

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D274/2006

CATCHWORDS

Domestic Building – claim and counterclaim – costs.

FIRST APPLICANT	Gilbert Clare t/as Gilron Services
SECOND APPLICANT	Rhonda Clare t/as Gilron Services
RESPONDENT	Melford Constructions Pty Ltd (ACN 102 491 010)
WHERE HELD	Melbourne
BEFORE	Senior Member D. Cremean
HEARING TYPE	Hearing
DATE OF HEARING	31 October 2006
DATE OF ORDER	10 November 2006
CITATION	Clare v Melford Constructions (Domestic Building) [2006] VCAT 2290

ORDER

- 1 On the claim for \$10,384.46.
- 2 On the counterclaim for \$1,143.92.
- 3 Reserve liberty to apply.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the First Applicant	Mr C. King of Counsel
For the Second Applicant	Mr C. King of Counsel
For the Respondent	Mr D. Pumpa of Counsel

REASONS

- 1 Despite repeated attempts, the parties in these proceedings have been unable to see their way to reaching agreement.
- 2 That is to be regretted. The Applicant, if successful, can win no more on the claim than \$10,774.46. The Respondent, if successful, can win no more than \$1,143.92 which is the amount of the counterclaim. But I am told that, so far, the Applicant's legal expenses exceed \$11,800.00 while those of the Respondent are about \$13,000.00. Each could have paid out the other, in the very beginning, and not come out behind. That would have been cheaper, for both, by far.
- 3 The Applicant's claim is made up as detailed in the "Summary of Amounts" filed with the Tribunal on 13 October 2006. The amounts claimed are set out there as follows:

Description	Amount Quoted \$	Amount agreed to be deducted \$	Amount paid to me \$
First quote 15/11/04			
Kitchen cabinets	21,714.00	0.00	18,993.00
Corian tops	13,728.00	13,398.00	0.00
Glass splash backs	1,727.00	0.00	0.00
Laundry	10,032.00	407.00	9,532.00
Bathroom/powder room	3,289.00	495.00	2,794.00
Entry cabinet	561.00	0.00	561.00
Coat cabinet	1,419.00	0.00	1,129.00
Rhona's study	7,953.00	495.00	7,458.00
Study Entry Shelving	4,081.00	297.00	3,784.00
Hanne's room elevation 1	5,093.00	440.00	4,653.00
Drawer under window Hanne's room	704.00	77.00	627.00
Bookcase/desk Hanne's room	3,091.00	231.00	2,660.00
Robe Hanne's room	2,898.50	110.00	2,588.50
Master bedroom WIR	3,080.00	0.00	2,880.00
Shaving cabinets	462.00	88.00	374.00
Night room	8,349.00	0.00	8,349.00
Shelving unit living room	1,045.00	330.00	715.00
Studio top shelving above	2,717.00	2,717.00	0.00
Second quote 08/03/05			

Studio Shelving elevation 4&5	6,138.00	0.00	6,138.00
5 drawers under bench	511.50	0.00	511.50
Pine ply shelving	1,386.00	0.00	1,386.00
Bedroom A ENS	1,243.00	0.00	1,243.00
Other items quoted			
Breakfast pantry and ironing board cabinet (undated)	3,437.50	0.00	2,725.00
Rye grass veneer on 9mm MDF verbally	3,610.50	0.00	3,610.50
Extras not quoted			
New age Veneer (bordo) on 10mm MDF	814.55	0.00	814.55
Cut and edge bordo veneer 3 hrs	181.50	0.00	181.50
Lacquer of doors/panels at \$65 per meter total 13.5	965.25	0.00	965.25
Lacquer of doors/panels at \$45 per meter total 28.5	1,410.75	0.00	1,410.75
Blackboard for Rhona's study	845.56	0.00	845.56
Lacquer/rye grass veneer \$45 per meter total 46.08	2,280.96	0.00	0.00
Cable cover to Rhona's study	22.00	0.00	0.00
Extra drawer and dividers in robe	165.00	0.00	0.00
2 pk lacquer to studio bench	264.00	0.00	0.00
Brackets to shelving in studio	748.00	0.00	0.00
Refit new pantry doors to pantry	1,089.00	0.00	0.00
Laminate kick face to bar unit	132.00	0.00	0.00
Other items			
Nepean Stone	0.00	0.00	0.00
Tile damage tiles and labor	0.00	0.00	0.00
Bank interest on advance payment	0.00	0.00	0.00
Cleaning account (1) 3 days	0.00	0.00	0.00
Cleaning account (2) 1 day professional cleaner	0.00	0.00	0.00
Fix up paint damage	0.00	400.00	0.00
Sub total	117,188.47	19,485.00	86,929.01
Total outstanding	10,774.46		

4 The Respondent's counterclaim is made up as detailed in the "List of items/Owed/Owing" filed with the Tribunal on 31 October 2006. They are as follows:

Description	Amount
	\$
Quote (1) 23/11/04 Total inc GST	91,943.50
Quote (2) \$9,278.50 less deduction \$1,243.00 for bedroom suite	<u>8,035.50</u>
	99,979.00
Agreed Variations	
VQ1 breakfast bar/ironing board	2,725.00
VQ2 blackboard to Rhona's study	845.46
VQ3 new age veneer (100mm bordo)	814.55
VQ4 cut and edge (bordo)	181.50
VQ5 templates for corian tops	330.00
VQ6 lacquer rye grass veneer (ceiling to dining area) 46 sq mtrs	2,280.25
VQ7 lacquer all doors/panels to m/bed + kitch/dining area 28.5 sq mtrs	1,410.75
VQ8 lacquer door/panels to Hanne's rooms 13.5 sq mtrs	965.25
VQ9 works ordered via clients (Dec/2005)	319.00
Studio bench	<u>150.00</u>
	10,021.76
Less Contract payments made to Gilron	83,318.51
Claim for Amerind \$3,610.50	
Payment to Amerind	<u>3,610.50</u>
Total Paid	86,929.01
<u>Credits for costs incurred by Respondent</u>	
Schiavello stone	8,571.00
Plus 8 hours pick up and deliver x 2 trips	800.00
Schiavello stone	3,800.50
Templates for above stone top	330.00
Nepean stone	2,290.00
Labour to complete joinery works	5,687.00
Tile damage tiles and labour	400.00
Credit studio bench top + drawers not laminated 3.8 x 8	1,500.00
Bank interest on advance payments	549.38
Cleaning account (1) 3 x days	1,085.00
Cleaning account (2) 1 day professional cleaner	262.50
Fix up paint damage	400.00
Amerind overpayment (\$3,610.50 claimed and paid, actual cost of sheets \$1,744.03, difference \$1,865.67)	1,865.67
Overcharge for Lacquering	<u>285.00</u>
	27,826.17
<u>Summary</u>	
Gilron original quote (received 23/11/04)	91,943.50
Gilron 2 nd quote (received 15/08/05)	8,035.50
Agreed variations to contract	<u>10,021.76</u>
Adjusted contract price	110,000.76
Less payments made by Melford	<u>83,318.51</u>
	26,682.25
Less credits to Melford	27,826.05
Balance due to Melford	1,143.92

5 I have read each of the Affidavits filed by the parties for these proceedings which agree on some things and disagree on others.

6 As regards the evidence given by or on behalf of each party there are, therefore, areas of both agreement and disagreement. One particular item I mention, however, is the Applicant's evidence given on an earlier occasion

about the distance he travelled to Hastings. He would have been travelling on the highway, if I was to accept his evidence on the point, at about 15 kph. This is farcical.

- 7 Further, as regards his evidence I note he concedes items totalling \$390.00. His mark up for labour also was I consider arguably far beyond what was generally reasonable, but I am not able to say on the evidence that it was so wholly unreasonable that I should disallow it.
- 8 Each party must prove its case on the balance of probabilities. Substantially, I am satisfied that, arising out of their business dealings with one another, each party has proved its case to this degree in respect of the amounts claimed.
- 9 That is, having heard and seen the witnesses give evidence, and having regard to their Affidavits, I am unable to say one side should win and the other side lose. Each should win – each was as credible as the other in most respects.
- 10 In accordance with the affidavits filed by each party I, therefore, make findings of fact in accordance with the materials set out therein. I am satisfied, based on those findings on these materials, I am able to make awards in respect of each party in the sums claimed (with a minor adjustment in the case of the Applicant of \$390.00).
- 11 I order the Respondent to pay the Applicant on the claim the sum of \$10,384.46 and I order the Applicant pay the Respondent on the counterclaim the sum of \$1,143.92. The difference is \$9,240.54 in favour of the Applicant if I set one off against the other.
- 12 I do not allow the Applicant costs in respect of the second day of hearing. That came about because the case could not be finished on the first.
- 13 As to costs otherwise, I will need strong persuasion to move from each party bearing their own costs as set out in s109(1) of the *Victorian Civil and Administrative Tribunal Act 1998*. I will need to be persuaded I am under an obligation to move. The provisions in s112 of the Act do not, I should add, oblige me to move. My view is that neither party has so conducted itself that it would be fair to do otherwise. Each has been unmoved by the plight of the other even though the claims of each were maintainable. I note the net difference between the parties is, as a result of my order, barely above \$9,000.00 yet the costs between the two of them total nearly \$25,000.00 – after a 2 day hearing with Counsel.
- 14 I reserve liberty to apply for costs. I do not expect, however, such liberty to be exercised. If it is exercised, it will involve a third day before the Tribunal, and the incurrence of costs for that day. I would not be expecting to order either party costs in respect of that day unless I am obliged to do so. Again, I cannot see how I could be obliged to do so.

SENIOR MEMBER D. CREMEAN

