

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D797/2005

CATCHWORDS

Domestic building, quality of work, reasonable compensation

APPLICANT	Helen Dean
RESPONDENT	John Hansen
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	26 July 2006
DATE OF ORDER	10 August 2006
CITATION	Dean v Hansen (Domestic Building) [2006] VCAT 1647

ORDER

The Respondent must pay the Applicant \$6,022.00 forthwith.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For the Applicant	In person
For the Respondent	In person

REASONS

- 1 On 24 October 2005 the Applicant commenced proceedings against the Respondent for the sum of \$13,000.00 'to have the unit completed properly as agreed upon'. The unit referred to by the Applicant is a granny flat at the rear of her home at Sebastopol near Ballarat. The one fact which is agreed between the parties is that the Applicant had paid the Respondent \$13,000.00.
- 2 A contract was entered into between the parties in or about March 2005 but, with the exception of a sketch and a copy of Ministry of Housing plans provided by the Applicant and the approved plans provided by the Respondent, there was no contract in writing.

The Applicant's claim

- 3 The Applicant's claim is for both incomplete work and defective work. She has a quotation to rectify the unit from P W and J A Vanderkley Pty Ltd ("Vanderkley") for \$24,775.00 and in addition she claims \$1,000.00 for stress.

The Nature of the Contract

- 4 The Applicant says that the contract was a fixed price contract to build the unit for \$13,000.00 and that the work was to include a veranda, a wardrobe and a linen cupboard and could include some second-hand materials. The Ministry of Housing plan does not include a veranda but does include a deck and the hand drawn sketch includes a veranda. The plan which both parties agree was submitted to Council for building approval does not include a veranda. The Applicant says the building was to be completed within 6 weeks
- 5 The Respondent says that he was assisting the Applicant who was an owner builder, that he was entitled to be paid \$3,000.00 for his labour and that he estimated the cost of materials, to be purchased by the Respondent, would be in the region of \$10,000.00. There is no question that the building permit was taken out in the Applicant's name as owner builder. However, on the Respondent's own evidence there is no doubt that, regardless of the payment arrangement between the parties, he fell within the definition of a "builder" in s3 of the *Domestic Building Contracts Act 1995* ("DBC Act") as it was his obligation to manage or arrange the building. The Respondent is not a registered builder and should not have undertaken major domestic building work.
- 6 The Applicant called as a witness her previous de facto husband, Peter Harrison but the contradictions in the evidence given by them about the precise terms of the contract and who was present when the contract was agreed demonstrate to me that the Applicant, the Respondent and Mr Harrison were all unsatisfactory witnesses on this point.

- 7 The Applicant's account of most of the contract terms is preferred to the Respondent's account, in circumstances where it was the Respondent's obligation under s31 of the DBC Act to provide a contract in writing and he failed to do so. I therefore find the Respondent was obliged to provide a unit for \$13,000.00.
- 8 The exception is that I do not accept the Respondent was obliged to provide a veranda. It was not on the drawings approved by the City of Ballarat and only appeared on the rough sketch provided by either the Applicant (according to her) or Mr Harrison (according to him). It is noted that the Vanderkley quote attributes \$7,865.00 to constructing the veranda alone, which also militates against it being a term that was agreed by the parties.
- 9 The Respondent claimed that he was entitled to a further \$474.00 for materials, but this was neither admitted by the Applicant nor proved by him. It is accepted that approximately \$2,000.00 was paid to the Applicant specifically for his labour. Mr Harrison's evidence is accepted that he worked on the building and he "was to receive \$1,000.00 back. But it went to the plumber."

Quality of the Work

- 10 The contract price was not high, and this indicates that the parties did not agree that the standard of workmanship would be above average. However the Applicant is entitled to a standard of reasonable workmanship, and where that contract is breached, is entitled to be placed in the financial position she would have occupied if the contract had been properly performed. In determining sums to be awarded for some of the items claimed, I have had regard to s53(1) of the DBC Act which provides that "The Tribunal may make any order it considers fair to resolve a domestic building dispute." My task in considering the Vanderkley quotation was made more difficult because the person who provided the quotation did not attend the hearing to give evidence, there was only one quotation and it was not itemised in detail.

- 11 The Applicant's claims regarding incomplete or defective work are:

Toilet

- 12 The Applicant complained that when first installed, the angle of the waste pipes beneath the toilet ran uphill rather than down which needed to be rectified, that the toilet is chipped and that the lid on the pan is broken. She said she had a plumber rectify the pipe problem.
- 13 The Respondent said that his plumber, Mr Robert Waldron, found two half rolls of toilet paper flushed down the toilet and he fixed that. The Applicant says she believes the Respondent put the toilet paper down the toilet and that it was rectified by her plumber. It therefore appears that there was toilet paper down the toilet and neither Applicant nor Respondent could provide an invoice from their plumber to indicate what work had been done

and there is no allowance on the Vanderkley quote for replacement or rectification of the toilet pan.

- 14 There is no allowance for the chipped pan or the alleged work to rectify the pipes, however a photograph provided by the Applicant showed the toilet lid broken and this was not challenged by the Respondent. The Respondent must pay the Applicant \$20.00 for this item.

Shower, Wet Areas and Usage of Correct Plaster and Retiling

- 15 The Applicant said the Respondent used standard plasterboard in the wet areas and that she was told by a building inspector that this was unsuitable. The Respondent agreed that he had used standard plasterboard in the whole of the unit including the shower but said that using wet area plasterboard was “optional”.
- 16 The edition of the Building Code of Australia relevant to this contract is BCA2004. Part 3.8.1 relates to wet areas, which provides that Performance Requirement P2.4.1 is satisfied for wet areas in Class 1 buildings (which includes detached houses) if they are waterproofed in accordance with Australian Standard AS3740 – Waterproofing of wet areas within residential buildings. Table 4.1 of the Standard provided that if plasterboard was used as the substrate for ceramic tiles in shower cubicles, wet area plasterboard sheet had to be used from 150 mm above floor height (to which height waterproofing was required) to 1800 mm above floor height. A failure to do so is a failure to build in accordance with reasonable standards of workmanship.
- 17 The Vanderkley quote allows \$13,960.00 for bathroom work, which is out of all proportion with the total sum the Respondent charged the Applicant for construction of the unit. In the absence of better evidence about the cost to install wet area plaster, properly tank and tile the shower, and make good other items in the bathroom, the Respondent must pay the Applicant \$4,000.00 for this item.

Quad to complete the corner of the bathroom

- 18 It is accepted that there is a gap in the pine quad in one corner of the bathroom which is unsightly and not in accordance with good building practice. This is taken into account under the previous item.

Architraves and skirtings

- 19 The Applicant complains that there are unsightly and defective architraves and skirtings with poor mitre joints and this is supported by photographs. The Vanderkley quote allows \$100.00 for this item which appears reasonable. The Respondent must pay the Applicant this amount.

Backing board for kitchen cupboards

- 20 The parties agree that the Masonite back on the kitchen cupboards was broken. The Respondent claims that the cupboards were second hand and

the Masonite was broken when the cupboards were purchased. The Applicant claims that the Respondent broke the Masonite.

- 21 Regardless of whether the Masonite was broken when the cupboards were acquired or later, it is poor building practice to install cupboards that do not have a sound backboard. The Vanderkley quote allows \$80.00 to repair this item and the Respondent must pay the Applicant this amount.

Linen press and wardrobe

- 22 The Applicant claims that it was part of the contract that the Respondent was to provide both a wardrobe and a linen press as part of the sum of \$13,000.00. The plan approved by the City of Ballarat indicates that there is a built in cupboard off the bedroom and the quote from Vanderkley indicates that there is a cupboard because the quotation includes an amount to remove the cupboard. The parties agree that the Respondent constructed a linen press at a later date although the Applicant claims that the linen press provided is unsuitable. The Applicant's evidence on this point is unconvincing and no amount is allowed.

Security door

- 23 The Applicant claims that as part of the contract works the Respondent was to provide a security door which he has not done. The Respondent denies that a security door was to be provided and there is nothing in any of the documentation to indicate that the Respondent would provide a security door. There is no allowance for this item.

Baseboards around exterior

- 24 There are no baseboards from floor level to ground level around the exterior of the unit. The drawing approved by the City of Ballarat shows a subfloor detail with what appears to be baseboards drawn on it. It is noted that on the Ministry of Housing drawing from which the detail appears to have been copied, the baseboards are noted as cement sheet fire skirt to finish 75mm below ground level. The Vanderkley quote includes \$750.00 for "baseboards around flat, labour and materials", which I find reasonable. The Respondent must pay the Applicant this amount.

Windows

- 25 The Applicant claims that the finish around the windows is rough and that they have not been flashed. The photographs she provided support her evidence that there are sharp pieces of metal apparent at the windows. The Respondent said that the windows had been flashed and siliconed however the Applicant's evidence is accepted on this point.
- 26 The Vanderkley quote allows \$550.00 for "windows not sealed under, to be flashed" and a further \$650.00 for "proper flashing around windows (sides and tops)", a total of \$1,200.00, which is a substantial proportion of the whole contract sum when there is no suggestion that Vanderkley is going to

replace the windows. In the absence of better evidence, the Respondent must pay the Applicant \$600.00 for rectification and further flashing of the windows.

Holes in the floor at pipe penetrations

- 27 The Applicant complains that there are rough holes in the floor around pipe penetrations and this is supported by the photographs provided by the Applicant. The Respondent said that he didn't see this work and it was not work undertaken by him. The Applicant's evidence is accepted on this point and in accordance with the Vanderkley quote, the Respondent must pay the Applicant \$195.00 for this item.

Brackets under unit on plumbing pipes

- 28 The Applicant claims an amount for brackets attached to various pipes beneath the unit, but was unable to provide a receipt or a sum for this amount. No allowance is made.

Downpipes

- 29 The Applicant says that the two downpipes at either end of the lounge room wall rattle and need to be secured. The Respondent said that he put in an extra bracket on the last occasion when he was at the property, however the Applicant's evidence is accepted that the downpipe rattle has not yet been rectified. The Respondent must pay the Applicant \$50.00 for this item being \$10.00 for materials and \$40.00 for labour.

Sundry Costs

- 30 The Applicant claimed the cost of petrol and parking when attending directions hearings and this hearing. Orders for such items are rarely made and no justification has been given for such an order in this case.

Stress

- 31 The Applicant claimed \$1,000.00 for the stress that has been caused by the dispute and the litigation. Stress is a personal injury which is not a claim that can be made as part of a Domestic Building dispute, by virtue of S54(2) of the DBC Act. However I take the Applicant to mean that she has suffered distress and upset. While her evidence is not doubted, such orders are rarely made and it is not appropriate on this occasion.

Doors

- 32 The Applicant claims that internal doors are insufficiently long and uneven at the base. A photograph indicated that the door complained of is within tolerances. No allowance is made.

Need to amend the plan

- 33 The Applicant has received a letter from the City of Ballarat requiring her to apply for an amendment to the building permit to ensure that the unit as built matches the approved plan. The Respondent said that the as-built version of the unit is the mirror image of the approved plan, and that this was done at the request of the Applicant. The Applicant denies this.
- 34 It is the builder's responsibility to build in accordance with approved plans and therefore the Applicant is allowed \$150.00 for redrawing of the plans for submission to Council and \$77.00 for the fee to Council for the amendment of the plan. The Respondent must pay the Applicant \$227.00 in total for this item.

Time to complete

- 35 The Applicant complains that the Respondent undertook to complete the works in 6 weeks but it took him over 12 months. The Respondent said that part of the delay was caused by the Applicant's inaction in calling for a frame inspection and that he was seriously ill during the works. In the absence of better evidence about the degree of delay and any loss occasioned by the Applicant because of the delay, no allowance is made.

Total payable

- 36 The Respondent must pay the Applicant \$6,022.00 forthwith, being:

Toilet seat	\$ 20.00
Shower etc	\$4,000.00
Architraves and skirtings	\$ 100.00
Kitchen cupboard backing board	\$ 80.00
Baseboards	\$ 750.00
Window repairs	\$ 600.00
Holes in floor at pipe penetrations	\$ 195.00
Downpipes	\$ 50.00
Amending plan	\$ 227.00

SENIOR MEMBER M. LOTHIAN