VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D1049/2010

CATCHWORDS

Domestic Building List; Extension to dwelling house; Claim for damages for alleged defects by owner; Counterclaim by builder; Damages awarded for some defects but not in cases where reconstruction work unreasonable in circumstance; Counterclaim dismissed.

APPLICANT	Kerrie Bourke
RESPONDENT	Capital Building Contractors Pty Ltd (ACN 107 033 689)
WHERE HELD	Melbourne
BEFORE	M.F. Macnamara, Deputy President
HEARING TYPE	Hearing
DATE OF HEARING	23 May 2011
DATE OF ORDER	8 June 2011
CITATION	Bourke v Capital Building Contractors Pty Ltd (ACN 107 033 689) (Domestic Building) [2011] VCAT 1086

ORDER

1 The respondent must pay the applicant damages in the sum of $14,310.00.

2 The respondent must carry out rectification works relative to items 6, 8, 13, 14-17, 20 and 22 in the attached reasons for decision.

3 Counterclaim dismissed.

M.F. Macnamara
Deputy President

APPEARANCES:

For Applicant	In person
For Respondent	Mr Peter Harnishmacher, Director

REASONS

BACKGROUND

1 Twelve Newton Street, Surrey Hills was a Californian Bungalow with a more recent extension at the rear. In 2009 the property was in a poor condition. Its owner Ms Kerrie Bourke, the applicant in this proceeding entered into a contract with Capital Building Contractors Pty Ltd, the respondent, to demolish the old extension and replace it with a ground floor extension consisting of a master bedroom, kitchen, laundry, rumpus, lounge, a study, deck, pergola and bathroom. Plans had been prepared in September depicting the work to be carried out. The contract price inclusive of Goods and Services Tax was under the contract, $358,155.

2 The contract documents prepared by the builder assumed that in addition to Ms Bourke, her husband Mr Peter Bourke would also be a party. Mr Bourke declined to sign the contract. He said he was *'a man of straw'*. When I enquired of Mr Bourke during the hearing what he meant by this phrase, specifically was he for instance an undischarged bankrupt, he said that he is a chartered accountant by profession and had hopes and expectations of being admitted to partnership in his firm. He therefore avoided owning any property in his own name. I took that to mean that were a judgment entered against him and his partners in the future, there would so far as his family was concerned, be no property which could be seized for the benefit of creditors.

3 Demolition of the old extension commenced before Christmas 2009. According to Mr Peter Harnishmacher, the principal of Capital, the demolition included in addition to the removal of the extension areas themselves, removal of all larth and plaster walls and the demolition of two chimneys. He said that Capital straightened and reinforced the walls of the remaining structure. He continued:

> Two main supporting walls had to be reinforced and packed out to bring them in line with an earlier rear extension which was also out of square.

4 Once the old extension was demolished a sub-floor area was exposed to the elements. Ms Bourke said that there was a lot of rain around Christmas 2009. Mr Harnishmacher said:

> The existing particleboard did not handle the rain on it at the time and went from marginal to disintegrating on a matter of a few weeks. Particleboard [is] normally capable of lasting the elements for a number of months.

This meant that this existing sub-floor structure could not be used as part of the renovation. Mr Harnishmacher said:

> To ensure a good quality result the existing faulty flooring had to be removed, joists straightened, packed and new particleboard flooring placed and sanded ready for the new KDHW stripped flooring.

5 Mr Harnishmacher on behalf of Capital told the Bourkes that the cost of these additional works were for their account. Mr Bourke who took a prominent role in the management of the contract even although he was not a party to it was of opinion that the damage to the old floor occurred because Capital failed to take prudent action such as protecting it with tarpaulin. He said the destruction of the old floor was Capital's fault and Capital should pay for it. Capital stopped work. The Bourkes then threatened to take the dispute to this Tribunal. In an e-mail dated 20 January 2010 Mr Harnishmacher after complaining of the Bourkes' refusal to *'discuss our options on site'* said:

> Capital is prepared to make the following offer. We will replace faulty particleboard at our expense. Please advise if you are happy to proceed on this basis.

Ms Bourke accepted this proposal and no proceeding was commenced at this Tribunal at that time.

6 The plans referred to in the contract had been prepared in September 2009. Amended plans were prepared in March 2010. The Bourkes had second thoughts as to a number of matters and variations were raised. Without canvassing the detail at this stage, the Bourkes saw these arrangements as entailing them being charged the cost of the extra work plus a builder's margin of 30%. Mr Harnishmacher on behalf of Capital felt that his company was being *'messed about'* and that the additional amounts agreed upon for variations were not an adequate compensation for the disruption which occurred in the progress of the building.

7 Both the September 2009 plans and the March 2010 plan provided for a glazed area of six panels at the rear of the house with a swinging door as part of the complex. The Bourkes elected to have sliding doors in lieu. By about April one particularly important change to the project was under discussion. The contract initially contemplated that a pergola would be included. After signing the contract Ms Bourke said she became aware that her child was hypersensitive to mosquito bites. Therefore the family would not have any good use for a pergola where their child might suffer mosquito bites. The proposal then was to convert the pergola into a sunroom which would be entirely enclosed and protected from mosquitoes. This arrangement was ultimately agreed upon. According to Mr Harnishmacher the standard windows which his company purchased from an organisation called *'Trend'* once converted to sliding door rather than swinging doors were too large to accommodate the six panel format provided for in the September plans and in the March plan. He said that during the discussions

as to converting the pergola into a sunroom the Bourkes had the opportunity to inspect the five panel windows which had already been delivered to the site and installed once already. He says that they therefore agreed to the five panel format which was ultimately installed in a different location with the pergola converted to a sunroom. As will appear the Bourkes complain about this installation because it is:

(a) not in conformity with the contract plans; and

(b) asymmetrical.

8 No doubt partly or as Mr Harnishmacher would I think have it, wholly by reason of the variations initiated by the Bourkes, 2010 was drawing to a close without the project having been completed. Given the relatively modest scope of works this was perhaps surprising. The Bourkes said that they were hampered by the absence in the building contract of a clear date for completion.

9 By late October they sought to force the issue. They sent an e-mail to Capital noting *'the kitchen was in and the floors have been polished'*. They continued:

> We are moving in next Tuesday. Accordingly could you please return the keys to us and advise us the days when tradesmen will be at the house so that we can arrange access for them.

10 By this time the Bourkes had become disenchanted with Capital. They wanted to have some trades employed directly by them carry out some of the finishing work. Mr Harnishmacher was resistant to this because he said that with respect to trades such as plumbing and electrical where final certificates had to be given there would be difficulty in obtaining a certificate for work where different tradesmen had been employed in its execution. He said warranties might also be voided.

11 Mr Harnishmacher said he believed the Bourkes had over committed themselves and that the pressure which was being put on his company was in response to their own financial embarrassment and inability to meet further rental costs. For their part the Bourkes said that they had been involved in a number of other renovations with other builders and they would happily have removed Capital from the project and engaged another builder or other contractors to complete.

12 The contract provided for the painting, internal and external to be arranged by the Bourkes' own contractors. It was not part of the scope of works for Capital. This was provided for in Item 20 of the specifications under the contract. That item included the following note:

> (commencement of any internal and/or external painting or staining works by owner prior to completion is an acceptance of all works being completed as per contract. (Unless previously agreed in writing with builder).

13 A further note stated:

> It is recommended that painting of the contracted works, should be completed within eight weeks of completion of extension.

14 There was a handover in November 2010. Some internal painting work has been done but no external painting work has been done. The result is that the external weatherboards fitted as part of the extension remain unpainted, protected by nothing other than whatever preliminary seal had been applied to them before their fixation.

15 The Bourkes resisted paying the final instalment on the building. They say that their resistance was based on *bona fide* complaints about defects. Mr Harnishmacher says that the resistance was merely tactical because they had in his view over committed themselves. On 17 December 2010 Ms Bourke filed an application in the Tribunal seeking an order that $7,339.78 of the final invoice be *'set aside'*, that is, that a finding be made that those moneys were not payable by her to Capital. She also sought an order for Capital to pay her $2,500 as costs of the rectification work. The grounds on which these claims were made related to a number of matters some of which are no longer issues, some of which have been resolved by the parties since and some of which continued to be in dispute.

16 The total amount claimed in the initial application was $9,839.78. As a result it was classified in the Tribunal's Domestic Building List as a *'small claim'* and listed for summary hearing. When the matter came on for hearing on 18 February 2011 Ms Bourke sought to modify her claim. Senior Member Walker adjourned the matter to further hearing on 23 May 2011 and it came on for hearing before me. Mr Walker also ordered the parties to file and serve expert reports by 15 April.

17 Capital filed and served a counterclaim.

APPLICANT'S CLAIM

18 Ms Bourke now claims damages relative to some 28 items based on a building report by Mr Vietz who describes himself as a building consultant. Capital relies on a report from Mr Jeff Van Hoven. Mr Harnishmacher on behalf of Capital said that Mr Van Hoven was a *'registered building inspector'*, he said Mr Vietz was not and therefore no credibility should attach to the Vietz report.

19 Regrettably, neither party made her or its expert witness available for examination or cross-examination. It follows that there are a number of respects in which I am not entirely clear as to the purport of the reports. Much background and explanation which would have assisted me in making my determination is unavailable. Given the absence of the expert my task in determining the proceeding has been made correspondingly more difficult. The *Building Act* 1993 provides for registration of persons in various classes as building practitioners and also as building surveyors.

It does not so far as I can make out provide for registration of individuals as building inspectors. I turn now to the various items.

1 Bathroom Tiling

20 This claim relates to what Mr Harnishmacher said was the children's bathroom. According to Mr Vietz the *Building Code of Australia* 2010 requires:

> A fall in the tiling to the floor waste of 1:80 to 1:60 within the shower enclosure. On site measurements show grades at the front of the shower as 1:140 to 1:190 none of the grades at the front of the shower is greater than the minimum 1:80.

21 Further, he said:

> The floor up to 1.5m from the open shower shall fall to the waste. Measurements show tiles below the level of the shower opening splashed water will not drain towards the shower.

22 Mr Van Hoven said that the Vietz report was *'incorrect'*. He said:

> A water test (10 mins) on site showed the water stayed within the shower screen area, without running onto the floor. The BCA 2010 (applicable at contract) Clause 3.8.1.10 notes the RECOMMENDED fall between 1:60 and 1:80 and then goes on in sub-section (5) to say that if it is not possible water should not affect the health and amenity of the area. The BCA 2010, Clause 3.8.1 definition of an unenclosed shower area is 1,500 mm from the showerhead wall.

23 Mr Van Hoven's conclusion and recommendation is:

> The current tile floor directs water to the waste, <u>just</u> [emphasis added]. If any splashing comes from the shower to the outside floor it is not an issue because the floor is waterproof within 1500mm from the raised wall and thus not a problem. The building regs allow 1500mm of waterproofing from the rose to the floor and walls without even fitting a shower screen. It should be noted this rose is very large and powerful not water saving as most are in today's new energy rated homes.
>
> Splashing can occur from a bath onto the floor and this is acceptable, so I see no difference with minimal splashing from a part enclosed shower if the floor is waterproofed (tiled). Note the shower floor tiles were laid on an existing floor and frame and were not priced to remove and alter the floor frame underneath.
>
> As the water does run towards the waste plug, I recommend fitting a water saving showerhead and a small, low meet strip fixed to the tiles at the shower and floor junction. Then conduct further tests to see if the water runs outside the shower. If excessive water goes onto the floor then, I suggest further waterproofing works be completed.

24 Mr Bourke said that it was Mr Harnishmacher who suggested that the shower enclosure had a screen covering off half the front rather than a door which completely enclosed it. Mr Harnishmacher said that the Bourkes had

tampered with the shower rose which had been installed by Capital's plumbing contractor and removed the water saving elements. Mr Bourke denied this. Mr Bourke showed me a short video sequence on his mobile phone which depicted the shower in question with water flowing outward.

25 Mr Harnishmacher said that the report from Mr Van Hoven completely exonerates the installation by Capital's plumber. He said the findings made by Mr Vietz in so far as they referred to *'at the front of the shower'* should be read as meaning outside the 1500mm distance from the waste plug which the *Building Code* required to have the necessary fall. He said as to the areas outside this portion of the bathroom which he described as the *'shower base'* since they were constructed on a pre-existing floor there was no attempt in the installation to create any slope toward the waste plug. The fact that such a slope had been found was a matter of happenstance. Mr Harnishmacher called evidence from his associate Mr Villela who told me that the installing plumber was a Mr Albert Perera who had worked for Capital for a number of years and whose work had invariably given satisfaction.

26 I am unable to accept Mr Harnishmacher's interpretation of the evidence. When Mr Vietz refers to falls *'at the front of the shower'* I take him to be describing the area within which the *Building Code* stipulates at a particular fall. Mr Vietz' finding was that the recommended fall stipulated by Clause 3.8.1.10 of the *Building Code of Australia* 2010 has not been met. There is nothing to suggest that this is a situation where falls of steeper than 1:100 *'are not achievable'*. Mr Van Hoven says that the tiles 'fall to the waste plug *'just' '*, an equivocal finding to say the least. Moreover he advocates the use and a smaller rose. My own experience limited though it is in hearing building cases in the Tribunal, suggests that these unenclosed showers create more problems than they are worth and it would be preferable if they were simply deleted as a design feature, however the parties have seen fit to provide for one here and I believe the direct finding of Mr Vietz that the water does not flow to the waste plug and the short video displayed to me on Mr Bourke's mobile phone outweigh the distinctly equivocal finding made by Mr Van Hoven. His suggestion for a variety of palliative actions tends to give the lie to the suggestion that there is no problem in the first place.

27 One solution of course is the one which the Bourkes say Mr Harnishmacher suggested, the installation of a door which would entirely enclose the shower base. They rejected the proposal that they pay for this door themselves. In the course of the hearing I asked how much such a door would cost, nobody replied. In the circumstances therefore I propose adopting the costing made by Mr Vietz for this rectification work, namely $10,000. The problem is functional and not merely aesthetic. In accordance with the principles discussed below rectification is the appropriate remedy. No mode of rectification other than complete reinstallation has been costed or proposed.

2 Spa Bath

28 Mr Vietz found *'the floor area of the acrylic bath is not supported'*. Mrs Bourke cross-examining Mr Harnishmacher's associate Mr Villela put it to him that the manufacturer's installation directions required that 75% of the underside of the spa bath be supported. Mr Villela said that he personally had seen to the installation, that he had a mortar bed beneath the underside of the bath in all areas except the vicinity of the waste outlet which had to be maintained clear for plumbing service. He estimated that 50 to 65% of the underside of the bath was supported by the mortar bed.

29 Mr Bourke said that he had administered a *'tapping'* test and that approximately half the bath was supported and the other half was not. The line between the supported and the unsupported area went diagonally across the bath.

30 Mr Van Hoven noting the allegation that there was no support under the bath said:

> This does appear so to the waste end only, but there is no access to check.

31 He recommended that the inspection hole be opened and the support checked and extra support eg. mortar be placed as per manufacturer's recommendations under the bath. Mr Harnishmacher said that upon the inspection conducted by Mr Van Hoven it was impossible to inspect the underside of the bath because no-one had brought an electric screwdriver. Mr Harnishmacher said that he had since conducted such an examination. He produced a photograph taken through the accessway which certainly depicted a mortar bed.

32 This creates a somewhat difficult situation. It is clear that from the end opposite the waste discharge that there is a mortar bed. Mr Villela says that 50 to 60% or 55 to 65% of the underside has been covered by a mortar bed yet the Bourkes say a *'tapping test'* would suggest otherwise. Regrettably I was not able to enquire of Mr Van Hoven more closely as to his findings. He seems to have regarded the allegation of lack of support as having some plausibility hence the observations which I have quoted. Were he confident that the bath was fully supported to the necessary extent, he would have refrained from making the rather equivocal comments that he did. In my view they are supportive of the view that Mr Bourke might well be right based on his tapping test. Accordingly in my view this item should be determined in favour of the applicant. The $10,000 amount referred to in the previous item is sufficient to extend to this rectification as well.

3 Lounge Room Window

33 According to Mr Vietz:

> The windows installed are wrong. The window unit shown on the contract drawings runs the full width of the room consisting of two fixed panels of glass each side and the twin glazed sliding doors.

34 The Bourkes' complaint here is that the plans show a six panel symmetrical installation whereas what has been fitted is a five panel asymmetrical installation. Mr Van Hoven for Capital said:

> I believe the owner made multiple changes to the original plan, after construction commenced. The contract in Clause 10.1 requires extra cost for 'special' windows and notes only standard sizes are included.
>
> As there were multiple changes to the floor plan (eg verandah change to a different verandah, then to a dining room) the builder was required to re-think and re-design the placement of the ordered windows and doors, some of which were already in place on site.
>
> This also included fitting sliding doors which are a wider unit. Once the sliding doors were added, there was no room to fit standard size units as the window area was now approx 300mm wider and too big for the allowable space, so a special order would be required. This and the extra works on the opening would have incurred an extra variation.

This amounts in effect to a statement by the builder that compliance with subject to agreed variations would have been too difficult and expensive so something less expensive and more convenient for the builder should be accepted in lieu.

35 This installation is simply not in accordance with the contract but that finding in itself does not necessarily lead to a conclusion that damages should be awarded to reconstruct the item to accord with the contract. In the celebrated case of *Bellgrove v Eldridge* the High Court of Australia considered the measure of damages for breach of a building contract. In a joint judgment Dixon CJ and Webb and Taylor JJ considered that the *prima facie* measure of damages for breach of a building contract by reason of defective work was the cost of rectification ((1954) 90 CLR 613, 617-8) their Honours continued:

> The qualification, however to which this rule is subject is that, not only must the work undertaken be necessary to produce conformity [with the contract] but that also, it must be a reasonable course to adopt. No-one would doubt that where pursuant to a building contract calling for the erection of a house with cement rendered external walls of second hand bricks, the builder has constructed the walls of new bricks of first quality the owner would not be entitled to the cost of demolishing the walls and re-erecting them in second houses. (1954) 90 CLR 613, 618

36 On the following page their Honours said that in circumstances where reconstruction is not reasonable then the measure of damages:

> Will be the diminution in value, if any, produced by the departure from the plans and specifications or by the defective workmanship or materials.

37 They said:

> The question is whether demolition and re-erection is a reasonable method of remedying defects.
> (1954) 90 CLR 613, 619

38 In the present case the window installation is not in itself defective. It is asymmetrical but otherwise unobjectionable. In all the circumstances of this case I cannot think that it would be reasonable to award damages based on the cost of demolishing this installation and reconstructing it. There is no evidence that the extension as completed is less valuable as a result of this departure from the building contract. I should note a more recent decision of the High Court of Australia, *Tabcorp Holdings Limited v Bowen Investments Pty Ltd* (2009) 236 CLR 272. In that case a tenant despite prohibition on making alterations to leased commercial premises deliberately removed the finishes included by the landlord despite a refusal of approval for the making of the alterations. The High Court upheld an award on damages representing the cost of reinstating the premises to their original condition. The Court did not consider that *Bellgrove v Eldridge* required it to find that the cost of such reinstatement was an unreasonable damages award to make because the remodelled finishes constructed by the tenant were commercially satisfactory, albeit not the finishes which the landlord had sought to maintain. This was a very different situation from that which arises under a building contract. The landlord could presumably have obtained an immediate prohibitory injunction restraining the tenant from making the alterations which were the subject matter of the proceeding. It is difficult to conceive that a court of equity would wish to intervene on an ad hoc basis in the execution of a building contract.

39 I confess to some difficulty in understanding the Court's explanation and distinguishment of *Bellgrove v Eldridge*. The Court did not however overrule *Bellgrove v Eldridge* and I treat it as still an authoritative statement for the measure of damages relative to breach by a builder of its obligations under a building contract by reason of non-conformity with the contract or its specifications or defect work. Applying the principles of *Bellgrove v Eldridge* in the absence of any evidence that the departure from the contract has led to a reduction in the value of the extensions, no damages award should be made with respect to this item.

4 Laundry Trough Splashback

40 Mr Vietz observed that the laundry trough tiling has been tiled with uneven size tiles and that the tiles appear to have been with their longer dimension in the horizontal rather than the vertical plane. Ms Bourke complained that the tiles in the powder room were laid vertically. She also complained that there was no adequate sealing at the base of one of the tiles in the laundry splashback. This was admitted as requiring rectification as a maintenance item by Mr Harnishmacher.

41 It is unclear to me that the contract requires conformity between the tiles in the laundry splashback and those in the powder room. It would not so far as I can see, albeit that I have not conducted an on site view but merely looked at plans, be possible to stand in the laundry and view the tiles in the powder room or stand in the powder room and view the tiles in the laundry. There is therefore no compelling reason for conformity between the two. Accordingly, either there is no contract breach at all here apart from the need to apply the silicone sealant at the base as a maintenance item or alternatively if contrary to my primary inclination, there is a breach, the principle of *Bellgrove v Eldridge* would lead to no damages award being made for it.

5 Architraves

42 According to Mr Vietz:

> The specifications provide that architraves shall be installed on the inside of all window and door units. In the laundry architraves are missing the builder overlooked this undertaking and installed the wrong size window to fulfil on this agreement.

43 Mr Vietz estimated the cost of installing architraves at $4,000. Mr Van Hoven says:

> This is not required for the rigs and if they were fitted there would be an extra cost variation for suitable door and windows to allow for the extra side room. Again, standard size units were used.

44 He said the windows were neatly finished and should be accepted.

45 As I understood Mr Harnishmacher this was an instance were the standard size windows which he employed simply could not provide for conformity with the requirement that architraves be provided. Item 10 of the specifications includes a note:

> Window sizes shown on drawings are regarded as nominal only. The nearest standard size windows included in the contract scope of work. Should special size windows be required additional costs may be applicable.

46 I am not exactly clear where the alleged requirement for the inclusion of architraves is to be found, assuming it exists there is a question as to whether it should be regarded as an obligation which overrides the note to Item 10 that generally standard size windows would be used and that there would be additional charges for any non-standard sizes called for. At any rate assuming without deciding that there is a breach shown here, I would decline to award damages based on the *Bellgrove v Eldridge* principle. It would in my view be clearly unreasonable to require an expenditure of $4,000 in these circumstances.

6 Waterproof Junctions of Impervious Surfaces

47 Mr Vietz complains about the poor quality silicone beadings at a number of places. Mr Harnishmacher agreed that these works should be conducted as maintenance items.

48 Bathroom hand basin seating is out of level. This finding was made by Mr Vietz who suggested either rectification or an award of damages of $400. Mr Van Hoven recorded *'the vanity bowl is not level'*. By reference to Mr Harnishmacher's written presentation made during the hearing this does not appear to be an item which he has consented to deal with as a maintenance item. In light of the concession made by Mr Van Hoven the $400 damages suggested by Mr Vietz should be awarded.

7 Damaged Internal Craftwood Trims, Architraves and Door Jambs

49 Mr Vietz' finding was of carelessly directed and misaligned nailing of architraves, jambs and stops which were said to *'have split and blown out the faces'*. He noted that one door jamb between the laundry and the kitchen is *'made of two pieces'*. His comment was:

> The job specifies new materials for a job where the finish is new. Not to look like a job with second hand material and construction.

50 With regard to architraves, jambs and stops he suggested an award of damages of $1,065 and $500 for the replacement of the door jamb between the laundry and the kitchen. Again, this was not an item which was the subject of any concession on the part of Mr Harnishmacher. Mr Van Hoven conceded the existence of some of these problems but said that these were matters for the painters to deal with and painting was outside the scope of the obligations of Capital. Regrettably as previously noted neither of the experts was here. There was no painting contractor whom I could enquire of as to whether the treatment of these phenomena on the door jambs and the architraves were properly items that a painter would undertake. Mr Bourke said painters would refuse to deal with their job until all of the nail heads were properly sunken. In these unhappy circumstances I am left to do my best without the opportunity of further expert guidance. Acknowledging that the obligations of a painter extend to surface preparation and some filling what is suggested here seems to go beyond what is reasonable and what painters should be expected to deal with. The door jamb in two pieces seems with all respect to Capital to be an egregious piece of poor workmanship from a company that according to Mr Harnishmacher prides itself on high quality work. There will be a damages award of $1,565 for these items.

8 Plaster to Passage Walls

51 Mr Vietz found that the plaster walls near the front door deviate from plane more than 4mm. Mr Harnishmacher agreed for Capital to attend to this as a maintenance item.

9 Laundry Skirting

52 Mr Vietz finds *'the skirting has been installed unsealed regulations require that laundry surfaces shall be waterproof'*. Mr Van Hoven agreed that this defect existed but observed that the obligation of painting lay with the owner. In the circumstances therefore I find no defect.

10 Dining Room Windows

53 Mr Vietz finding is that the tops of adjacent windows (architraves) at the north-west corner are visibly out of level. Mr Van Hoven said:

> I checked the windows and noted windows were a different height to the doors. The arcs are level, but finish at a different height due to the size variation.

54 Mr Van Hoven said that the owners should:

> Accept as is, as the sizes are standard Trend sizes. The height at the top is not noticeable to cause concern. The builders had to 'compromise' due to different window and door unit sizes and profiles used on site.

55 The specifications in a note to Part 10 state:

> The nearest standard size windows included in the contract scope of work.

56 The phenomenon observed is as a result of the selection of a standard window size. It is arguable therefore that there is no breach of contract involved. Even if there were the principles of *Bellgrove v Eldridge* discussed above would not render it reasonable to incur the very large expense suggested by Mr Vietz of $10,000 to replace the windows so that they are of equal size. I note that Mr Harnishmacher has offered to raise the architraves 5mm *'if owners supplied new architrave'*.

11 Site Grading

57 Mr Vietz observes:

> On the northern side of the house the builder has removed material on the driveway and in so doing caused a trench at the side and under the house. This has created grading of the surface directing the runoff water towards and under the house. The builder has created a damaging situation plinth boards have been placed below the ground level as seen in the photo.

58 Mr Van Hoven's comment was:

> Before this was removed to allow the builder to have access to dig new stump holes, water was already running towards and under the house due to the natural site slope. The owners are required to landscape as part of the contract and the builder is not responsible.

59 The scope of work as described in the contract specification provides:

> Landscaping and fencing work covered in those nominated in the specification.

are excluded. An existing driveway or portion of driveway had to be demolished to allow the extension structure to be erected. In my view the issue is a landscaping one. This is the responsibility of the owner and not the builder. The earth could be removed from around the plinth board as part of the landscaping process. Alternatively Mr Villela's opinion could be accepted that the plinth board was of treated pine and hence would not be affected by being partly buried. There is no defect on this score.

12 Front Weatherboards

60 Mr Vietz observes:

> The front elevation shows the weatherboards matching in with the existing. The builder has installed a vertical board creating an obvious demarcation of an add-on.

61 Mr Vietz says that $1,200 should be awarded by way of damages to allow another contractor to undertake rectification works:

> To provide a finish of one front, with any lots staggered, estimated cost $1,200.

Mr Van Hoven's response was:

> Weather stop left in and new weatherboards butting to this. New weatherboards can be run into the existing dwelling, but this would be an extra cost. There is no right or wrong answer here.

62 Ms Bourke said that she wanted a *'seamless transition'*. She said she made this clear in pre-contractual negotiations. She says when she complained about it to Mr Harnishmacher he referred to the *'entire contract'* clause in the building contract viz that pre-contractual discussions were excluded. Mr Harnishmacher referred to the second of the appendices to the specifications which states:

> Any modification works (other than specified in contracted items) to the existing house or services requested by council, statutory authority or engineers will be subject to additional cost.

63 Mr Villela agreed that it would have been relatively easy to *'lap'* the weatherboards so as to avoid a visible seam in the wall. Given that the existing structure was not entirely *'true'* it would not have been possible to have the new boards simply *'line up'* with the old.

64 I disagree with Mr Van Hoven that *'there is no right or wrong answer here'*. Mr Harnishmacher drew attention to a comment made by Mr Van Hoven at the conclusion of his report:

> Having inspected many thousands of houses over 30 years, I believe this job is above average industry standard and has been completed to a good builder's standard.

It was clear to me from this and a number of other remarks which he made that Capital aspired to be regarded as a company which provided a superior product rather than merely the most economic and cheapest. In light of that aspiration a clear *'right'* answer relative to this item, namely that the solution adopted by Capital whilst not expressly prohibited by the plans and specifications was an inappropriate shortcut. The owners should have the cost of rectification estimated by Mr Vietz at $1,200. Having regard to the aesthetic importance of this issue and the relatively modest cost of rectification it is reasonable in accordance with the principles of *Bellgrove v Eldgridge* so to order.

13 Spouting

65 Mr Vietz found that the spouting to the front bedroom , number 2, falls the wrong way. Mr Van Hoven says it is:

> Possible workers on site have dropped the gutter level with ladders.

66 Mr Harnishmacher agreed that Capital would do this as a maintenance item.

14 Rear Garden Tap

67 Mr Vietz says *'provide cover plate behind tap against weatherboard'*. Mr Van Hoven agreed that this should occur. I am not clear whether this has been done as yet, it is not amongst the items listed on Mr Harnishmacher's written statement as being accepted as a maintenance item. If it has not been done already it should be done as a maintenance item.

15 Incomplete Demolition

68 Mr Vietz says *'remove stump outside sunroom*'. Mr Van Hoven said that the owner had *'a rubbish pile over it and it was missed for removal'*. His comment was *'builder can remove still'*. This should be done as a maintenance item and Mr Harnishmacher agreed to this.

16 Decking

69 Mr Vietz says it is necessary to install one missing screw outside the lounge room. Mr Van Hoven agreed with this as did Mr Harnishmacher.

17 Weathering Flashing Above Laundry Door

70 Mr Vietz said *'make good to comply with recognised practice'*. Mr Van Hoven said:

> Builder advises head flashings in place to all doors and windows where required, but not visible with arcs over.

He said he assumed this to be correct and:

> Builder can caulk top of arch and weatherboard junction as an extra precaution. Reg require one head flashing.

71 Mr Harnishmacher said that because of a debate between the owner and Capital as to whether the contract required architraves the flashing had been installed before the architrave and hence was hidden by the architrave. Capital should carry out the caulking suggested by Mr Van Hoven.

18 Site Clean

72 Mr Vietz says *'builder's clean site of building materials'*. He suggested that the owners should be compensated for two hours work in removing building materials from the site and that Capital should clear the site of remaining building materials. Ms Bourke said that she had incurred a $45 tipping fee. Mr Van Hoven says:

> It appeared some rubble left in the long grass is not from new works. Some minor rubble left on site.

73 Mr Harnishmacher said that the rubble in question was not from the new work. Ms Bourke said that it came from the demolition of the two chimneys. Ms Bourke's interpretation seems to me more likely to be correct. On the other hand I do not believe that it is proper to award damages for the 'owners' time carrying out labouring work much less at the rate of $60 per hour. I award damages in the amount of $45 representing the tipping fee with Capital to remove any other building materials left over from the work.

19 New Weatherboards

74 Mr Vietz said:

> Boards appear to have many defects not holes, shapes and splits. The extent of poor material is high. Remove and replace defective timbers or repair.

75 He said that many nail heads were *'proud'*, they should be punched to recess the head beneath the surface. Mr Harnishmacher and his associate Mr Villela said that any problems with the new weatherboards were caused by the failure of Ms Bourke to have those weatherboards painted. That should have been done within eight weeks they said. According to Mr Villela once the boards are fixed by nails the stress to which they are exposed by being first, saturated by rain and then dried by the sun leads to movement which creates stresses leading to splits, that is the cause of the splitting. He said that if a weatherboard split whilst being fixed it should be discarded. Mr Harnishmacher was broadly critical of Ms Bourke and her husband for not having the new weatherboards painted. The provision which Capital included in its building specifications as to the effect of painting, it must be said, constitutes a deterrent to Ms Bourke arranging painting before this matter has been adjudicated upon. Moreover, any painting and filling that might take place would tend to conceal whatever defects in the work Ms Bourke was complaining of.

76 Capital's criticism of the Bourkes for not having these weatherboards painted is ironic given that Capital felt it was alright to expose old particleboard flooring to the elements for several weeks.

77 As previously observed I have not had the opportunity of hearing directly from independent building experts in the course of this hearing. In these circumstances it seems to me that whilst wetting and drying is likely to surface problems and shrinkage in weatherboards over the period in question, here it is unlikely to cause phenomena as extensive as splitting. In my view it is more likely that the splitting which was demonstrated to exist by photographs that were produced to me has resulted from damage during fixation. As Mr Villela agreed, when this happens the damaged weatherboards should be discarded. Capital regarded it as appropriate to install a door jamb in two pieces and continued in the course of this hearing to defend that practice as appropriate. It seems to me highly likely therefore that Capital's contractors would have failed to replace a weatherboard which split during fixing. The photographs also show many knot holes, shakes and splits, the total extent of which go beyond what a painter might reasonably be expected to cope with. Mrs Bourke complained that painters had refused to contemplate doing the job until all of the nails were punched home. Mr Van Hoven said:

> The contract notes owner to do all prep and paint works, within eight weeks to prevent damage to the wood. The boards were filled in areas but not primed or painted yet and have weathered more than normal because of the delay by the owner. This also caused more shrinkage than normal and heads to pop.

78 He said that the owner should sand and paint immediately to stop damage and cupping etc. He also suggested the removal of the nails to the corner stop. Since I have awarded damages for the entire removal of the corner stop. This last recommendation should clearly be implemented. Mr Vietz' assessment of the cost of rectifying these defects is $2,500 and I award damages in that amount.

20 Front Light Fitting

79 Mr Vietz said that this was not level. Capital's electrician returned to the site to rectify this problem but informed Ms Bourke that the fitting was the wrong type of fitting. He declined to take any action. Mr Harnishmacher said that a chock of wood could be installed behind the fitting to bring it level. It seemed to him to have been the proper approach. He said he was disappointed in the electrician. I direct that Capital rectify this defect.

21 North Wall Under Eaves at Front

80 Mr Vietz says that the exposed nails from the corner stop should be removed. Given that I have awarded damages for the corner stop to be removed altogether no separate award should be made for this matter.

22 Roofing to Laundry Extension

81 Mr Vietz says that the overflashing has been fixed to the side of the house *'using uncoated steel screws'*. Mr Harnishmacher said it was impossible to purchase uncoated screws. He denied the existence of this defect. He agreed that the spouting to this south sloping roof had an extensive overhang and should be cut back. I direct that this rectification be carried out by Capital.

82 A roof leak has apparently been rectified by Capital and so nothing further need be said of it.

23 Safety Switch

83 Mr Vietz says that it cuts out when there is heavy rain. Either Capital should rectify it or he says there should be an award of damages to commission another contractor to rectify the problem. Capital's electrician has already attended in an unsuccessful attempt to rectify this problem. Mr Harnishmacher correctly observed that the identification of a problem which is by its nature intermittent is always very difficult. In the circumstances I am unable to make any award or give any direction. A direction for further rectification work is in the absence of the identification of the cause of the problem unlikely to achieve anything and no estimate can be given as to what outlay would be entailed in having someone fix the matter. Accordingly, no award will be made.

COUNTERCLAIM

84 Capital filed a counterclaim in the proceeding dated 8 February 2011. It sought $19,840.71. Part of that represented an outstanding final payment which I understand has now been paid and so can be put aside. Other amounts are clearly untenable as counterclaims in a building dispute such as *'solicitors' fees $500 estimate'*. None of the documents filed in this proceeding have been filed by solicitors. None of the documents filed in this proceeding have purported to be drawn by solicitors. No solicitors have appeared in the course of this proceeding. The next claim is $860 *'time to prepare counterclaim 15 hours $860'*. The basis for such a claim does not appear. It would if admissible at all be admissible as a claim for costs but since the Tribunal's power to award *'costs'* is restricted to legal costs or costs of a professional advocate they are not admissible, nor are photocopying costs or the costs of filing the application. The counterclaim also extends to *'replace faulty underflooring $3,680'*. As the narrative that I have given earlier shows, this was a matter that was the subject of an apparently binding agreement between the parties to the effect that Capital would carry out this work at its own expense. Mr Harnishmacher gave no explanation as to how Capital should be entitled to go back on its word. There is also an unliquidated claim for *'aggravation and anxiety'*. The counterclaim observes:

Suspect Tribunal is not able to award such amounts even though this sort of thing is all consuming for builders in this situation.

85 Capital's suspicions in this regard are correct. There is a further claim of $1,720 *'demo and extend shingles re-do'*. I take this to be an arrangement whereby the shingles at one gable end of the house were re-applied so as to match the shingles at the end which was not the subject of any renovation or extension work. The shingles as originally constructed accorded with their depiction on the plans. Ms Bourke drew attention to a notation on the plans however to the effect that those shingles, that is, the ones depicted on the plans should match the shingles at the other end. This appears to be correct. The notation states *'Gable end to best match existing detail'*. In my view the notation is sufficient to make good an entitlement on the part of Ms Bourke to have the shingles at the two ends match without any additional charge. There is also a claim of $540 interest *'for mnths pro rata 15%'*. There is no further detailing of the calculation. Given that I have found that significant defects exist, I think in the circumstances the appropriate order with respect to the counterclaim is that it be dismissed.

MFM:RB