

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D82/2006

CATCHWORDS

Claim for work done – set-off asserted for cost of rectifying defects in the work – no notice of defects to tradesman before rectification – no opportunity to assess genuineness of claims – need for care that claim genuine – claim for interest – nature of

APPLICANT	Robbie P. Berry
RESPONDENTS	Tony Summerfield, Stephanie Summerfield
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	19 July 2006
DATE OF ORDER	21 July 2006
CITATION	Berry v Summerfield (Domestic Building) [2006] VCAT 1478

ORDER

1. Order the Respondents to pay to the Applicant the sum of \$14,678.85.
2. Further order the Respondents to pay to the Applicant \$2,300.36 damages in the nature of interest.
3. The counterclaim is struck out.
4. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant

Mr R. Lombardi of Counsel

For the Respondents

Ms S. Kirton of Counsel

REASONS

The proceeding

- 1 In this proceeding the Applicant Mr Berry claims an amount of \$30,475.95 for carpentry work and materials he supplied in the construction of a luxury two unit development built by the Respondents as owner-builders at 7 and 9 Dendy Street, Brighton.
- 2 The Respondents do not dispute the amount claimed by the Applicant except to say that the Applicant's work was defective, that they incurred substantial sums in rectifying it and seek to set these sums off against the Applicant's claim.

The hearing

- 3 The matter came before me for hearing on 17 July 2006. Mr Lombardi of Counsel appeared for the Applicant and Miss Kirton of Counsel appeared for the Respondents. I heard evidence from the Applicant and from his building expert, Mr Bellew. For the Respondents I heard from the First Respondent, Mr Summerfield, from a Mr Specchio, his site manager who oversaw the construction, from his expert witness, Mr Setford and from the rectifying carpenter, Mr McKay. The hearing proceeded over two days with the afternoon of the first day being taken up by a view at No. 7 Dendy Street.
- 4 Generally, a defects case will turn upon the evidence of the expert witnesses but in this case, by the time the experts arrived on the scene the defects had been rectified by Mr McKay. Their evidence was therefore of limited utility. I did not form an unfavourable impression of any of the witnesses.

No opportunity to inspect

- 5 Where defects are alleged, it is very difficult for the workman against whom the allegation is made to meet it when he has not been advised of the existence of the alleged defects and has had no opportunity to inspect them himself or have them inspected by an expert witness. In such circumstances the Tribunal should proceed with great care to ensure that the claim is genuine. However in this case I was impressed by the evidence of Mr McKay. His manner in the witness box appeared to be detached and dispassionate. He answered questions clearly and concisely with apparent care and in a measured manner. He produced a costing of the rectification works that he had prepared, based upon records that he kept at the time the work was done.
- 6 The other evidence for the Respondents was that of Mr Summerfield and Mr Specchio. Although he has had other projects built as an owner-builder, Mr Summerfield disclaimed any building expertise. Mr Specchio is a registered builder but although he says that on a number of occasions he drew to Mr Berry's attention items that he thought needed attention he did not notice the matters that were later rectified by Mr McKay. Both he and

Mr Summerfield acknowledged that they had not, while Mr Berry was employed, otherwise complained about the quality of his work. When queried as to whether any list of defects had been compiled while Mr Berry was on site Mr Specchio produced a list which turned out, on further examination, to be simply a list of tasks that needed to be completed on site. There is nothing on this document that I can see to indicate that the author of the list believed there was any rectification work to be undertaken by Mr Berry or that his work was deficient.

- 7 Despite this, where a carpenter undertakes work as such he undertakes to carry it out with all reasonable care and skill appropriate to the trade qualification he professes to have. It is no answer to say that another person, in this case Mr Specchio, ought to have detected the defects in his work. It would be relevant to the quantum of damages if bad work that ought to have been apparent is covered up. In such a case it may be argued that the damages should be confined to what it would have cost to rectify the work at the time it ought to have been noticed. But in this case, Mr Specchio says, and subject to what follows I accept, that he was told by Mr Berry that the walls were ready for plastering and I am not satisfied that he knew or ought to have known that work was defective before Mr Berry left the site.

The contract and its termination

- 8 The agreement was an informal one. Mr Berry had been employed by the truss company to erect the framework for the Units and when he finished, he accepted an invitation from the Respondents to do further carpentry work on an hourly basis. He was to be paid \$35 per hour for his own labour and also for that of his employee carpenter and apprentice. Considering that it included the labour of the apprentice, it seems on the evidence that this was a reasonable rate. The plans he was given did not show all of the work required and Mr Berry and his employees carried out work as directed by Mr Specchio. Invoices were rendered monthly although by the end of Mr Berry's involvement, payment was considerably in arrears. No satisfactory explanation was given for this.
- 9 The parties got on well together although towards the end of Mr Berry's involvement, Mr Summerfield was becoming impatient that Mr Berry was devoting time to other jobs. Some of these were for Mr Specchio.
- 10 On the evening of Friday 3 December 2004, Mr Berry's tools were stolen. He rang Mr Specchio on the following morning, Saturday, and told him that he would need to make arrangements for other tools in order to continue work. It was agreed that he would meet Mr Specchio on site on the following Tuesday. He was not able to do so until about 10.00 a.m. on that day due to sourcing the necessary tools. When he arrived, he was informed by the site labourer, Peter, that he should contact Mr Summerfield. When he did so he spoke with both Mr Summerfield and Mr Specchio who was with him at the time. An arrangement was reached whereby Mr Berry

would cease work but would be paid for everything that he had done to date.

Claims for payment

- 11 Thereafter Mr Berry sent invoices and made numerous telephone calls to the Respondents to secure payment. Finally, in a letter to Mr Berry from Mr Specchio dated 18 January 2005, the Respondents alleged that the work was defective and that all costs of rectification would be deducted from monies outstanding. Attempts were made to reach a settlement of the dispute with the assistance of Mr Bellew but these were unsuccessful. A list of the alleged defects was requested and, in response, the list produced by Mr McKay at the hearing was prepared. This proceeding has now been brought and the Respondents have counterclaimed for damages for defective workmanship.

The issues

- 12 The dispute concerns whether the Respondents' claims that the work is defective are genuine and if so, the cost of rectifying the defects. Essentially, the Respondents' case relies upon Mr McKay and fortunately for them he was an impressive witness.

The evidence

- 13 Mr Berry said that his work was done properly and suggested that there were many other trades on site which might have damaged his work. In particular, he pointed out that the air conditioning contractors had cut holes in walls and installed ducting in bulkheads that he had constructed which might have damaged the bulkheads. Some of the defects related to adjustment of a skirting board made from MDF, which is a manufactured timber. The suggestion was that the use of a mortar screed to lay the tiles in some areas of the house might have caused the MDF to deform due to the water in the mortar. Although Mr McKay acknowledged that it is possible that water can cause MDF to deform, the uncontradicted evidence of Mr Specchio was that the MDF was not laid directly on the mortar but above it to take account of the thickness of the tiles. Further, uneven skirtings were also observed in other rooms where carpet had been laid and there was no mortar screed. I am not satisfied that the unevenness that was seen in the skirtings was due to this cause. No water damage to the MDF skirtings that were not repaired was pointed out to me on site.
- 14 In a number of instances the walls had to be straightened where they were next to a piece of cabinetwork because the cabinet was square and the wall was not. Mr McKay acknowledged that the defect in the wall might not have been apparent until such time as the cabinet was in place but it nonetheless should not have been defective. It was suggested that the cabinetmaker ought to have made the cabinets to fit into the space the carpenter had constructed. I accept from Mr McKay's evidence that the

cabinetmaker ought to make the cabinets square and that if there is a discrepancy found to exist it is the wall that ought to be adjusted.

- 15 One of the complaints was that a stud wall constructed between the outside stringer of the spiral staircase and the floor in the hallway was not perpendicular. Mr Berry said that he had constructed the wall so that the inside face of it sat behind the stringer so as to leave the stringer exposed. Mr McKay has constructed a new wall which covers the stringer. Nevertheless he said, and I accept, that the reason the wall had to be reconstructed was that the studs from which it was made were not perpendicular and that the curve on the floor did not follow the curve on the stringer above it. He demolished the wall built by Mr Berry and reconstructed it using a curved sole plate made of plywood which followed the curve of the stringer.
- 16 From the description of the defects, which was given by Mr McKay in considerable detail, I am not satisfied that it is likely that any of these were caused by other trades. The list Mr McKay prepared was distributed to the parties and had a numbering system. I shall not transcribe it in these reasons. In each instance, subject to the following comments, I accept Mr McKay's evidence that the work in question was required in order to rectify defective workmanship of Mr Berry and his employees. The exceptions to this general statement are as follows:
 - a In two instances, Mr McKay has charged \$85.00 for replacing a cavity slider track. Mr Berry was employed to provide labour only. The materials he purchased were charged at cost to the Respondents and the slider track in each instance came with the sliding door unit. It was replaced because Mr McKay thought it was a cheap track that might cause problems later. I do not think this is defective workmanship on behalf of Mr Berry and the two items at \$85.00 will not be allowed.
 - b The wall above the stair to the basement was out of plumb and not in line with the kitchen wall on the opposite side of the passage. The sole plate was also not affixed to the slab. There were problems with the size of the slab in this area and also problems with accommodating the waste pipe from the toilet immediately behind the wall. According to Mr Berry's evidence which I accept in this regard, Mr Specchio had not determined how he wanted this finished. I regard this as being incomplete work. The walls ought not to have been covered with plaster until such time as construction was completed. Accordingly, this item will not be allowed in either unit.
 - c There were a number of duplications in Mr McKay's list which were identified during the hearing and have been deleted. Rectification work that he carried out to the basement and the sauna has also not been claimed.

Cost of rectification

17 Mr McKay gave evidence that his charges were based on a labour rate of \$40.00 an hour plus GST. Both experts agreed that this was a reasonable rate and I accept his charges for carrying out the various items of work. I have added these up to \$10,747.60. There was no expert evidence that the time claimed for rectification was unreasonable.

Cost of plastering

18 In addition, the Respondents claim the cost of replastering the work that Mr McKay rectified for which they have produced an invoice of \$6,160.00. The author of this document was not called to give evidence and so all I have is what the document says, which is as follows:

“Re 9 Dendy Street Brighton – units x 2

Rectification works to stairs, bulkheads in kitchen. P50 around doors and externals of cupboards. Replastering is required, after framework repair by carpenter.

Materials and labour.

Unit 1 \$2,800.00 plus GST -	\$3,080.00
Unit 2 \$2,800.00 plus GST -	\$3,080.00
Total	\$6,160.00”

19 This makes no reference to walls but it is apparent from the other evidence that the claim for plasterwork is in regard to all of the repairs carried out by Mr McKay, which included removal of plasterwork from walls. Since I have not allowed the plasterwork relating to the wall in the stairwell to the basement in either unit, an appropriate deduction must be made. Unlike some other areas of work, this is an entire wall in each case, albeit a small one. In other areas, only small sections of plaster had to be replaced. It is unclear whether there was any plasterwork to do down in the basement where none of the rectification cost has been claimed although there is no mention in Mr McKay’s list concerning the removal of any plaster there. I must make some deduction and in the absence of any better evidence I will allow $\frac{3}{4}$ of the plastering claim, which amounts to \$4,549.50.

Cost of rectifying unrectified items

20 The Respondents also claim the cost of rectifying the remaining items that Mr McKay did not rectify. Mr Setford has assessed the cost of rectification at \$6,800.00. He said that rectification would require 2 carpenters on site for 4 days followed by a plasterer for 3 days with painting to follow plus protective coversheets and a clean on completion. This relates solely to No. 7 Dendy Street, since No. 9 has been sold. I was shown the outstanding items during the site inspection and Mr Summerfield said that, although not happy with them these were the ones that they elected to live with rather than spend money to rectify.

21 They related to irregularities in angles of some short lengths of skirting board. Some were noticeable others were almost imperceptible. The Respondents did not elect to fix them at the time. To repair them now would, according to Mr Setford's evidence, which I accept in this regard, amount to the figure that he has calculated but there is no evidence as to what it would have cost to repair them at the time they were first discovered nor is there any evidence as to what it would have taken to have repaired them. Instead, the Respondents have elected to proceed with the tiling of the floors and painting so that the irregularities are now effectively set in concrete. They are not going to be repaired but I think I should make some allowance for the fact that the work was not done in a proper and workmanlike manner. In the absence of any better evidence than I have I will allow an amount of \$500.00.

Conclusion

22 The total of these figures is \$15,797.10 and that amount will be allowed. Since the amount sought by the Applicant is considerably more, the two sums will be offset and the net amount of \$14,678.85 will be ordered on the claim.

Interest

23 There is a claim by the Applicant for interest in the prayer for relief. The power to award damages in the nature of interest in domestic building cases is conferred on the Tribunal by s.53(2)(b)(ii) of the Domestic Building Contracts Act 1995. An award of such damages is made where it is considered by the Tribunal to be "fair" within the meaning of s.53(1). In this case the Respondents have withheld an excessive sum of money on account of the defects complained of equivalent to almost double the set-off awarded. I think it would be fair to award damages to the Applicant for the loss of use of the excess money retained. Section 53(3) provides that, in awarding damages in the nature of interest, the Tribunal may base the amount awarded on the interest rate fixed from time to time under section 2 of the Penalty Interest Rates Act 1983. There is no evidence to suggest that some other rate would be more appropriate and so I will adopt that. The rectification work ceased on 14 February 2005 by which time the Respondents ought to have been able to make some reasonable assessment of the amount to be retained. I will calculate the interest from that date until the date of judgment. That amounts to 520 days at 11% per annum on the amount awarded, which I calculate to be \$2,300.36.

24 Costs will be reserved.

SENIOR MEMBER R. WALKER