

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D165/2011

**CATCHWORDS**

Domestic building - work and labour – contract to supply at an hourly rate – nature of agreement – incomplete work not charged for – reasonable rate for time spent working - lower rate for travelling time – defective work – absence of expert evidence – calculation of amount due – set-off

<b>APPLICANT</b>	Cenekin Pty Ltd (ACN: 005 877 430)
<b>RESPONDENT</b>	Captain Stag Pty Ltd (ACN: 125 688 539)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R. Walker
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	19 December 2011
<b>DATE OF ORDER</b>	27 January 2012
<b>CITATION</b>	Cenekin Pty Ltd v Captain Stag Pty Ltd (Domestic Building) [2012] VCAT 90

**ORDER**

Order the Respondent to pay to the Applicant \$1,774.82.

**SENIOR MEMBER R. WALKER**

**APPEARANCES:**

For the Applicant	Mr D. Hawkins in person
For the Respondents	Mr G. Howard in person

## REASONS

### Background

- 1 The applicant Cenekin Pty Ltd is a builder (“the Builder”). Its director, Mr Hawkins, is a registered building practitioner. The respondent (“the Owner”) is the owner of a residential unit at Falls Creek (“the Unit”). The sole director of the Owner is Mr Howard.
- 2 Mr Hawkins and Mr Howard are cousins. Mr Howard is a diesel mechanic but in his youth he worked for a short time for Mr Hawkins’ father, who was also a builder, and so he has a small amount of building experience.

### The agreement

- 3 In about early 2010 the Unit required renovation and extension work and the external face of the building also needed to be re-clad in non-flammable material in order to satisfy new fire regulations that came into force following the Black Saturday fires. Mr Howard had plans prepared and asked Mr Hawkins to quote on the necessary work.
- 4 Pursuant to this request, Mr Hawkins prepared an undated quotation to carry out the work to lock up stage plus plastering and kitchen, and including structural work, for a price of \$76,409.52. Mr Howard was unable to afford to pay that amount and so asked Mr Hawkins if he (Mr Howard) could assist in the work in order to contain costs.
- 5 Discussions ensued and it was agreed that Mr Hawkins would provide labour and materials to carry out the work and that Mr Howard would assist with it. Materials were to be supplied by the Builder at cost plus 10%. Mr Howard says that the same was to apply for the labour but Mr Hawkins says that there was no agreement as to any particular amount for labour. Rather, he says that he told Mr Howard that he would “look after him” in regard to the labour.

### The work

- 6 Work commenced in February and continued through March until the beginning of May when, following a dispute between the parties the Builder left the site.
- 7 During this period some invoices were rendered and some payments were made.

### Legal proceedings

- 8 On 20 August 2010 the Builder commenced these proceedings against the Owner claiming \$24,317.90, including interest.
- 9 On 29 April 2011 Mr Howard commenced separate proceedings in his own name seeking damages for defective workmanship. This proceeding, which in effect is a counterclaim, ought to have been commenced in the name of

the Owner. I said during the hearing that I proposed to amend the claim by substituting the Owner as the applicant and that will be part of my order.

- 10 Both matters came before me for hearing on 19 December 2011 with five days allocated.

### **The hearing**

- 11 The parties represented themselves. For the Builder I heard from Mr Hawkins and his wife and for the Owner I heard from Mr Howard. A number of photographs were produced along with the plans and some correspondence. The whole of the evidence was heard on the first day of the hearing and I then informed the parties that I would consider the matters they had raised and provide a short written decision.

### **The labour**

- 12 In regard to the dispute concerning the labour, I think that it is more likely than not that the agreement for cost plus 10% applied only to the materials, as Mr Hawkins claims. This is because the labour supplied was by full time employees of the Builder so it would have been quite difficult to calculate the actual cost to the Builder of providing that labour. I think it is unlikely that the parties would have agreed to labour being charged at cost plus 10% without some further discussion as to how that cost was to be assessed.
- 13 Mr Hawkins said, and I accept, that it was agreed that the Builder would “look after” the Owner in regard to the charges for the labour. That is a very vague arrangement and I cannot find that it means anything more than that the Owner will not be overcharged; that is, that the charges that are to be made will not be more than what is fair and reasonable in all the circumstances.

### **The Owner’s claim for defective and incomplete work**

- 14 In order to properly consider the issues raised in relation to defective and incomplete work it is necessary to bear in mind the type of contract that the parties entered into.
- 15 Generally, where there is a contract to complete an agreed scope of works for an agreed price then the measure of damages for the Owner in regard to any defective or incomplete work is the cost of rectifying the defects and completing the work, less any unpaid balance of the contract price.
- 16 Where work is done at hourly rates, the fact that some work has not been completed will usually mean that the Owner has not been charged for having it done.
- 17 If the Builder has carried out work and charged for it, then, if the work is defective, the damages will generally be the cost of rectifying the work that he has charged for so that it conforms with what the contract required. If there is no evidence as to the cost of rectification the Owner is at least entitled to be credited with the difference between what he paid and the value of what was done (see: *Hanak v. Green* [1958] 2 QB 9; *Edward Ward*

*& Co v. McDougall* [1972] VR 433).. It may be that, if an item of work is sufficiently defective, it is of no value and that therefore he is entitled to receive back the whole of the amount that he paid to have that particular item of work done.

- 18 Finally, if the Builder who is working on an hourly rate does defective work then, quite obviously, he is not entitled to also charge for the hours that he spends rectifying his own defective work.

### **The evidence**

- 19 Evidence as to what was done and as to the alleged defects was given by Mr Howard. He is not a builder or an expert in building matters and so I must treat his evidence carefully. However it appears that he was continually on site whereas Mr Hawkins was not. It also appears that part of the work that was done was pulled down and rebuilt. That is something that can be observed, even by someone who is not a qualified tradesman.
- 20 I thought that both Mr Howard and Mr Hawkins attempted to give an accurate account of what they observed and what they recalled. I now turn to the issues and the findings that I have made.

### **The hours worked**

- 21 The hours were recorded in the Builder's office by its bookkeeper. The number of hours recorded were those advised to the bookkeeper over the telephone by the employee concerned. Since the employee was working for wages there was no incentive for the employee to overstate his hours although naturally, he would want to satisfy his employer that he was working and not standing idle.
- 22 Mr Howard disputed some of the hours and since he was on site I accept his evidence where he has any record of it.
- 23 For some of the time, the workmen were living at Falls Creek in accommodation provided by Mr Howard with meals that he also supplied. At other times they were driving each day to the work site from Wodonga and back again, which took an hour and a half each way.
- 24 The hours the Builder has claimed are for the time from when the workmen left Wodonga until they returned, that is, they include travelling time and the times during which the workers were eating lunch and morning and afternoon tea. All of this is claimed at the same hourly rate. I am not satisfied that the parties agreed to any such arrangement.
- 25 When a tradesman is paid by the hour, then, in the absence of specific agreement, he is paid for the hours that he works, not the hours that he spends travelling, eating his lunch or having morning and afternoon tea. The hourly rate charged should normally take account of the fact that he will need to get to and from the workplace and that he will spend part of the day eating his lunch and having breaks.

- 26 However, the agreement was that the Builder would charge a fair and reasonable amount for the workers that it provided. I think that, where the workers had to spend three hours driving to and from the worksite when they were coming from Wodonga, it is fair and reasonable to make some allowance for travelling time.
- 27 The labour was by three qualified carpenters and two apprentices. Two of the qualified carpenters were Mr Hawkins and a man called Casey. Their labour has been charged at \$55.00 per hour. A third carpenter, more experienced and the one who appeared to fix the work of the others, Owen, was charged at \$75 an hour. I am satisfied on Mr Hawkins's evidence that those are fair and reasonable rates for these qualified carpenters. The two apprentices were Tim and Jarrod, and their time was charged at \$25.00 an hour. I am satisfied on Mr Hawkins's evidence that that rate was fair and reasonable. Those sums should be allowed for the time the men were on site and not on a lunch or tea break. In addition to those, I will allow \$20 and hour for each man for travelling time where they had to come from Wodonga.

#### **The hours worked**

- 28 On 12 March four hours are claimed for Casey and four hours for Mr Hawkins. Mr Howard says that no work was done on that day because Mr Hawkins got Casey very drunk the night before. If that were true, and it was not denied, I think that it is unlikely that he would have worked the four hours the following day that are claimed in the invoice and therefore Mr Howard's evidence is to be preferred. The charges for this day will therefore not be allowed.
- 29 According to Mr Howard's evidence on 23 March Casey pulled down all of Mr Hawkins' veranda work saying that he had cut it all out of square. Mr Howard said that this wasted two days and all of the existing timber that he had worked hard to reclaim was wasted. Casey also pulled down all the toilet framing. The two days referred to are likely to have been the day claimed for Casey and the day claimed for Mr Hawkins on 11 March. For the Builder's workmen to pull down its own work shows clearly that the work in question was defective and so the hours claimed for 11 March will not be allowed.
- 30 Work stopped on the job on 25 March when Mr Hawkins discovered there was no building permit. As a registered Builder he should have satisfied himself that there was a building permit before starting work. I accept his evidence as to the communications that he had with a representative of the Resort administration but he should have known nonetheless that a building permit was required.
- 31 Following contact with a building surveyor, work resumed. It is difficult on the evidence to assess how much time was lost as a result of this but I shall not allow the time claimed for preparing the application. That is

preparatory work that the Builder ought to have done before commencing on the job.

- 32 On 28 March Mr Howard rang Mr Hawkins to say that Casey had built the bathroom framing and walls so far out of square that it had to be demolished and rebuilt by himself and Jarrod. There was some evidence given about this by Mr Hawkins. In regard to this complaint and also and also the veranda, he said that he had to follow the lines of the existing building. However in wet areas where there are square tiles to be laid and cabinet work to be installed it is important to work to a square and the fact that the work had to be taken down and rebuilt to a satisfactory state is evidence that it was initially defective. On this basis I disallow the hours claimed for Casey on 24 and 25 March.
- 33 On 12 April labour was charged from 7:00 a.m. but Mr Howard claimed that the plaster truck did not arrive until 9:30 a.m. I accept Mr Hawkins' evidence that the plaster truck was organised by Mr Howard and that his men nonetheless had to be paid. However there is also a claim by Mr Hawkins for four hours on that day and according to Mr Howard's evidence which I prefer he was not on site on that day. That claim will not be allowed.
- 34 On the evening of 13 April a birthday celebration was held for Casey. It is clear from the evidence that there was a considerable amount of drinking and Casey got very drunk, vomited on his bed and all over the carpet. Jarrod was sent the following day to clean it up and Mr Hawkins left the day afterwards and never returned to the site. According to Mr Howard nothing was done by anybody on that day (14 April). There is a claim for six and a half hours for Casey and Tim. I think that it is unlikely that they worked those hours and that Mr Howard's evidence that nothing was achieved is credible. I will not allow the hours claimed for that day.
- 35 Mr Howard complained that on 20 April extra concrete was required because the Builder's barrow had a hole in it. He said that, because of the concrete wasted, an extra load was required and time was lost waiting for the concrete truck to return from Mt. Beauty. Although it appears from an invoice that the Builder did purchase a new barrow I think it is unlikely that a hole in a concrete barrow would have resulted in the need for an additional delivery. Mr Hawkins denied that that was the case. There is insufficient evidence to enable me to find that the delay was any fault on the part of the Builder. It was Mr Howard who sourced the concrete from Mr Beauty and if the Builder had its workmen on site ready to work then it is entitled to claim for their time.
- 36 There are three further claims for Mr Hawkins attending the site on 18, 19 and 20 April. These will be disallowed since it does not appear that he was on site on those days.

### **Further rectification of the work**

- 37 Following his departure Mr Hawkins sent an experienced carpenter, Owen to the site. According to Mr Howard Owen had to re-install the windows that had already been fitted by Mr Hawkins. According to Mr Hawkins the problem with the windows was that they had been ordered by Mr Howard to the precise dimensions of the openings without making any allowance for imperfections. The openings had to be planed out in order for the windows to fit. The windows were aluminium and could not be altered themselves. Although I accept Mr Hawkins' evidence about that, they should have been fitted properly the first time. It should not have been necessary for Owen to re-fit them.
- 38 On 29 April Owen told Mr Howard that the whole extension was out of level and he spent nearly all day levelling it. Mr Hawkins said that the problem with levels was that they could not pour the pads until they had been inspected and had used temporary supports. The floor should, nonetheless have been built level.
- 39 In this instance I think the appropriate thing to do is to disallow the hours for that particular day since it is impossible to identify which date this defective work was done. Owen also informed Mr Howard that all of the roof bearers that Casey fitted were wrong. This also appears to have been fixed on that day.
- 40 On 29 April Owen informed Mr Howard that he could not finish the job because he was injured and that there was nobody else that the Builder could send to do it. Thereafter no further work was done by the Builder.

### **Unrectified defects**

- 41 Mr Howard complained to Mr Hawkins that the Builder caused the whole upstairs and roof of the Unit to drop. Photographs of the roof support his evidence.
- 42 According to the engineering drawings the upstairs of the Unit was to be supported by two beams and the end of one of the beams was to be supported on a triple stud. According to Mr Howard's evidence it is not supported on a triple stud and photographs of the underside of the Unit show a number of pieces of timber stacked up under the floor immediately beneath whatever support has been provided.
- 43 Photographs of a door upstairs show that, in order to get it to close, the bottom had to be cut on an angle. That door will now need to be replaced and the upstairs jacked up and properly supported.
- 44 This is defective workmanship but the problem is quantification of the Owner's loss. Mr Howard tendered a quotation from another Builder, Warrington Homes, to correct some defective carpentry at a cost of \$6,150 plus GST and, in regard to the incorrectly installed steel beam, to repair and refurbish it to the engineering drawings, an amount of \$12,800 plus GST.

- 45 Mr Hawkins says that the claim of \$12,800 is grossly inflated and pointed out that Mr Warrington is a friend of Mr Howard. Mr Howard acknowledged that but then, Mr Hawkins is also his cousin. The real issue is not that the Builder giving the quotation is a friend of his but rather, that he was not available for cross-examination or to explain precisely what it is he is quoting for and how his price is calculated.
- 46 Insofar as it is to do anything that the Builder did not do, it is not claimable because the Owner has not been charged for work that the Builder has not done. For example, part of the scope of work for which Warrington has quoted would probably be to install a proper concrete pad under the floor and provide something to take the load from the triple stud and transfer the load to the pad. It would also probably include the supply and installation of a triple stud. None of that work has been charged for by the Builder.
- 47 I think that I should make an allowance to replace the door. Apart from that I will disallow the labour of the Builder insofar as it appears to have related to the incorrect positioning of this beam. Since Owen appears to have been the skilled carpenter that Mr Howard says fixed the mistakes of the others I think it is likely that the defective work was carried out by other workmen before he arrived on site. I will therefore disallow the 8 hours claimed for Casey and Tim on 15 April.
- 48 Mr Howard alleges the existence of a number of other defects and claims as follows.

**Wasted concrete due to hole in barrow - \$400.**

- 49 I am satisfied that there was a hole in the barrow both on Mr Howard's evidence and on the fact that there is evidence that the Builder purchased a barrow during the course of the job but to suggest that anything like \$400 worth of concrete was wasted is fanciful. In the absence of better evidence I am not prepared to make any allowance.

**Wasted stirrups**

- 50 Because of the absence of the permit the pads could not be poured until the foundation had been inspected and so the structure had to be propped up on a temporary basis until that had occurred. When the pads were poured Mr Hawkins suggested that the stirrups be encased in the pads in a particular place even though the final position of the posts that they would support was not known. When the posts came to be installed the stirrups were in the wrong place and had to be cut off and repositioned. Mr Howard is claiming \$400.00 for the loss of the stirrups. I am not at all clear on this claim. He said that Owen suggested that the bottom of the stirrups be replaced with a plate that could be bolted into the pad. It was apparent from the photograph that the stirrup with the plate welded onto it had been hot dipped galvanised and that clearly could not have been done on site. When I pointed this out to Mr Howard he said that the mistake was remedied before the stirrups were galvanised. I am not satisfied as to this claim.



**Replace cut floor joists \$6,150.00.**

51 Photographs show a number of joists that had been cut through and compromised and a quotation to replace this for \$6,150 from Warrington Homes has been produced. This claim is established.

**Remove and replace insulation and sisalation to fit noggings correctly to walls.**

52 Mr Howard said that the noggings were not spaced as they ought to have been to allow the fixing of the external cladding in the contemplated manner. He said that the walls had also not been correctly battened for the insulation and that all this had to be redone. He has claimed \$6,350.00 and in support has produced a quotation from Warrington Homes. Since the most of the existing walls were to remain I do not understand how the Builder would be responsible for the positioning of noggings in those walls. In the absence of expert evidence to show that this is defective work for which the Owner has been charged, I cannot allow it.

**T rim and square all fascias and eaves.**

53 This is another quotation from Warrington Homes for \$2,149.00 but it is unclear whether this relates to the existing building or work done by the Builder. In the absence of clarification I cannot allow it.

**Conclusion**

54 The hours adjusted as aforesaid will be allowed, plus the materials with a 10% margin. To that I will add 10% GST and then deduct the payments that have been made and the allowances that I have made in favour of the Owner. The result is as follows:

Labour (adjusted as above):		\$12,719.00
Permit fee:		\$ 1,159.60
Materials (including 10% margin)		
Invoice 6166	\$1,820.00	
Invoice 6162	\$3,644.79	
Invoice 6145	<u>\$2,918.78</u>	<u>\$ 8,383.57</u>
		\$22,262.17
Plus GST		<u>\$ 2,226.22</u>
Total due to Builder		\$24,488.39
<u>Less:</u>		
Payments made:		
30/04/2010	\$10,000.00	
17/05/2010	\$ 2,918.78	
10/06/2010	\$ 3,644.79	

Allowance for noggings	\$ 6,150.00	<u>\$22,713.57</u>
Balance due to the Builder		<u>\$ 1,774.82</u>

55. Since this calculation takes account of the claims made by the Owner, proceeding D365/2011 will be struck out.

**SENIOR MEMBER R. WALKER**