixing stage. Mr Gurvich says that in Unit 2 the doors, architraves and skirtings were installed in the downstairs area and in part of the upstairs, and that although not installed, they were on site and clearly visible in Unit 1. Following the meeting Mr Chomaniuk gave Mr Gurvich a verbal quote of \$34,000.00. A written quote was subsequently provided for internal and external painting of the two townhouses for the price of \$25,960.00 inclusive of GST which was accepted verbally by Mr Gurvich on behalf of the Applicant.
- 2 Mr Gurvich alleges it was a term of the contract that these works be completed to a very high standard – that all walls and ceilings were to be sealed and two topcoats applied. The timber architraves, skirting boards and doors were to be blade filled, have one coat of undercoat applied, sanded and then two coats of topcoat were to be applied – three coats in all, to each surface. The external areas including windows and eaves were also to have three coats.
- 3 Work commenced and the painting to Unit 2 was completed. The painters were requested to do some additional works including rectification works arising out of damage caused by other trades in Unit 2 and on 29 August 2005 the Respondents rendered an invoice for \$3,036.00 ('the variation invoice') which has not been paid. Mr Gurvich said this invoice had not been paid because it was not itemised. However, I pause to note that the initial quotation, the invoices and the invoices from the 'rectifying painter' were similarly not itemised. There is no evidence that Mr Gurvich requested an itemised invoice for these additional works.
- 4 Painting to Unit 1 commenced but was not completed, the contract being terminated by the Applicant before completion. Mr Gurvich said he terminated the contract when he came back from a short two week break and found Jan Chomaniuk lying on the newly polished floor painting the skirting boards without having taken any steps to protect the floor. It was not masked and the paint tin was sitting directly on the floor. The contract was terminated by the Applicant on 20 October 2005.
- 5 Mr Jan Chomaniuk alleges the reason for termination of the contract was his demand for payment of the variation invoice. He alleges that the Applicant was suffering some cash flow problems and that some other contractors were experiencing difficulties in getting paid. However, there was no evidence from any other contractor about this.

- 6 By application dated 8 November 2005 the Applicant made application to this tribunal seeking payment of the sum of \$30,300.00 being the amount it says it has been required to spend on rectification and completion works (\$28,500.00) and cost of an expert report from BSS Design Services (\$1,800.00). After the Applicant sought legal advice, Amended Points of Claim were filed on 3 October 2006 claiming \$28,500.00 for repainting costs, and refund of \$1,040.00 being an alleged overpayment. These state that the Respondents have rendered, and the Applicant has paid, the sum of \$27,000.00 which is patently incorrect. The Respondents have rendered invoices totalling \$26,136.00 (\$23,100.00 on account of the contract price of \$25,960.00 and the variation invoice of \$3,036.00) of which the sum of \$22,300.00 has been paid. This is now conceded by the Applicant.
- 7 By counterclaim dated 23 October 2006 the Respondents claim payment of the sum of \$22,180.00 being the balance of the contract price and a claim for additional works in the sum of \$16,620.00. The variation claim was reduced to \$14,250.00 during final submissions, when various claims were withdrawn and the amount now claimed is \$17,910.00. Itemised particulars of the claim for variations were not included and were not provided until after lunch on the first day of a two day hearing when the Respondents filed Further and Better Particulars of the Variation Claim. Unfortunately, those particulars simply ascribe a 'lump sum' figure for each item claimed and no particulars are provided of the applicable material and labour costs.
- 8 Most of the counterclaim is comprised of a claim for payment for variations and additional works including what the Respondents say were rectification works made necessary by damage caused by other contractors and in particular the electrician. The variation invoice for \$3,036.00 has apparently been subsumed into the claim for variations.

The Applicant's claim

- 9 The Applicant claims what it says was the cost of rectification and completion works. It contends that the works were of an unsatisfactory standard and had to be stripped back and redone in their entirety. It relies on an expert report from Alasdair Macleod of BSS Design Group. Mr MacLeod inspected Unit 1 on 24 and 26 October 2005. At paragraph 9 of his report he states:

The results of this report indicate that from the original quotation this building was to be painted to an extremely high quality. This is highlighted by the fact that three coats were required generally (some project homes are built these days with a two coat system) and five coats were included to the interior woodwork. The Builders requirements can be considered as 'very high' particularly for the internal timber work.

The general standard of work both internally and externally is not anywhere near that which was quoted to the builder.

In addition to this, from a rectification perspective, much of the work is incorrect because it has not been prepared properly. With the

painting trade the issue of preparation is 'vital' because if surfaces are not prepared properly it is virtually impossible to work over these surfaces to obtain a satisfactory finish later.

In other words in order to remedy the situation it is virtually necessary to strip much of the work back to 'scratch' and start again. Needless to say some of the work that has been done by the current painter is obviously of value as, for example, many of the walls and ceilings are virtually satisfactory and in undertaking remedial work we would say that these would only require one coat. In fact technically some areas may require no coats. However from the builder's perspective if having another painter finish the job off we would suggest that the entire building needs repainting to one extent or another to all surfaces internally and externally.

- 10 It is apparent that some rectification works are required. Mr MacLeod gave clear evidence during cross examination that it was not necessary to repaint the walls and ceilings other than where they had been damaged/patched (because of damage caused by other trades) and therefore painting in the nature of rectification works was required. The painters had taken some photographs on the day their services were terminated which I am satisfied are indicative of the nature and extent of rectification works that are required. A number of lights and electrical switches, door handles and striker plates have been moved. In some instances there has been some plaster patching to the ceiling and walls although there are some photographs showing holes which had not been repaired at that time. Other photographs show incomplete filling where door handles/striker plates have been moved. I accept that it would be unreasonable, especially given the requirement that the painting be finished to a high standard, for the patches to be 'patch painted' and that it would be necessary in such instances for the whole area whether it be a wall, ceiling, door jamb, door or other area to be repainted.
- 11 Interestingly, and I did not hear any evidence in this regard, nor were any submissions made, I note that there were apparently no complaints about the standard of work to Unit 2 – the first unit painted.
- 12 I found Mr Gurvich to be less than frank in his evidence. By way of example, he was evasive in relation to questions about the patching and repainting occasioned by the moving of a number of light fittings. Until shown a photograph where three plaster patches were obvious, he maintained that only one light fitting had been moved in the kitchen. Although he denied that any other lights had been moved, when shown some photographs during cross examination, he agreed that some down lights which had initially been installed in the wrong location had been relocated to their correct position – a fine distinction as this resulted in patching of the ceiling.
- 13 He was similarly evasive in relation to questions concerning the need for rectification works to the doors. He denied that the door handles had been changed, although he later said they had been removed by the painters who

had lost many of the parts. Again he was shown some photographs of door snibs/striker plates which had clearly been moved necessitating patching of the timber. Although he initially suggested this had only occurred in respect of one door, when shown a second he reluctantly conceded that another had been moved and patched and was unable to say if they were the only two instances.

- 14 Although Mr MacLeod indicated he thought the works, if they had been carried out properly, were 80 or 90% complete when he inspected the property, Mr Gurvich said he considered only 20 % of the works had been carried out – this assessment was without any qualification as to the quality of the work.
- 15 I have some reservations about Mr McLeod’s evidence. Although he said that he thought the walls and the ceilings generally did not require repainting, he later said that he thought most of the work that had been carried out was worthless and had to be redone. I did not find this persuasive.
- 16 Mr Gurvich on the one hand maintained that the extent of painting required in many of the areas requiring rectification because of damage caused by other contractors was not as extensive as alleged by the Respondents, that a ‘touch up’ was all that would be required and that the cost of carrying out this work was minimal. He said it would not be necessary to repaint the whole of the ceiling where the lights had been moved yet on the other hand he persisted in his claim that the whole of the works were so bad they needed to be redone. I reject this and accept that it is good practice to repaint a whole wall/ceiling as the case may be when patching is done especially in a house where the required standard was very high.
- 17 Unfortunately, the only quotation for the rectification works was from Anmafil Painting Service Pty Ltd who did not carry out the rectification and completion works – these were carried out by Richard Alford Painting who do not appear to have provided a quotation although I note that their invoices total \$28,500 - the same price as quoted by Anmafil Painting. The quotation is not itemised nor is there any indication as to the respective costs of rectification and completion. It is clear that there was additional work over and above the contract works to be carried out even if one accepts that the whole job had to be redone. Invoices from Richard Alford Painting are the only evidence submitted by the Applicant in support of its claim. Although these are stamped with a ‘PAID’ stamp with payment details written in for each payment made, proof of payment was not otherwise tendered. Further, I note that \$10,000.00 was allegedly paid in cash. Mr Gurvich said that cheques were cashed so that the painter could pay his workmen in cash as an incentive for them to work weekends. However, these cash payments are recorded as having been made on various days of the week, and that no details of the ‘cash cheques’ have been recorded. I cannot therefore be satisfied on the evidence before me as to the amount that has been paid for these works.

- 18 Richard Alford was not called to give evidence and I have no alternative other than to apply the rule in *Jones v Dunkel* (1959) 101 CLR 29 and infer that his evidence would not have assisted the Applicant. I have no evidence as to the scope of the works carried out by Richard Alford Painting although I do know that some additional works were carried out because of the damage caused by other contractors and further that the concrete floor in the garage was sealed – Mr Gurvich estimated the cost of sealing the concrete floor at \$800 allowing \$200 for the sealing ‘paint’. When asked about how much he had paid the rectifying painter for the additional work, he suggested it was the Respondents’ obligation to work this out. This indicated a complete lack of understanding of the need to properly prepare and prove the Applicant’s case.
- 19 As counsel for the Applicant conceded in her final submissions, it is difficult to be satisfied as to the reasonable cost of carrying out the repainting works in the absence of any independent assessment. Mr McLeod gave evidence that the combined quotation of \$25,960.00 for the two units was in, his view, a ‘bit light on’ although he did not proffer an opinion as to what the reasonable cost of the works might have been. I have considered his evidence that the walls and ceilings were of a generally acceptable standard, noting that there were significant rectification works to be done to the walls and ceilings, including the cornices. Although he said that, because of the poor preparation, the works were of little value I am not satisfied on balance this is the case, particularly where there has been no complaint about the standard of the painting in Unit 2.
- 20 The photographs taken by Mr McLeod and exhibited to his report are not very clear. I did not consider it appropriate to consider the digital copies which he brought with him to the hearing in the absence of the Respondents having been given a reasonable opportunity to do so. In this regard I note that, initially, the Respondents were only provided with black and white copies of those photographs and it was not until early in the New Year they had colour copies, which were apparently sent to their solicitor by the Applicant’s solicitor on 22 December 2006 – the last business day before Christmas.
- 21 The photographs taken by the Chomaniuks, whilst confirming that there were extensive rectification/repairs works required because of damage caused by other trades, otherwise did little to assist the Respondents’ position that their works had been carried out in a proper and workmanlike manner. Many of the photographs demonstrate that whilst there may have been some damage caused by other trades, for example, the floor sander, that in a number of instances although they said they had completed various sections of the works, that they were in fact incomplete. There are also examples of what appears to be poor preparation, overspraying and the like. The series of photographs marked MC6 are illustrative of this.
- 22 The Chomanuiks attitude about failing to protect the newly polished floor, both of them giving evidence that they did not consider any protection necessary, was also surprising.

- 23 In the circumstances, on the limited evidence before me on behalf of the Applicant, and in the absence of any evidence from the Respondents as to their estimate of the cost of the works, I consider the sum of \$7,500.00 being a little more than half the Respondents' quotation for the works for Unit 1, assuming that 50% of the quotation for the total job was applicable to Unit 1, to be adequate compensation for any additional works arising out of the Respondents' breach of their obligations.

The Respondents' counterclaim

- 24 Evidence was given on behalf of the Respondents by Jan Chomaniuk and his son, Mark Chomaniuk. I note in passing that the First Respondent is identified on the tribunal record as John Chomaniuk and is variously described as John Chomaniuk and Jan Chomaniuk by the Respondents' solicitors. Although the Respondents seek to rely on the affidavits of each of their witnesses filed and served in accordance with previous orders of the tribunal, the Applicant seeks an order that Jan Chomaniuk's affidavit is inadmissible. It became apparent during cross-examination that various paragraphs in his affidavit and in Mark Chomaniuk's affidavit are identical. Jan Chomaniuk does not read English and had an interpreter assist him at the hearing. The Respondents' solicitor was called to give evidence and said that he had only translated part of the affidavit and he had subsequently left the room so that Mark Chomaniuk could complete the task. He was unable to say whether the affidavit had been translated or its contents simply explained to Jan Chomaniuk. On Jan Chomaniuk's own evidence, he signed the affidavit after its contents had been explained to him by his son, not translated. In the circumstances I give little weight to the contents of his affidavit, although I have had regard to his oral evidence.
- 25 Although the additional works which form the basis of the Respondents' counterclaim were set out in a schedule attached to the Points of Counterclaim, itemised particulars of the amounts claimed for each item were not provided until after lunch on the first day of the hearing. Mark Chomaniuk was the Respondents' primary witness. Although not entirely clear, it seemed from his evidence that these variation claims are calculated on 'today's' prices not on the prices applicable in 2004 when the works were carried out.
- 26 The variation claims are based on an hourly labour rate of \$45 per hour and include additional materials although no details of those materials are provided. Mr Gurvich gave evidence about what he considered to be a reasonable price for the variations that are conceded. Unfortunately his evidence as to what would be reasonable costs for any of the claimed variations is not supported by any calculations, or independent evidence. In relation to each of the variation claims I make the following comments and findings:

Unit 2

Cornices: \$1700, skirtings: \$2300.00, door frames: \$1600.00, window frames: \$1500.00

- 27 The Chomaniuks claim that it was their initial understanding that the larger decorative cornices were to be in the downstairs living and dining areas only, but that subsequently these were also installed in the upstairs bedrooms, hallway and living area. This is denied by the Applicant. Mr Gurvich gave evidence that the cornices in the upstairs area are not decorative.
- 28 The Chomaniuks also claim they were told by Mr Gurvich that the skirtings would be standard which they say means 10 cm flat skirting and that this was being replaced when they started the works. They also allege that they were told by Mr Gurvich that the window and door frames would be flat, as would the doors, and that these were changed at the time they commenced the work. Mark Chomaniuk gave evidence that when they discussed this with Mr Gurvich he indicated that they should just give him a bill for the extras at the end of the job, which they apparently did for Unit 2 on 29 August 2004 ('the variation invoice'). This invoice does not include any reference to a change in cornices, skirtings, window or door frames (architraves). It seeks payment for:

Internal and external painting at above address to specifications. All labour and materials included, Extras for first unit included are: garage walls (concrete + splash + repair), feature wall, man hole, boxed above kitchen benches + walls, general scratches & dints on door and walls (*sic*)

- 29 Following termination of the contract, the Respondents did not render any further invoices for variations. It seems that the first time many of these so-called variations was raised was when the counterclaim was filed in October 2006 some eleven months after the application was made, and approximately two years after the contract was terminated. On the evidence before me I cannot be satisfied that there was any change to the cornices, skirtings or architraves and the claim in relation to those items is disallowed.

Bulkheads in kitchen - \$1400.00

- 30 Mr Gurvich concedes that additional painting was required for the bulkheads above the kitchen cupboards. He suggests that an allowance of \$200.00 should be made for this, and further that he understood it was included in the variation invoice. I am not persuaded that this is a reasonable allowance.

Change of colour to all internal walls - \$1,770.00

- 31 This was withdrawn during final submissions when Jan Chomaniuk indicated some uncertainty about this claim.

Finish to outside verandah - \$250.00

32 Mr Gurvich gave evidence that he did not understand this claim, and neither Mark Chomaniuk nor Jan Chomaniuk were able to clarify it sufficiently to persuade me on balance that it should be allowed.

Painting of garage walls - \$500.00

33 This claim is conceded by the Applicant although Mr Gurvich disputes the amount claimed.

Additional repairs and rectification due to damage caused by others - \$720.00

34 It is conceded by the Applicant that repairs and rectification works were necessary although once again Mr Gurvich considers any allowance for those works should be minimal.

35 Mr Gurvich also concedes that there were other additional works carried out which were included in the variation invoice, but which, in my view, do not appear to have been included in the Further and Better Particulars of the Variation Claim including the painting of the feature wall and painting necessitated by the installation of the manhole.

Conclusion re Unit 2

36 In all the circumstances, it being difficult on the evidence before me to quantify the cost of the additional works, I find that the variation invoice is representative of a reasonable cost and that the amount set out in that invoice should be paid to the Respondents by the Applicant - \$3,036.00.

Unit 1

37 Unit 1 was the second unit to be painted and the painting works were incomplete when the contract was terminated. The photographs taken by the Chomaniuks confirm that extensive rectification/repair work was required because of damage caused by other trades. I am not satisfied that all the works the subject of this claim have been completed – it seemed to me in listening to the evidence of Mark Chomaniuk and Jan Chomaniuk that the cost of attending to many of the items had been calculated on the basis of what it would have cost had they been required to do the work.

38 I reject any suggestion by Mr Gurvich that these works could be carried out at a minimal cost, or that it would have been satisfactory to simply paint the area which had been repaired without painting the entire wall, ceiling, door, architrave as the case may be. The Applicant asserts that the painting work was to be carried out to a high standard and I am not persuaded that this standard would have been achieved with ‘patch painting’.

39 With respect to each of the claims for Unit 1 I make the following comments and findings:

Cornices - \$600.00

40 This claim was withdrawn during the hearing following Chomaniuk’s evidence that they knew that there were to be decorative cornices in unit 1.

Skirtings - \$400.00, window frames - \$600.00

41 For the reasons set out above in relation to Unit 2 this claim is disallowed.

Painting of garage walls

42 It is conceded by the Applicant that this work was carried out by the Respondents but Mr Gurvich said he thought the charge was excessive, and that, in his view, \$400.00 would have been a reasonable cost for the works. On balance, in the absence of persuasive evidence from either party, I find that \$550.00 was a reasonable cost which I will allow.

Conclusions re Unit 2

43 In relation to the claim for Unit 2 I therefore allow \$550.00.

Conclusion

44 As I understand the Respondents' claim, as clarified during final submissions, they also claim the balance of the contract price because they say the contract was wrongfully terminated by the builder. However, neither party, and in particular, the Respondents led any direct evidence in respect of this claim. Further, it is not clear from the Points of Counterclaim that such a claim is being made, or the basis on which it is made. Although it is alleged that the Applicant has wrongfully failed to pay the balance of the contract price, there are no particulars as to why it is entitled to such payment and the claim is disallowed. It is common ground that the works were not completed as at the date of termination. The Respondents

45 On the claim I therefore find the Applicant is entitled to damages in the sum of \$7,500.00 from which must be deducted the balance of the contract price: \$3,660.00. The balance payable by the Respondents to the Applicant is therefore \$3,840.00. On the counterclaim the Applicant must pay the Respondents the sum of \$3,036.00 for Unit 2 and \$550.00 for unit 1, a total of \$3,586.00. It is appropriate that this be set-off against the amount the Respondents must pay to the Applicant leaving a balance for them to pay of \$254.00.

46 I will reserve the question of costs with liberty to apply but once again draw the parties' attention to the provisions of s109 of the *Victorian Civil and Administrative Tribunal Act 1998*.

DEPUTY PRESIDENT C. AIRD