VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D502/2006

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building – claim and counterclaim – signed variation – defective works.

APPLICANT	Classic Period Homes Pty Ltd (ACN: 096 046 105)
RESPONDENT	David Appleby
WHERE HELD	Melbourne
BEFORE	Senior Member D. Cremean
HEARING TYPE	Hearing
DATE OF HEARING	13 July 2007
DATE OF ORDER	25 July 2007
CITATION	Classic Period Homes v Appleby (Domestic Building) [2007] VCAT 1303

ORDER

1 I find in favour of the Applicant in the sum of $10,500.00.

2 I find in favour of the Respondent in the sum of $41,715.00, subject to paragraph 4.

3 I order on the Counterclaim the amount awarded to be set off against the amount claimed on the claim and the balance to be paid by the Applicant.

4 I reserve position on final figures.

5 I reserve liberty to apply to deal with any application for costs. I exclude 27 June 2007. I shall, at that point, deal with the final figure I should be ordering the Applicant to pay the Respondent.

6 I direct this matter be listed before me on 28 August 2007 at 10.00 a.m. at 55 King Street Melbourne. Allow half a day.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicant	Mr G. Thexton, Solicitor
For the Respondent	Mr A. Beck-Godoy of Counsel

REASONS

1 The claim in this matter is for a sum of $14,360.40.

2 The counterclaim (adjusted) is for a sum of $31,215.50.

3 The hearing has taken up, in effect, four listing days. One of the days was wasted and I have made a costs order against the Applicant's solicitor personally in that regard under s109(4) of the *Victorian Civil and Administrative Tribunal Act* 1998. I have previously published reasons for my order. See [2007] VCAT 1235. I put that matter, therefore, to one side.

4 I have allowed the Counterclaim to be amended to claim a revised sum despite closure of the Applicant's submissions. The Applicant was in attendance only by its solicitor and he declined my offer of an opportunity to be able to speak with his client about the matter. It seemed to me, though, that the revised counterclaim did not add a cause of action but merely updated the particulars. The Applicant was not seriously prejudiced, in my view. Further the revisions, I consider, were matters already drawn to the Applicant's attention in one way or another – in evidence or otherwise. Finally, I held, I should allow the amendment so as to observe my duty of acting fairly and according to the substantial merits of the case. See s97 of the Act.

5 During the hearing I received evidence from Mr Clune on behalf of the Applicant and from Mr Appleby, the Respondent himself. I also heard from their experts. I was particularly impressed with the evidence of Mr Fagan. Mr Lees, it seemed to me, was very disadvantaged in not having actually gone on site until 31 May 2007 – only 3 weeks or so before the hearing itself. His report was only prepared on or about 6 June 2007.

6 One matter I can deal with immediately, in light of the Respondent's concession. I am satisfied I should find in favour of the Applicant that a sum of $10,500.00 is owing as the amount due under a signed variation. The balance of the claim, however, is in contention. Indeed, even the sum of $10,500.00 is in contention in this way: although the Respondent admits the sum, he claims to set off against that sum so much of his counterclaim as is necessary to extinguish it and to claim the balance of his counterclaim thereafter.

7 I have been well placed to observe the witnesses giving their evidence. I have already indicated how, I think, Mr Lees has been disadvantaged. But as to the versions given in evidence by Mr Clune and Mr Appleby – where they conflict – I must prefer the evidence of the latter. Mr Appleby was very precise in what he said and had a good recollection of events. Mr Clune, on the other hand, seemed vague and imprecise on important points. At times, even, he appeared to be struggling to answer or remain alert, for some reason.

8 Two further matters I should mention are these. First, the Applicant failed to produce the original contract ordered to be produced at the hearing. Nor did its solicitor produce the same despite advising the Respondent's solicitor in February 2007 that the "original" contract was available to be perused. His letter to that effect is curious: either he had the original when he wrote the latter or he did not and, if he did not, either he was mistaken or he was not telling the truth in saying he did. The Respondent asks me to find the original document does not exist. I am unable to find this is so. In particular I am not prepared to make a finding that the solicitor was not telling the truth. Second, Mr Clune admitted he is not a registered builder. The person who was a registered builder with the Applicant – a Mr Jacquin – was not called and did not give evidence. Yet the evidence he could have given would surely have been material. I do not accept the explanation for his absence that it was not considered necessary to call him in light of the nature of the claim: there was still a counterclaim to defend.

9 I consider I am entitled to draw adverse inferences from both these (in my view) serious omissions – see *Jones v Dunkel* (1959) 101 CLR 298.

10 Having heard the parties and their experts, and having given due consideration to their submissions, I am satisfied that on the counterclaim I should find in favour of the Respondent in the sum claimed – namely, $31,215.00 or some other proper figure. I am satisfied that his entitlement to an order in that amount has been established on the balance of probabilities. However, I am not satisfied I should be making any finding in favour of the Applicant beyond the sum of the variation – namely, $10,500.00.

11 As regards the latter – the balance on the claim alleged to be due above $10,500.00 – I am not satisfied that circumstances exist where I should be ordering the Respondent to pay this sum. There is nothing in writing signed by him authorizing a variation and thus there has been non-compliance with s38 of the *Domestic Building Contracts Act* 1995. See s38(6)(a). I do not consider that the exception created by s38(6)(b) applies. In that regard I was referred to the decision in *Lloyd L Wilkins Pty Ltd v Vondrasek* [2006] VCAT 2479 at [118]-[121]. I do not consider, however, that there are exceptional circumstances in this case or that there would be a significant or exceptional hardship by the operation of s38(6)(a): see s38(6)(b)(i). I consider it would be unfair to allow recovery – that is, that it is not the case that it would not be unfair to allow it. See s38(6)(b)(ii). The Applicant had sufficient opportunity to arrange a signed variation and failed to take advantage of it even though it was able to arrange one for the $10,500.00 amount. Furthermore, I am satisfied, on the basis of the photographs and otherwise, that the Applicant left the Respondent's home (which it had transported to Clunes from Malvern) in a most sorry state – one where it should not obtain any reward for doing so beyond what was authorized in writing.

12 I reject the notion that I may simply order in favour of the Applicant on the extra amount by reference to s97 or 98 of the Act or by reference to s53 of the 1995 Act. In that regard I was referred to passing comment made in *Mackie and Staff Pty Ltd v Mueller* [2006] VCAT 1049 at [18]. I do not, in any event, consider it fair I should order in favour of the Applicant considering its conduct in this matter. I rely upon the adverse inferences I draw by application of the rule in *Jones v Dunkel*, above. There is no reliable evidence given to me by the Applicant, I consider, which makes it fair for me to so order. That includes the evidence, so to speak, not called from Mr Jacquin. I can only assume his evidence would not have been favourable.

13 As regards the Counterclaim I am satisfied based on Mr Fagan's expert view that, on the basis of his observations and accepted industry practice, the estimated cost of rectification is $25,079.00. I accept the contents of his report dated 19 December 2006 as true and correct and fair and reasonable. The photographs annexed thereto do not lie. Seldom have I encountered a property left in such a poor state. I note Mr Lees' comment in his report dated 6 June 2007 that Mr Fagan's costs – "At face value appear reasonable, if a finishing builder was engaged to complete the works".

14 I cannot agree with the submission that no "linkage" exists between the condition of the premises at the time of Mr Fagan's inspection and the time when the Applicant left site. In my view based on the evidence, and on the balance of probabilities, they are clearly causally connected. The condition of the premises at the later date is merely a progression of their condition when the Applicant departed. Mr Jacquin might have given evidence on a point like this but he was not called, as I have noted. Again, I assume his evidence would not have been favourable.

15 Nor can I agree that the items recommended for rectification by Mr Fagan lie outside the Applicant's scope of works. They seem to me quite plainly to lie within the terms of "Schedule 7". I note it refers to "Reinstate dwelling onto stumps" and "Rebuild passage, Kitchen and meals area". It is true it purports to exclude "any replastering or repairs" and "any brick work on concreting" or "any electrical, painting, tiling works" but these exclusions are stated to be "unless otherwise specified expressly to the contrary". In that regard, I do not have the original contract as I have noted and it may very well be that it does expressly so specify to the contrary. In the absence of the original contract I do not consider I should find that the items sought to be excluded are not otherwise specified expressly to the contrary. The inference I draw is that production of the contract would not have assisted the Applicant. In other words, I apply *Jones v Dunkel* to draw an adverse inference. However, even if the rule in that case did not apply in this case (as extending to documentary matters) I could not find (in the absence of the original contract) that those items had not been expressly provided for otherwise. This is not a finding I could making having regard to s97.

16 I accept Mr Appleby's evidence that there are further rectification costs totalling $6,606.50. His evidence was not seriously challenged either at all or on this point. This sum represents materials and his labour at a rate of $65.00 per hour for 51 hours completed work. I also accept that carpet replacements cost $1,750.00 and that repolishing of the floors cost $4,800.00. These are items, in my view, directly attributable to the Applicant's poor workmanship. Its poor workmanship is responsible also for the items dealt with in detail by Mr Fagan in his report. Both Mr Fagan and Mr Appleby made impressive witnesses, in my view. I consider that neither lost any credibility in cross-examination which was, I must say, somewhat short and abrupt.

17 I have totalled up the amounts for rectification, etc. and they seem to come to $37,235.50. Yet I note in the Particulars of Loss the amount mentioned is $39,515.50. This must be re-examined by the Respondent.

18 For the moment I will order on the Counterclaim in an amount to be finally declared.

19 I shall reserve my position on final figures. At the moment, however, I agree a set off applies so that while I find in favour of the Applicant on the claim for $10,500.00 I find in favour of the Respondent on the counterclaim in an amount in excess of that amount. That extinguishes the sum of $10,500.00. The balance, over and above that sum, I order in favour of the Respondent. As to the actual figure, I await the further mention of the matter.

20 In that regard, I reserve liberty to apply to deal with any question of costs. I shall, at that point, deal with the final figure I should be ordering the Respondent.

21 I make the orders and directions set out.

SENIOR MEMBER D. CREMEAN