VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D271/2011

DOMESTIC BUILDING LIST

CATCHWORDS

Rectification works – duty to mitigate, whether builder entitled to rectify; Set-off – whether allowed; Costs – whether costs follow the event.

APPLICANT	Australian Profile Pty Ltd (ACN 096 139 150)
FIRST RESPONDENT	Lazare Pty Ltd (ACN 007 127 568)
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	2 June & 25 July 2011
DATE OF ORDER	3 August 2011
CITATION	Australian Profile Pty Ltd (ACN 096 139 150) v Lazare Pty Ltd (ACN 007 127 568) (Domestic Building) [2011] VCAT 1482

ORDER

1. The respondent must pay the applicant $3,361.73.
2. No order as to costs.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	Mr P. McDermott of Counsel
For the Respondent	Mr N Pateras, director, in person

REASONS

INTRODUCTION

3. The applicant is a supplier of light weight cladding and decorative products used in the construction of domestic buildings. It also provides rendering services. The respondent is a builder of domestic dwellings. Up until the middle of 2010, the applicant had contracted with the respondent on a number of occasions, supplying cladding, decorative mouldings and rendering services in relation to domestic dwellings constructed by the respondent.

4. In or around June 2010, the parties fell into dispute over work performed by the applicant on number of residential projects constructed by the respondent. This culminated in the respondent withholding payment in respect of two projects where the applicant had supplied products and services for the respondent.

5. On 4 April 2011, the applicant issued this proceeding, wherein it claims $7,902.64 [1] from the respondent. The applicant's claim is made up as follows:

   (a) Cade Grove

      (i) Final claim: $2,487.23

      (ii) Variation (**'VO1'**): $203.50

      (iii) Variation (**'VO2'**): $407

      (iv) TOTAL: $3,107.73

   (b) Coleman Street

      (i) Final claim: $4,794.91

   TOTAL: $7,902.64

6. Apart from the claims representing VO1 and VO2, the respondent does not dispute that the remaining amounts would have been due and payable had the applicant's work been completed satisfactorily.

7. In that regard, the respondent contends that it suffered loss and damage as a result of it having to make good work undertaken by the applicant in relation to two projects where the applicant was contracted by the respondent. Consequently, the respondent seeks to set-off so much of the applicant's claim commensurate with that alleged loss and damage. In particular, the amount sought to be set off is said to be as follows:

   (a) Lot 933 Cade Grove: $1,410.40

   (b) Lot 946 Cade Grove: $2,723.51

[1] The original claim was $4794.91 but was increased with leave of the Tribunal on the first day of hearing.

8. In addition, the respondent contends that it is yet to spend another $500 in carrying out further repairs to Lot 933 Cade Grove. Accordingly, the total amount sought to be set-off is $4,633.91. Consequently, $3,268.73 of the applicant's claim is admitted.

9. Therefore, the issues for determination are:

   (a) Was the applicant entitled to claim for VO1 and VO2?

   (b) Is the respondent entitled to deduct $4,633.91 by way of set-off from the amount otherwise due and payable to the applicant?

THE VARIATIONS

VO1

10. Mr McDermott of counsel appeared on behalf of the applicant. Mr Kuok, director of the applicant, gave evidence on its behalf. Mr Pateras, director of the respondent appeared and also gave evidence on its behalf. He also called Mr Hewlitt, building supervisor, to give evidence on its behalf.

11. Mr Kuok gave evidence that VO1 related to additional work undertaken by the applicant following an instruction given to vary the work that had already been completed. In particular, he said that that the applicant was contracted to fit polystyrene cladding to the fascia under a balcony of a home being constructed by the respondent. He said that the applicant's employee, Theo, was told by the respondent's site supervisor, Kevin McShane, to fit that polystyrene cladding, such that it protruded above the top edge of the balcony fascia. He contended that Theo was directed to do this because the respondent wanted to finish the balcony tiles so that they butted up to the edge of the polystyrene cladding, rather than being laid over the edge of that cladding.

12. Mr Kuok said that the work was done in accordance with that instruction but that subsequently, Kevin McShane told Theo *that it didn't look good and would not allow water to drain from the balcony*. Mr Kuok said that Theo had told him that Kevin McShane gave an instruction to reconstruct the installation of the polystyrene cladding such that it was lowered to allow the tiles to be laid over the top of the cladding edge. He said that that work was undertaken and as a result, the applicant issued a separate invoice in the amount of $407 dated 4 February 2010. Regrettably, Theo was not called to give evidence to verify Mr Kuok's evidence.

13. Mr Pateras gave evidence that the respondent disputed the invoice. He said that Kevin McShane had told him that no instruction was given to finish the polystyrene cladding above the balcony edge. Regrettably, Kevin McShane was also not called to give evidence.

14. Mr Pateras said that of all the projects undertaken by the applicant for the respondent, approximately 75 per cent had balconies. During cross-examination, he put to Mr Kuok that of all those homes that had

balconies, none were constructed with the polystyrene cladding being finished under the balcony tiles. Mr Kuok did not dispute that.

15. Mr Pateras gave evidence that it was common practice to lay tiles over the edge of the polystyrene cladding sheets because that would allow the balcony to drain. He said that he knew of no occasion where that construction methodology was not adopted by the respondent.

16. Given that neither Mr McShane nor Theo was called to give evidence, I must adjudge between two competing factual contentions, both of which are based on hearsay evidence. Ultimately, I prefer the evidence of Mr Pateras, it being the more likely scenario. In particular, I accept the evidence of Mr Pateras that it was common practice for the respondent to lay tiles over the cladding edge, given that this methodology allowed the balcony to drain. Accordingly, it seems unlikely that in those circumstances, a direction would have been given to alter that standard practice. I therefore disallow this aspect of the applicant's claim.

VO2

17. Mr Kuok gave evidence that VO2 related to additional rendering undertaken by the applicant that was not included as part of the original quotation. He said that the rendering was to a small section of blue board cladding over the front entrance of Lot 946 Cade Grove. He contended that the applicant's quotation did not include that area. Regrettably, the quotation was not produced.

18. Mr Pateras disputed that the rendering of the blue board was not covered within the scope of work contracted for. He said that the relevant plans showed rendering to that area. Regrettably, those plans were not produced.

19. Mr Pateras contended that it made no sense to exclude a small portion of work from the rendering works to be undertaken by the applicant because that would require the respondent to engage another rendering contractor to carry out that work. He argued that the scope of the work comprising the subcontract was set out in the relevant plans.

20. Having looked at the *Purchase Order* dated 1 June 2009 prepared by the respondent and given to the applicant before it commenced work on this project, it appears that the area above the front entrance was not mentioned as part of the area to be rendered by the applicant. In particular, although the area might have been depicted in the plans, there is no mention of that rendering work in the *Purchase Order*, notwithstanding that the document otherwise sets out the required rendering work in some detail.

21. Consequently, I find that the rendering of that area was not work covered by the original quotation prepared by the applicant. Accordingly, I find that the amount of $203.50 representing VO2 comprises a variation to

the original scope of work. Therefore, I allow this aspect of the applicant's claim.

22. Consequently, I find that the applicant is entitled to $7,495.64, absent any set-off for defective works.

SET-OFF CLAIM

23. Mr Pateras gave evidence that the respondent incurred expenses totalling $4,133.91 associated with rectifying works undertaken by the applicant at two properties constructed by it. In addition, Mr Pateras said that the respondent is liable to spend a further $500 to re-render a masonry pier, which he said had been inadequately render patched by the applicant. Mr Pateras contended that the respondent was entitled to set-off its loss as against the applicant's claim.

24. Mr Kuok gave evidence that the respondent should not be allowed to set off any amount because the applicant stood ready and willing to undertake rectification work at its cost but was denied an opportunity to do so by the respondent.

25. By contrast, Mr Pateras contended that the respondent was given an opportunity to carry out the repairs but had refused to do so. He called Mr Hewlitt who gave evidence as to a conversation that he had with Mr Kuok regarding the issue of defective workmanship. Mr Hewlitt said that he spoke with Mr Kuok regarding the rectification of work but *that the conversation got a bit heated and Joe* [Mr Kuok] *hung up*. Mr Hewlett said that following that conversation no further work was undertaken by the applicant, both in terms of new work or rectification work. As a consequence, the respondent undertook the rectification work itself.

26. Mr Kuok disputes Mr Hewlitt's account of that conversation. He reiterated that he had told Mr Hewlitt that the applicant stood ready and willing to undertake rectification work but that the respondent denied it that opportunity.

27. In my view, consideration as to whether the applicant was denied an opportunity to carry out repairs raises a threshold question. In particular, whether the respondent was under obligation to allow the applicant an opportunity to carry out the repairs, rather than undertaking that repair work itself. If the answer to that question is no, then the factual dispute as to access is of no real consequence. In other words, if the respondent was under no obligation to first allow the applicant the opportunity to repair, then issues regarding denial of access are of limited relevance. This is because the work undertaken by the applicant at the two residences was handed over as complete. This is not a situation where it is alleged that the applicant was denied access to complete the subcontracted works.

28. As a general proposition, once work has been handed over as complete, an innocent party is under no obligation that it must allow the contractor

an opportunity to make good defects in that work. In contracts of personal service, such as the contract between the parties in the present case, an innocent party is usually entitled to the cost of repairs in light of the principle of mitigation.[2] In other words, it is often the case that where the relationship between the parties to a contract of employment has fallen into dispute, it is unreasonable to expect the innocent party to consider an offer from the defaulting party to repair, absent any contractual term to that would otherwise impose such an obligation on the innocent party.

29. Having considered the evidence of Mr Hewlitt and Mr Kuok, I find that in the absence of any contractual term requiring the respondent to give the applicant an opportunity to repair, the relationship between the parties had deteriorated to such an extent that it cannot be said that the respondent had acted unreasonably in carrying out the repairs itself.

30. Further, I find that the contract between the parties did not contain a term requiring the respondent to give the applicant an opportunity to carry out the repairs before it undertook that work itself. In particular, neither party contended that the contract contained such a term, either express or implied. Moreover, there is nothing in the documents produced in evidence that indicate that such a right exists.

31. Further, there are no factors that suggest that such a right is to be implied in to give business efficacy to the agreement, as might be the case had the contract contained a term stipulating a defects liability period in which the applicant was to make good any defects in the works completed by it. In such a case, one might argue that the presence of a clause stipulating a defects liability period carries with it a right (as well as an obligation) to carry out repairs during that specified period.[3]

32. However, no such term is present in the contract between the parties. That being the case, I do not consider that the respondent was under any contractual obligation to allow the applicant an opportunity to carry out repairs itself. The applicant was required to carry out the works in a professional and workmanlike manner and within a reasonable period.[4] Once the works were handed over to the respondent as complete, which I find was the case, there was no ongoing obligation imposed upon the respondent to first allow the applicant an opportunity to make good defects before undertaking that work itself.

33. Accordingly, I find that the respondent is entitled to set off so much of its loss and damage as is proved to be caused by the applicant's breach of contract.

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[2] *Payzu Ltd v Saunders* [1919] 2 KB 581 at p 589.
[3] See for example the decision of Cole J in *Turner Corporation Ltd (Receiver & Manager Appointed) v Austotel Pty Ltd* (1997) 13 BCL 378
[4] Implied to give business efficacy to the agreement.

Brick pier

34. As noted above, Mr Pateras contends that the respondent is liable to spend a further $500 to re-render a masonry pier, which he said had been inadequately render patched by the applicant. He produced photos of that masonry pier to support his evidence. Those photos showed some distortion of the rendered surface, approximately 300 mm above ground level. However, no evidence was produced as to how that $500 was calculated or derived. Similarly, no expert opinion evidence was adduced to substantiate that the work was defective, in a structural or technical sense.

35. That said, I find that there is insufficient evidence to substantiate a finding that the render coat to the masonry pier is defective, although I accept that there appears to be some unevenness in textured finish. However, no attempt has been made by the respondent to repair that section of work, even though other rendering work completed by the applicant has been re-rendered by the respondent. One might infer from that fact that the respondent (and its respective client, homeowner) are not overly troubled by the aesthetic appearance of the finished texture finish, given that this work was done more than 12 months ago. That being the case, I am not satisfied that the aesthetic finish is so bad as to constitute defective workmanship. Therefore, I do not accept that $500 or any amount is to be set-off in respect of this particular item of work.

Lots 933 & 946 Cade Grove

36. Mr Pateras gave evidence that the respondent had incurred the following expenses in rectifying work completed by the applicant:

(a) Lot 933 Cade Grove:

(i) Painting: $200

(ii) Paint: $108.90

(iii) Labourer: $137.50

(iv) Scaffold: $964

TOTAL: $1410.40

(b) Lot 946 Cade Grove:

(i) Roof plumbing: $185.15

(ii) Carpentry: $385

(iii) Rendering: $2,090

(iv) Cladding materials: $63.36

TOTAL: $2,723.51

37. Mr Pateras produced invoices and a quotation to verify that expenditure. In addition, he called Mr Hewlitt who gave evidence as to the rectification work carried out by the respondent.

38. I am satisfied based on the evidence of Mr Hewlitt and Mr Pateras that the respondent incurred expenses in rectifying works undertaken by the applicant as set out in paragraph 36 above. Although there is no expert opinion evidence verifying that the works were defective, I consider that on the balance of probabilities the works were defective, given the rectification work undertaken by the respondent. In other words, the fact that rectification work was undertaken leads to a strong inference that the work was defective. Further, there is no contrary evidence. Mr Kuok did not contend that the work performed by the applicant did not require rectification. His objection to the set-off claim was limited to an argument based on the applicant being deprived of the opportunity to rectify the work itself. As I have already found, that argument is without substance given the nature of the contractual relationship between the parties.

39. Turning then to the question of quantum. Mr McDermott submitted that there was insufficient evidence before me to be satisfied that the invoices and quotation produced by Mr Pateras adequately represented the rectification work carried out by the respondent. He cross-examined Mr Pateras for some time over the expenditure said to have been incurred by the respondent. He submitted that there was no evidence that the invoices and quotation were ever paid. Further, he argued that an adverse inference should be drawn because none of the contractors or suppliers alleged to have carried out the rectification work or supplied materials for that work were called to give evidence in the proceeding. Finally, he argued that some of the invoices were illusionary, in that they did not adequately describe the rectification work and could easily be attributed to other work undertaken by the respondent.

40. Mr Pateras gave evidence in relation to each of the invoices and the quotation produced by him. He said that all of the invoices had been paid by the respondent. He confirmed that the invoices, or the relevant part of the invoice relied upon, was solely related to the rectification work undertaken by the respondent. In particular he said:

    (a) The invoice from Dulux in the amount of $108.90 represented the cost of materials (paint) required to cover over patches in the render work undertaken by the respondent. This was not challenged by the evidence of Mr Kuok.

    (b) The invoice from Alex Lambouras in the amount of $200 represented the cost of painting labour at a rate of $40 per hour over a period of five hours. This was not challenged by the evidence of Mr Kuok.

(c) The invoice from Partex in the amount of $2,090 represented the cost of re-rendering work undertaken at Lot 946 Cade Grove. Again, the scope of the work set out in that invoice was not challenged by Mr Kuok. Mr McDermott submitted that the scope of the work represented work relating to two dwellings, given that two lot numbers had been handwritten on the invoice. Mr Pateras said during cross-examination that he was unaware who wrote on the invoice but that the handwritten reference to *Lot 950* was of no consequence because the respondent had not constructed any dwelling at that lot number.

(d) The quotation from Raven in the amount of $964 was said to be a cost of hiring and erecting scaffolding to undertake rectification work at Lot 933 Cade Grove. Again, Mr Kuok did not challenge that such scaffolding was required.

(e) The invoice from Visgard Pty Ltd in the amount of $137.50 was said to represent the amount charged by the labourer required to assist the painter in moving the scaffolding.

(f) The part of the invoice from Timbersmart Constructions in the amount of $385 was said to be the cost of the carpenter engaged to remove the polystyrene cladding from the front balcony of Lot 946 Cade Grove and reinstate the same. I consider this to be a reasonable sum, when compared to the original Purchase Order.

(g) The invoice from Ezyclad in the amount of $63.36 was said to be the cost of new polystyrene cladding sheets. This amount was not challenged.

(h) The invoice from Hi-Tech Plumbing (Aust) Pty Ltd in the amount of $185.15 was said to represent the cost of removing and reinstating capping in order to replace the polystyrene cladding at Lot 946 Cade Grove. This was not challenged by the evidence of Mr Kuok.

41. Having regard to the evidence of Mr Pateras, I find that the respondent incurred the expenditure as described in paragraph 40 above and that such expenditure represented the reasonable cost of repairing the work undertaken by the applicant. Consequently, I allow the respondent's set-off claim in the amount of $4,133.91.

42. I will therefore order that the respondent pay the applicant $3,361.73, being the difference between the amount of the applicant's claim that I have allowed ($7,495.64) and the amount that the respondent is entitled to set-off against that claim ($4,133.91).

COSTS

43. At the conclusion of the hearing on 25 July 2011, Mr McDermott submitted that irrespective of what finding I made in relation to the

respondents set-off claim, an amount of money will still be awarded to the applicant in respect of its claim. He said that in those circumstances, costs should follow the event and that the respondent be ordered to pay the applicant's costs of and associated with the proceeding.

44. Mr McDermott referred me to two VCAT authorities in support of his submission.[5] Having read both authorities, I do not agree that these authorities support his argument. Indeed, there is nothing in the dicta of those authorities which support an order being made that costs should follow the event. Further, I am of the view that such an order would be contrary to s 109 of the *Victorian Civil and Administrative Tribunal Act* 1998. That section states, in part:

> (1) Subject to this division, each party is to bear their own costs in the proceeding.
>
> (2) At any time, the Tribunal may order that a party pay all or a specified part of the costs of another party in a proceeding.
>
> (3) The Tribunal may make an order under subsection (2) only if satisfied that it is fair to do so having regard to -…

45. Subsection (3) then sets out a number of factors which the Tribunal can take into account in exercising its discretion to make an order for costs. In my view, none of the factors set out under ss (3) are present in this proceeding. There is no suggestion that the respondent failed to comply with orders of the Tribunal, caused an adjournment, attempted to deceive the applicant, vexatiously conducted the proceeding or was responsible for prolonging unreasonably the time taken to complete the proceeding.

46. Further, there is nothing to suggest that the nature or complexity of the proceeding would justify the making of a costs order. Indeed, it seems to me that the reason why the proceeding was unable to be concluded on the first day, in part, results from the fact that the applicant amended its claim during the course of that first day of hearing. Consequently, in order to afford procedural fairness to the respondent, the matter was adjourned to allow the respondent time to consider the additional claim made by the applicant. As I have indicated, I do not believe there is anything out of the ordinary associated with this proceeding that would justify an order being made that the respondent pay the costs of the applicant and I refuse to make such an order. The applicant's application for costs is dismissed.

SENIOR MEMBER E. RIEGLER

[5] *Arrow International Australia Pty Ltd v Indevelco Pty Ltd* [2006] VCAT 1485; *Age Old Builders Pty Ltd v Swintons Pty Ltd* [2006] VCAT 870