

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO BP1014/2016

CATCHWORDS

DOMESTIC BUILDING DISPUTE – Whether a domestic building contract was entered into between the parties in circumstances where the building permit stated that the work was to be undertaken by an owner builder; Whether it was reasonable to demolish the building works where the works did not comply with the *Building Act 1993*; Damages – assessment of damages for breach of contract.

FIRST APPLICANT	Mr Nick Camilleri
SECOND APPLICANT	Ms Marisa Marabito
RESPONDENT	Buildpro Holdings Pty Ltd (ACN 141 483 810)
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	20 and 21 July 2017
DATE OF ORDER	4 August 2017
CITATION	Camilleri v Buildpro Holdings Pty Ltd (Building and Property) [2017] VCAT 1155

ORDERS

1. The Respondent must pay the Applicants \$14,725.
2. Liberty to apply on the question of costs and interest, provided such liberty is exercised by 18 August 2017.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicants	In person.
For the Respondent	Mr J Gray, solicitor.

REASONS

INTRODUCTION

1. The Applicants are the owners of a residential property located in Keilor East (**‘the Owners’**). They contend that they entered into a domestic building contract with the Respondent for the supply and construction of a *Stratco* pergola/carport, together with associated timber decking. The Owners further contend that the construction of the pergola/carport and the timber decking was defective, incomplete and either did not comply with the relevant building permit or was undertaken without building approval. As a consequence, they demolished all of the works and now seek compensation against the Respondent for the cost to rebuild the pergola/carport and timber decking.
2. The Respondent denies that it undertook any building work. It contends that it merely supplied the building materials necessary for the construction of the pergola/carport and timber decking and that the work was carried out by the Owners themselves as ‘owner builders’. The Respondent further contends that, in any event, it was unnecessary to demolish the works and that any defects or noncomplying work could have been rectified or completed at minimal cost.

ISSUES

3. Given the position adopted by each of the parties, the issues for determination are summarised as follows:
 - (a) Did the Respondent undertake the building works?
 - (b) Are the building works defective, incomplete or otherwise non-compliant with the *Building Act 1993* and the regulations made thereunder?
 - (c) If the building works are defective, incomplete or noncomplying, was it reasonable to demolish?
 - (d) What is the reasonable cost of rectifying, completing or otherwise making the works compliant?

EVIDENCE AND FINDINGS

Did the Respondent undertake the building works?

4. There is no single written building contract signed by the parties evidencing any agreement that the Respondent would undertake building work. Nevertheless, the Owners rely upon a quotation provided by the Respondent dated 3 February 2016, together with a number of other documents, as evidence that the Respondent was not

only supplying materials but also was to perform building work. That quotation refers to two *Colorbond Stratco beam and roof* structures, measuring 12.2m x 4.3m and 11.2m x 3.0m, being the pergola and carport; and to timber decking with one step. The total price quoted is \$27,600. This price includes a late change to the design of the pergola to incorporate a gable roof, in lieu of a flat roof (\$2,000). It also includes the cost of obtaining a building permit, which was separately priced at \$1,350.

5. It is common ground that \$23,975 has been paid to the Respondent, leaving a balance of \$3,625.
6. The building permit application, and the building permit itself, note the relevant builder as *Owner Builder* and specify that the cost of the proposed works is \$11,500. There is no mention in the building permit application or the building permit of the timber decking. In other words, the work, the subject of the building permit, is confined to *Construction of Carport and Veranda*. This is peculiar given that the building permit is dated 7 May 2016, which postdates the quotation by several months.
7. Mr Gray, solicitor, appeared on behalf of the Respondent. He submitted that the building permit application and the building permit itself are evidence that the Respondent was not the builder of the works.
8. The First Applicant, Mr Camilleri, gave sworn evidence that he was unfamiliar with the process of obtaining building approval and merely signed the building permit application form presented to him by Dinh Pham, the representative of the Respondent. He said he was unaware that he was making an application for building approval as an owner builder.
9. Mr Camilleri said that in late January 2016 he contacted the office of *Stratco* after receiving a brochure in his mailbox relating to their products, which included pergolas and the like. He recounted that the representative from *Stratco* told him that she would send someone to his property to quote on supplying and constructing the proposed works. Following that telephone conversation, Mr Camilleri said he was contacted by Mr Pham for the purpose of arranging a time to visit his property in order to quote on the proposed work.
10. On 3 February 2016, Mr Pham visited the Applicant's property. According to Mr Camilleri, he told Mr Pham that he wanted a pergola at the rear of his house, with a carport constructed on the adjoining side. He said he also discussed the possibility of decking underneath the pergola.

11. Mr Camilleri recounted that Mr Pham then measured the site and prepared a written quotation 'on the spot'. That quotation stated that the cost of the pergola and carport would be \$15,350, \$8,900 for the deck and \$1,350 for obtaining building approval.
12. Mr Camilleri said that after he received the quotation, he discussed the proposed works with the Second Applicant. He recalled that Mr Pham came out to the property on a second occasion after Mr Camilleri had indicated to Mr Pham that he wished to change the design, so as to incorporate a gable roof over the pergola. On that second occasion, Mr Pham amended the written quotation previously handed to Mr Camilleri to include a notation: *\$2000 gable roof*. Mr Camilleri said that Mr Pham subsequently telephoned him and asked whether he had made a decision. Mr Camilleri said that he told Mr Pham that he would be happy for Mr Pham to build the proposed works, following which Mr Pham said that he would be in contact with Mr Camilleri to arrange for payment of the deposit and money for the permit fees. The discussion between the parties was subsequently confirmed in email correspondence passing between them.
13. On or about 18 March 2016, Mr Camilleri deposited \$2,625, representing 10% of the contract price, together with \$1,350, representing the cost of plans and permits, into a bank account nominated by Mr Pham. What followed were further discussions between the parties regarding site information and the like, which ultimately culminated in the issuing of a building permit and stamped construction drawings dated 7 May 2016.
14. According to Mr Camilleri, preparatory works commenced shortly before the building permit and construction drawings were approved by the building surveyor. Indeed, Mr Camilleri stated that the application for a building permit was prepared by Mr Pham and presented to him on the first day of work. He said, and I find, that he signed that application form on that day.
15. Photographs were tendered in evidence, depicting the state of the works from 27 April 2016 through to the middle of May 2016. A number of people are seen in those photographs erecting the pergola, including Mr Pham. In addition, Mr Camilleri gave evidence that Mr Pham attended his property almost on a daily basis and was heavily involved in constructing the pergola, carport and the decking.
16. Moreover, progress stage payments were made to Mr Pham as the work progressed. As indicated above, by the time the works ceased, \$23,975 had been paid to the Respondent, through Mr Pham.
17. Mr Pham chose not to give evidence in the proceeding, notwithstanding that he attended the hearing at all times. No

explanation was provided as to why Mr Pham chose not to give any evidence regarding the matters raised by Mr Camilleri. Accordingly, I infer that his evidence would not have assisted the Respondent's position.

18. In weighing what is the uncontested evidence of Mr Camilleri and the corroborating evidence of the Second Applicant, and having regard to the photographs tendered in evidence, I find that the Respondent, through Mr Pham and other contractors engaged by it, not only supplied the building materials but also undertook the building work. My finding is reinforced by the fact that payment was demanded and paid, commensurate with certain stages of the work having been completed. In my view, that method of payment is consistent with there being a building contract and inconsistent with a contract where only materials are supplied.
19. That domestic building contract is evidenced by the written quotation signed by Mr Pham, on behalf of the Respondent, the application for a building permit prepared by Mr Pham and signed by Mr Camilleri and the stamped construction drawings, ultimately issued by the building surveyor.

Are the building works defective, incomplete or otherwise do not comply with the *Building Act 1993* and the regulations made thereunder?

20. The Owners contend that the construction of the pergola/carport and the decking were so defective that the only reasonable remedy was to demolish all of those works. Regrettably, no expert evidence was called by the Owners to support that contention. Instead, they relied upon documentary evidence.

The pergola/carport

21. There are a number of quotations and correspondence from contractors which Mr Camilleri contends prove that the pergola/carport is defective. For example, Mr Camilleri tendered in evidence an undated letter from *Get Plumbed Plumbing & Gasfitting*, which states, in part:

After being called to inspect the newly installed Pagola [sic] at the client Nick and Marissa Camilleris home... I noted the following defects.

1. Roof is already starting to rust and also spreading to gutters, due to contractor cutting flashing with grinder and not cleaning shaving off roof.
2. Roof is leaking in multiple places due to:
 - * No sheets are wethered ion [sic] anyway whether up or down.
 - * Inadequate flashing too many parts of roof.

* Flashing installed in incorrect manner.

3. Roof is not secured to Australian standard.
4. Roofing screws installed incorrectly, threw [sic] the valley of the sheets, not the rib. (this will definitely shorten the life of the sheets and be extremely more susceptible to leaking in the future)
5. All flashing is installed incorrectly and needs to completely be replaced.
6. Most sheets extend too far into gutter exceeding Aust Standard.

In my professional opinion the whole roof and flashing all need to be puuled [sic] down and replaced so the roof is installed correctly to meet all Australian Standards. I have prepared a quote for the clients Nick Camilleri to do so.

22. A quotation from *Get Plumbed Plumbing & Gasfitting* dated 24 October 2016 in the amount of \$15,400 was also tendered in evidence. It contemplated the removal and re-installation of a new *Colorbond* roof and flashings to the pergola and carport. Regrettably, the author of that undated letter and quotation was not called to give evidence at the hearing.
23. The Owners further rely on an *Inspection Notice* issued by the relevant building surveyor in relation to the pergola/carport on 15 June 2016 (amended on 7 January 2017). It directed that the following work be carried out to the pergola/carport:
 - (a) Additional rafter brackets to be installed to the carport as per the plans.
 - (b) Remove roof sheetings to allow open roof space to the carport and Veranda as per the plans.
 - (c) Flashing to be installed to the carport and veranda roofs.
 - (d) Install 2M10 bolts to each rafter brackets/side beams connection or replace with rafter brackets (horizontal face) to allow the 2M10 to be installed.
 - (e) Replace all the roof sheetings and correctly install the roof screws to the crest in lieu of the pan.
24. No expert evidence was adduced in support of, or in response to, matters raised by the Owners, other than the Respondent requesting that the Principal Registrar issue a summons to the relevant building surveyor to appear and give evidence. In that regard, Mr Rached Hachouch, the building surveyor, appeared on the second day of hearing to answer questions put to him by Mr Gray. Mr Hachouch was shown a *Stratco Sanctuary Verandahs, Patios, Carports and Pergolas* manual, which stated that *Prodeck* roof sheeting should be 'pan fixed'.

Mr Hachouch conceded that in light of that document, it may have been permissible to fix the roof decking through each pan – if the roof sheets were, in fact, *Prodeck* roofing sheets. This evidence conflicts with the building surveyor's *Inspection Notice* and the Owners' contention that the appropriate fixing method was to secure each roofing sheet through the top of the crest (or rib). In that regard, the Owners referred to the *Stratco Superdek* roofing and walling manual, which states:

ROOFING – CREST FIXING ONLY

One fixing required per crest

25. Mr Gray contended that the roofing sheet used was not *Superdek* but rather, *Stratco Prodeck*, which is another type of roof sheeting produced by *Stratco* and which has a similar profile to *Superdek*, albeit having a heavier gauge. Mr Gray produced the *Prodeck* installation manual, which recommended pan fixing, rather than crest fixing.
26. Regrettably, the Respondent produced no evidence as to what type of roofing sheet was supplied (*Superdek* or *Prodeck*). Nevertheless, Mr Gray submitted that the evidentiary burden of proving that the fixing methodology was incorrect lies with the Owners, being the party alleging that the work was not performed in accordance with the all regulatory requirements. In my view, there is insufficient evidence for me to be satisfied, one way or the other, that the fixing methodology adopted by the Respondent was contrary to the manufacturer's recommendations.
27. However, the Owners contend that the fixing of the roof sheets represents only one aspect of the defects in the construction of the pergola/carport. In particular, Mr Camilleri gave evidence that some of the roof sheets show signs of premature rusting. Mr Hachouch was shown a number of photographs and opined that the rust was most likely caused by metal filings not having been washed from the roof after sheets had been cut with an angle grinder. The *Superdek* manual tendered in evidence stated:

Where possible cut sheets on the ground, and always clean of any swarf and metal filings progressively during the installation. Dispose of off-cuts carefully.
28. In my view, that recommendation would apply equally to *Prodeck* roofing sheets, if, in fact, they were supplied. The failure to properly wash off metal filings has led to some of the roof sheets prematurely rusting, which I find would not have occurred had the manufacturer's recommendations been followed during the installation process.
29. Moreover, the Owners contend that some of the structural columns or posts which support the pergola/carport have not been fixed into the

post footings but rather, have been part welded to uprights which were fixed into the post footings. Mr Hachouch was shown a number of photographs depicting this construction methodology. He opined that this differed from the construction methodology depicted in the approved drawings. He said that an engineer would need to be engaged in order to certify that this alternative methodology was structurally sound. I accept Mr Hachouch's evidence on this point. The *Post detail* in Sheet 2 of the approved drawings depicts the posts being embedded within each post footing. The detail does not show any welding of the posts onto an upright.

30. In my view, the rusting of the roof sheets and the welding of the columns constitutes a breach of the contractual warranties imported into the contract between the parties by s 8(a) and (c) of the *Domestic Building Contracts Act 1995*. Those provisions state, in part:

The following warranties about the work to be carried out under a domestic building contract are part of every domestic building contract –

(a) the builder warrants that the work will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract;

...

(c) the builder warrants that the work will be carried out in accordance with, and will comply with, all laws and legal requirements including, without limiting the generality of this warranty, the **Building Act 1993** and the regulations made under that Act; ...

31. Similarly, I find that the failure to install sufficient rafter brackets, the failure to allow open roof space in accordance with the approved drawings (creating a fire break) and the failure to install flashings in a proper and workmanlike manner, all being items identified by Mr Hachouch and set out in his *Inspection Notice* are also breaches of the contractual warranties imported into the contract between the parties.

The deck

32. It is common ground that the building permit obtained by the Respondent did not mention the construction of the timber deck. Similarly, the approved drawings did not depict the deck. According to the Owners, that work required building approval. Indeed, that contention is consistent with Mr Hachouch having issued a *Building Notice* on 15 June 2016. That *Building Notice* stated, in part:

...

3. Pursuant to section 106 of the Act, I am of the opinion that:

3.1 Building work has been carried out on the building without a building permit required by the Act Section 16.

3.2 Building work has been carried out on the building in contravention of building permit issued for:
Construction of carport and veranda

The building work, building permit number; 2016/104 dated 7/05/2016. In that:

3.2.1 An addition (deck) has been constructed to the rear of the dwelling contrary to the permit drawings.

4. The above is/are the reason/s why this Notice was issued.

NOW TAKE NOTICE THAT:

5. You are required to SHOW CAUSE in writing within 30 days of the date of service of this Notice:

5.1 Why should not carry out the following building work in relation to the Building:

5.1.1 Demolish the deck to the rear of the dwelling.

33. On 24 July 2016, Mr Hachouch elevated the status of that *Building Notice* and issued a *Building Order* requiring the demolition of the deck.

34. In addition, Mr Camilleri gave evidence that the footings for the deck were not founded deeply enough and that this constituted a further defect. Photographs were tendered in evidence, which Mr Camilleri said showed the inadequate founding depth of the footings.

35. Mr Gray contended that the photographs could not provide an accurate assessment of the founding depth of the footings because they merely showed the top of the concrete pad upon which the stumps were embedded, rather than the founding depth of the pad itself.

36. In my view, the absence of any expert evidence makes it difficult to determine whether the deck was defectively constructed or not. However, that does not change the fact that no building approval was obtained for construction of the deck. Having regard to the building surveyor issuing a *Building Notice*, followed by a *Building Order* in respect of the deck, I find that building approval should have been obtained prior to that work commencing. Section 16 of the *Building Act 1993* states, in part:

16 Building permit required

- (1) A person must not carry out building work unless a building permit in respect of the work has been issued and is in force under this Act and the work is carried out in accordance with this Act, the building regulations and the permit.

37. Consequently, I find that the Respondent breached the warranty implied into the contract between it and the Owners under s 8(c) of the *Domestic Building Contracts Act 1995*, requiring all work to be carried out in accordance with the *Building Act 1993*.

Was it reasonable to demolish?

38. Mr Camilleri gave evidence that he did not have sufficient funds to undertake remedial work and as a result opted to demolish all of the works so as to comply with the direction or orders issued by Mr Hachouch. Initially, he demolished the deck, which resulted in Mr Hachouch cancelling the *Building Order* dated 24 July 2016. Subsequently, the whole of the pergola/carport structure was dismantled. Mr Camilleri said that he then sold the dismantled structure for \$6,000 on *Gumtree*.
39. It is common ground that the Owners did not engage an engineer to inspect the pergola/carport in order to assess whether the alternative construction methodology adopted by the Respondent was structurally sound; nor did they engage anyone to rectify the other deficiencies identified by Mr Hachouch in his *Inspection Notice*. Mr Gray contends that the Owners have therefore failed to mitigate their loss. He argued that they should have explored those avenues before demolishing the pergola/carport.
40. In particular, Mr Gray submitted that complaints relating to the welding of the pergola columns could have been easily addressed by arranging for an engineer to certify that the as-constructed works were structurally sound. He submitted that the Owners bore the evidentiary burden of proving that the pergola/carport structure was so defective so as to warrant complete demolition, rather than rectification. He referred me to a quotation for \$1,320 that the Respondent obtained from *ARC Construction*, which he contended represented the reasonable cost to rectify the pergola/carport. It stated:
 - (a) install six additional rafter extension brackets;
 - (b) remove roof sheeting to comply with building permit; and
 - (c) undertake further work to the flashing.

41. Regrettably, there is no evidence that the welding of the columns, as an alternative construction methodology, would have been certified by an engineer. Without evidence going to that question, I am unable to determine that an engineer would have certified that the alternative method of constructing the pergola/carport was structurally adequate or sound. To do so would be speculation on my part. Moreover, even if certification could be obtained, there is no evidence as to what an engineer would charge to carry out that work. Obviously, if the cost of engaging an engineer, coupled with the cost of rectification, outweighed or was commensurate with, the cost of demolition and reconstruction then it would be difficult to justify adopting that course.
42. In those circumstances, I do not accept that the Owners failed to mitigate their loss by failing to engage an engineer to certify that the alternative building methodology was structurally sound.
43. Moreover, Mr Camilleri said that the construction of the pergola/carport was undertaken by the Respondent, principally under the direction of Mr Pham. There is no evidence to suggest that Mr Pham is a licensed plumber or that a licensed plumber was engaged to undertake the roof plumbing work. Indeed, no *Certificate of Compliance* was produced during the course of the hearing to indicate that a licensed roof plumber had been engaged by the Respondent to undertake the roof plumbing work. If that were the case, it may explain why some of the flashing has not been completed in a proper and workmanlike manner.¹
44. Consequently when considering all of the above factors, I am of the view that the Owners did not act unreasonably in demolishing the pergola/carport and then seeking to recover some of their loss by selling the individual components.
45. Similarly, I am of the view that the Owners were left with little option but to demolish the deck, having regard to the *Building Order* issued by Mr Hachouch. My view is reinforced by Mr Hachouch's evidence, given in answer to a question that I posed during the hearing, that it was not possible to obtain retrospective building approval for the construction of the deck.

WHAT IS THE REASONABLE COST OF RECTIFYING, COMPLETING OR OTHERWISE MAKING THE WORKS COMPLIANT?

46. The Applicant's claim \$44,030 made up as follows:
 - (a) Demolition and reconstruction of the deck in the amount of \$13,830 plus \$1,200 for drawings and building permit. These

¹ The Respondent conceded that some remedial work to the roof flashings was required, as mentioned in the *ARC Constructions* quotation tendered in evidence.

amounts comprise the *Dickthehippy* quotation dated 22 June 2016.

- (b) \$29,000 to supply and install a *Stratco Outback Gable Veranda*, which includes replacing the gutters and sheets on the flat roof (the carport). This amount is comprised in a quotation from *Innovative Verandahs* dated 26 July 2016.
47. The demolition of the deck and the pergola/carport was carried out by Mr Camilleri himself. No contractors were engaged in that exercise. Therefore, the Owners concede that the above quotations need to be discounted to take that factor into account. Further, Mr Camilleri conceded that he sold the individual components of the pergola/carport for \$6,000 on *Gumtree*. That also needs to be taken into account in assessing the Owners' net loss.
48. Regrettably, no representative of either *Dickthehippy*, *Innovative Verandahs* or any other contractor, was called to give evidence as to what they would charge to rebuild the pergola/carport or the deck. The Owners rely solely on the quotations produced in the hearing.
49. The original cost of the pergola/carport was \$18,700, which included obtaining building approval.² This is significantly less than the amount of the *Innovative Verandahs*' quotation of \$29,000, even if demolition of the pergola was taken into account. Given the difference between the two prices, I am not persuaded that the *Innovative Verandahs* quotation accurately represents the reasonable cost of rebuilding the pergola/carport.
50. The only direct evidence of the cost to supply and erect the pergola/carport is Mr Camilleri's evidence of the original contract price; namely, \$18,700. In the absence of expert opinion evidence or at the very least, evidence from a relevant contractor (as to the cost to supply and erect the pergola/carport), I find that the reasonable cost of constructing the pergola/carport is the original contract price of \$18,700.
51. Similarly, the uncontested evidence was that the original cost of the deck was \$8,900. In my view, that represents the best evidence to assess the reasonable cost of constructing the deck from afresh (excluding the cost of obtaining building approval).
52. In calculating the Owners' loss and damage occasioned by the Respondent's breach of contract, I refer to the often cited passage in *Robinson v Harman*, where Park B stated:

² \$15,350 (base price) + \$2,000 (cable change) + \$1,350 (permit).

... that where a party sustains loss by reason of a breach of contract, he is, so as far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.³

53. As indicated above, the reasonable cost to rebuild the pergola/carport and deck is \$27,600, based on my findings above. However, there are a number of other factors to consider. In particular, Mr Camilleri conceded that the Owners received \$6,000 for the sale of the individual components comprising the pergola/carport. That amount needs to be deducted from the Owners' claim.
54. In addition, the Owners have retained the timber decking and framing timbers. I find that, in all likelihood, those timbers, or at least a substantial amount of those timbers, can be reused. Consequently, I find that the Owners' 'out of pocket' costs to rebuild the deck relate primarily to the cost of labour. Therefore, the value of those materials retained by the Owners (or should have been retained by the Owners) needs to be taken into account in order to determine that net loss. Regrettably, there is no evidence before me as to the cost of the timber decking and framing materials. Nevertheless, and doing the best I can with the evidence before me, I will allow 50% of the original contract price for the cost of materials retained by the Owners. Therefore, I find that the Owners' net loss in respect of the deck is \$4,450. This figure does not include the cost of obtaining building approval. The *DicktheChippy* quotation tendered in evidence quoted \$1,200 for obtaining building approval. Given that this amount is similar to the amount that the Respondent charged to obtain building approval for the pergola/carport, I consider this sum to be reasonable. Accordingly, I find that the total amount of Owners' loss in relation to the deck is \$5,650.
55. Finally, not all of the \$27,600 contract price was paid. \$3,625 remained to be paid under that contract. That amount also needs to be discounted from the Owners' claim in order to determine their net loss.
56. Having regard to my findings set out above, I conclude that the Owners' claim of \$44,030 is to be reduced to \$14,725, made up as follows:
 - (a) \$12,700 in respect of the pergola/carport;
 - (b) \$5,650 in respect of the reconstruction of the deck;
 - (c) less \$3,625, being the amount that remained to be paid under the original contract with the Respondent.
57. Consequently, I will order that the Respondent pay the Owners \$14,725, having regard to my findings set out above.

³ *Robinson v Harman* [1848] 154 ER 363, 365.

SENIOR MEMBER E. RIEGLER