

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D465/2010

CATCHWORDS

Domestic Building – defective work – builder ordered to rectify defects – claim for lost income by owner in providing access to Builder to fix defects – circumstances in which allowed – claim by owner for lost income in attending Tribunal disallowed.

APPLICANT	Tracy Bromilow
RESPONDENT	J.G. King Pty Ltd (ACN 006 627 210)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	14 July 2011
DATE OF ORDER	1 August 2011
CITATION	Bromilow v J.G. King Pty Ltd (ACN 006 627 210) (Domestic Building) [2011] VCAT 1462

ORDER

Order the Respondent to pay to the Applicant the sum of \$4,000.00

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	In person
For the Respondent	Mr Draper, Business Manager (by telephone)

REASONS

Background

- 1 This proceeding concerned complaints by the Applicant (“the Owner”) in regard to defects in a house constructed on her behalf by the Respondent “the Builder”).
- 2 The hearing took place on 27 April 2011 when orders were made by consent that the Builder pay to the Owner \$339.20 and that the builder rectify defects noted on a Building Commission inspection report (“the Report”). It is apparent from the form of the order that not all matters were determined.
- 3 By paragraph 6 of the order there was liberty reserved to apply in the following terms:

“There is liberty to apply for further orders, and any such application is to be heard by Senior Member Lothian unless unavailable.”
- 4 The order concludes with the following note:

“The Tribunal notes further:
That the Applicant claims she has lost time at work in the past when the respondent represented it would attend site but failed to do so. Should this occur again, the Tribunal notes that she will have a cause of action for such lost days under the Fair Trading Act 1995 for misleading and deceptive conduct.”
4. From this it would appear that the Tribunal was not functus officio and that it was open to the Applicant to apply for further orders, in particular, in regard to the matters referred to in the by the Tribunal in the note appearing at the foot of the order. However the liberty is not expressed to be confined to those matter.
5. On 27 May 2011 the Owner complained that the Builder had not complied with the orders and that said that arrangements for access were made by the Buider without anyone attending to carry out the work. The Registry treated this as an application pursuant to the leave reserved and the matter was listed for directions on 27 June 2011 when the Owner was directed to file and serve “amended Points of Claim which were to describe any outstanding claims (including claims for time lost.”
6. Revised Points of Claim were filed and served by the Applicant on 6 July 2011. In these, the Owner seeks damages for loss of income she has suffered in regard to the failure of the Builder to carry out work or attend the site at pre-arranged times.

Hearing

7. The matter came before me for hearing on 14 July 2011. I heard evidence from the Owner and also from the business manager of the builder, Mr Draper who appeared by telephone.

- 5 The Owner gave details of each day that she had to take off work and I am satisfied with that evidence. In regard to the days claimed when she had to appear before VCAT the dates that she gave agreed with the Tribunal's records of times that she was present.
- 6 The Builder was represented by its Business manager, Mr Draper, who attended by telephone.

The claims made

- 7 The loss of income sought is for twelve days the Applicant had to take a day off work in order to provide access to the builder in order that the Builder might carry out work on the house. She also claimed a further six days that she had to take off in order to attend hearings at the Tribunal and a further eight days when she stayed home in order to provide access to the Builder's tradesmen in accordance with an arrangement reached with the Builder and the tradesmen did not appear.
- 8 The rates claimed by the Owner were verified by employment records that she produced. She is an employed as a chef between Wednesday and Saturday (both inclusive) each week and produced a pay slip to show her rate of pay. She also does consultancy work on Mondays and Tuesdays and produced evidence of her earnings. She acknowledged that she could not be certain that she would have obtained consultancy work on the days that she informed the agency that she was not available, but she lost the opportunity of work that might have been available to her on those days.
- 9 Mr Draper did not and indeed was not able to dispute any of the allegations made by the Owner. He said that arrangements for access and the attendance of tradesmen are problematic. He said they were difficult to arrange and tradesmen are sometimes not reliable. That may be so, but that is not an expense that ought to be visited upon an owner.
- 10 The period with respect to which these amounts were claimed is well after the maintenance period and well beyond the time by which any defects or maintenance items appearing following possession ought to have been attended to by the Builder.
- 11 An owner should expect some inconvenience in granting access to enable a builder to attend to maintenance items during the maintenance period. However, where the builder has still not remedied the defects by the end of that period the point is reached where further inconvenience to the owner is quite unreasonable and not something that any owner entering into a building contract would expect to be subjected to.
- 12 The loss of income claimed arises directly from the need to rectify defective workmanship. It would not have arisen but for the breach by the Builder of the building contract. The claim with respect to those losses should therefore be allowed as damages for breach of contract.

- 13 In regard to the loss of time the Owner suffered in attending the Tribunal, that is an allowance that is never made. A party attending a hearing before this Tribunal is not allowed any income lost arising from such attendance.

Amount to be allowed

- 14 The Owner assessed her loss arising from all absences from work, including attendances at VCAT, at \$10,734.16. Because she was aware that she was not needed to be at home all day on those days she sought half that amount namely, \$5,367.08.
- 15 The loss with regard to the consulting work on the Mondays and Tuesdays was calculated on the basis that she certainly would have obtained work on those days. That is not the case. It is a matter of evaluating the loss of the chance that she would have obtained work. Making some allowance for that and disallowing the days upon which she attended the Tribunal, I think it is reasonable to allow the Applicant \$4,000.00.

SENIOR MEMBER R. WALKER