

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D193/2009

CATCHWORDS

Domestic building, dispute regarding contract sum, alleged defects, incomplete work.

APPLICANT	John Casabene t/as J.A.C.Painting
RESPONDENT	Antonio Ferriera
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	1 October 2009 and on site on 12 November 2009
DATE OF ORDER	24 November 2009
CITATION	Casabene trading as J.A.C. Painting v Ferriera (Domestic Building) [2009] VCAT 2428

ORDER

The Respondent must pay the Applicant \$5,050 forthwith.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant	Mr J. Casabene in person
For Respondent	Mr A. Ferriera in person

REASONS

- 1 The Applicant painter, Mr Casabene, seeks payment of \$14,000.00 from the Respondent home owner, Mr Ferriera, for “plastering and paint work up to 28-11-08”. Mr Ferriera has not counter-claimed, but defends the claim on two grounds – he says that the agreed contract sum is less than Mr Casabene contends and that the quality of the work is so poor that a substantial proportion, including all the painting, must be done again. The parties agree that when they parted company, the painting work at least was incomplete.
- 2 The hearing before me was a re-hearing necessitated by a mistake which took Mr Ferriera to the wrong hearing room. The hearing was before me on 1 October 2009 and on site on 12 November 2009.

THE CONTRACT SUM

- 3 The parties agree that there was a contract between them. At least for this part of the construction of his home, Mr Ferriera has been engaging his own tradespeople.
- 4 The house is a substantial home, on two levels. Mr Casabene says that the total contract sum for plastering labour, but not for the supply of plaster board, and all the painting including supply of paint is \$34,000 whereas Mr Ferriera says that it is “about \$18,000”. The parties agree that \$13,000 has been paid.
- 5 Mr Casabene gave evidence that the first contact between the parties was when Mr Ferriera approached him. He was working next door to the site of the home and Mr Casabene said he priced the job from plans. He said he gave two alternate prices – one for plastering with “existing windows” of \$17,000 and one “without window” – which the parties agree means without window reveals - of \$16,000. According to Mr Casabene the painting was an additional \$18,000, being labour and materials, so the total price was \$35,000 or \$34,000. He said it was agreed that, although the plastering of at least some window reveals was included, the agreed sum was \$34,000, of which \$16,000 was for plastering.
- 6 Mr Casabene referred to a photocopy of two documents handed up at the hearing on 1 October 2009. One was “quotation 12936” of 9 August 2008 and the other was the next page in the quotation book – 12937. On that document “quotation” was crossed out and “tax invoice” written in. It is over three and a half months after the quotation; dated 28 November 2008. The quotation was addressed to “Antonio” – Mr Casabene said he did not know Mr Ferriera’s family name at that stage. His explanation for the length of time between the quotation and the tax invoice, although they are adjacent pages, is that he usually works with his brother, but this job was under his own name.

7 I directed the Principal Registrar to send a letter to Mr Casabene directing him to bring the relevant quotation book to the hearing on 12 November 2009. He failed to do so. I therefore have some doubt as to the provenance of the alleged quotation and tax invoice.

8 Mr Ferriera gave evidence that Mr Casabene was working for a neighbour who said Mr Casabene was a good and fussy painter. Mr Ferriera said his neighbour told him the price to plaster and paint the neighbour's home was \$14,000 in total. He saw the neighbour's job and Mr Casabene said the price for Mr Ferriera's home would be "about \$18,000." He referred to a quote written on the back of an envelope, which he said confirmed his recollection. He tendered the envelope, which Mr Casabene confirmed was his writing. He said he received the envelope a few days before the work was due to start. The envelope is document 15 on the Tribunal file. The words on the envelope arranged as they appear on the envelope are:

PLASTER LABOUR ONLY	Existing Windows
	\$17350 \$19085
	CASH INC GST
	Without Windows
APPROX BOARD SUPPLY \$9,000 ¹	\$15350 \$16885
	CASH INC GST
	CASH INC GST
PAINTING	\$18600 \$20460

9 Mr Casabene's explanation of the difference between the envelope and quotation 12936 was "We did a take-off [of the price] on site then refined it and put it in the quotation book". However, I note the "refined" price is both less precise and lower than the "take off", even without GST, if window reveals are included.

10 Mr Ferriera said "In my mind, the [total] price was \$18,000" but this is not logical. If it were so, the price would not change regardless of whether the job were with "existing windows" or without. It would also mean that if the job were "existing windows" the price of painting the whole of this substantial home would be \$18,600 minus \$17,350 which equals \$1,250. The envelope appears to me to support Mr Casabene's recollection of the price, rather than Mr Ferriera's.

11 In support of his view that the reasonable cost to hang plaster is less than Mr Casabene says was agreed, Mr Ferriera provided two quotations to hang plaster throughout the home from Saad's Plumbing & Plastering and from Mota Plastering Pty Ltd which were respectively for \$8,085 and \$9,592; both inclusive of GST. The Saad quotation is undated, the Mota quotation is dated 22 February 2009 and I accept Mr Ferriera's evidence that neither

¹ "Approx board supply" appears in an oval shape, which I believe means that it was a note to Mr Ferriera, rather than a sum included as part of the quotation.

visited the site. Mr Ferriera said they priced the job from the drawings. No-one from either firm appeared to give evidence.

- 12 If a fair price to plaster were approximately half way between these quotations – say \$8,750 - applying that sum to Mr Ferriera's recollection that the total price was \$18,000 would mean that deducting \$8,750 for plastering would leave only \$9,250 of the contract sum for painting – significantly less than the approximately \$14,000 Mr Ferriera says should be allowed for rectification and completion. Mr Ferriera cannot succeed in both arguments – if the fair cost of completion is in accordance with the C&A Painting Services quotation of \$15,950 submitted by Mr Ferriera, that is inconsistent with the total contract sum being in the region of \$18,000 as he submits.
- 13 In the absence of particularly compelling evidence from either party, I accept Mr Casabene's evidence that the total sum payable by Mr Ferriera for plastering and painting is \$34,000, of which \$16,000 is for plastering. Because it would be illegal for the parties to reach an agreement which did not include payment of GST, I find that the sum is inclusive of GST.

QUALITY OF THE WORK

- 14 Mr Ferriera also submits that the plastering is rough and the painting not well done, and that it would cost at least \$14,000 to rectify. As mentioned above, he provided a quotation from C&A Painting Services for \$15,950 inclusive of GST.
- 15 My observations on site are that the plaster finish is generally acceptable although faint lines are visible along the joints of plasterboard in the extensive kitchen and family room ceiling. It is not clear what has caused these lines – the ceiling appears to be level and flat when inspected closely. It is possible that another coat of paint, or possibly the application of a skim coat over the whole surface, is necessary. There are also some areas on walls where there are barely detectable trowel marks or indentations, and the finishes of corners, particularly projecting corners, generally requires further work. Some are rough and contain small plaster dags, but I was shown no work that calls for demolition and re-installation.
- 16 I note that a storage area down stairs has been plastered but not stopped, and I accept the evidence of Mr John Casabene that plastering this area was not part of the original contract, but plaster was hung to ensure that electrical wires would not be loose.

DEGREE OF COMPLETION

- 17 Mr John Casabene gave evidence that tax invoice 12937 was for a progress payment of \$3,000 for plastering and \$9,000 for painting, which inexplicably added to \$12,727, to which \$1,272 was added for GST, giving a total of \$14,000. I have already expressed my concern about the provenance of this tax invoice.

- 18 Mr Casabene said on 1 October that painting was 60% complete, but I note that 60% of \$18,000 is \$10,800; not \$9,000. Mr Casabene said that he had completed all upstairs ceilings, sealed and applied the first coat of colour to the walls, and completed all downstairs ceilings and walls – the skirtings, architraves and doors had not been installed when he was painting, so had not been painted.
- 19 I treat the plaster work as complete, subject to minor rectification that can be undertaken in the course of painting. The degree of completion of painting therefore takes the minor plaster faults into account.
- 20 On site I saw that there was little paint work which did not need further work, with the possible exception of the down stairs ceilings. Even so, further cutting in will be necessary between the ceiling and walls in the large room down stairs, which is currently used as the master bedroom. Mr Tony Casabene said he considered the work 50% complete and Mr Ferriera said it all needed to be done again. There is extensive wood work which is part of the work to be painting, and no preparation or painting at all has been undertaken.
- 21 I am not satisfied that the painting is anywhere near 50% complete – it appeared to me to be about one third complete, with the necessity to make additional allowances for minor rectification of the plaster. In the absence of convincing evidence from Mr Casabene about the cost to complete the painting, I accept the C&A quotation as reasonable and note that it approximates my own estimate, on the basis that somewhat more than one third of the work represented by the contract sum remains to be undertaken.

FINANCIAL RECONCILIATION

- 22 Mr Ferriera must pay Mr Casabene:

For contract sum	\$34,000
Less paid	<u>\$13,000</u>
	\$21,000
Less C&A quotation	<u>\$15,950</u>
Sum due	<u>\$5,050</u>

SENIOR MEMBER M. LOTHIAN