

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D356/2009

CATCHWORDS

APPLICANT	Rena Mary Eid
RESPONDENT	Robert Gordon Adam
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	5 July 2010
DATE OF ORDER	4 August 2010
CITATION	Eid v Adam (Domestic Building) [2010] VCAT 1263

ORDER

1. Order the Respondent to pay to the Applicant \$94,106.64.
2. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mrs J. Johnston, solicitor
For the Respondent	Mr R. Adam in person

REASONS

Background

- 1 The Applicant, Mrs Eid, (“the Owner”) is the owner of a dwelling house (“the House”) and land in Essendon, Victoria.
- 2 The Respondent, Mr Adam (“the Builder”) was at all material times a registered builder.

The Contract

- 3 By an undated contract (“the Contract”) entered into on or about 2 October 2002, the Builder agreed to construct an extension on the rear of the House and insert a decorative dormer window on the roof for the agreed price of \$168,400.
- 4 The work was to be carried out in accordance with plans and specifications provided to the Builder. There were also certain additional works to be done which are described in Schedule 5 of the Contract.
- 5 The Owner was to supply certain materials and to bear certain costs, including underground power, electrical connection, telephone connection fees, all electrical work and external paving. The gas pipes were to be re-laid up to the metre at the cost of the Builder with other costs to be borne by the Owner.
- 6 The Owner was to supply all windows and doors and door frames, rosettes for fitting in the ceiling, all external doors, all door furniture and all cabinetwork. The Builder was to fit the bathroom wall cabinet, the built in wardrobes in the three bedrooms, the bathroom shaving cabinet, the laundry trough and cabinet, the bathroom basement and vanity and the en suite vanity cupboard.
- 7 Taps and plumbing fittings were to be supplied by the Owner and fitted by the Builder as were the dishwasher, shower screen and door, the rod for the shower curtain, the towel rails, the soap holder, the toilet paper holder, smoke detectors, ducted vacuum and garbage disposal unit, a central heating unit, the cooling unit, the range hood and the ceiling exhaust fans. The intercom, electrical work and security system were to be provided by the Owner and there was no provision for the Builder to fit any of it.
- 8 There were prime cost figures given for floor and wall tiling and the existing stormwater drainage pipes were to be replaced if they were found not to be PVC. No sewer plumbing was required.
- 9 The terms of the Contract were negotiated on her behalf by her husband, Mr Eid, who was the person who dealt with the Builder on site and provided him with instructions. He was also the principal witness for the Owner at the hearing. I am satisfied that he was authorised by the Owner to deal with the Builder on her behalf and there was no suggestion to the contrary.

The extent of the work to be done on the original house

- 10 At the time of the Contract the House was a modest double fronted Edwardian weatherboard with four principal rooms at the front and a kitchen, laundry, bathroom and meals area at the rear. The rear section was to be demolished and was to be replaced with a large extension copying to some extent the style of the original House.
- 11 The plans attached to the Contract are fairly basic with very little in the way of detail. The extension at least doubled the area of the House. Two new external doors were to be cut in the existing House with a provision in the plans that the existing structure will be made good. Similarly, some windows were to be installed in existing frames and the windows were to be made good. The plans identify certain work as being required to be done to the front four rooms.
- 12 The price included repair and reinstatement of all plasterwork to the existing House where necessary. Under “external cladding it is provided that it will match existing and that the Contract price provides for all carpentry work and materials for “the repair and reinstatement of the existing House”.
- 13 The Owner claims that this means that the Builder was to renovate the whole of the existing House including the decorative fretwork and the front veranda. I do not find that these things were included. The plans are quite specific as to what was to be done to the existing House and these other items are not specified. I should not infer from the general statement “repair and reinstatement of the existing House” that it means anything other than making good the interface between the new and the old. That was the interpretation of the Builder’s expert, Mr Rob Lees, and it is a sensible one.
- 14 The whole of the Colour bond roof including downpipes, guttering, capping and flashing was to be replaced by the Builder.

Time

- 15 There was no provision at all in the Contract as to how long the work was to take. In the Points of Claim the Owner says that there was a verbal agreement that it be completed by 2 April 2003. That is denied in the Points of Defence. The evidence as to this by Mr Eid was that he discussed with the Builder how long it would take and the Builder said that he would complete the work in March or April 2003. That seems more in the nature of an indication as to the Builder’s expectation than a contractual agreement to complete the work by a particular date. The Builder denies any such agreement. I am not satisfied that there was any completion date agreed.
- 16 In the absence of any agreement the law implies an obligation upon the Builder to carry out the work within a reasonable time in all the circumstances. Those circumstances would include such things as the extent and difficulty of the work, the extent of any variations, the weather and any

other cause outside the Builder's control which influenced the progress of the works.

Construction

- 17 Pursuant to the Contract the Builder demolished the rear of the existing House, excavated the site and constructed the extension almost to lock up stage. In the course of replacing the roof and installing the cosmetic dormer window, he reconstructed much of the roof framing in the existing house. I accept his evidence that this was at the request of the Owner's husband Mr Eid and it is not specified in the plans. It was therefore outside the scope of works and was an extra.
- 18 The frame was inspected and verbally passed by the building inspector who informed the Builder that he could proceed to the next stage. In a subsequent letter addressed to the Owner, the building surveyor asserted that the frame was not "officially" approved because the inspector had directed the Builder to submit updated roof plans to take account of the additional work that he had done at Mr Eid's request in the roof. This request for plans was passed onto Mr Eid by the Builder. According to Mr Eid's evidence it was never attended to and no issue was thereafter taken by the Building Surveyor as to the absence of these plans. A frame is either approved or it is not. There is no distinction between official and unofficial approval. I am satisfied that the frame was approved.

The progress payments

- 19 The Builder and Mr Eid proceeded in their dealings on a very informal basis. No formal claims for payment appear to have been made. Instead, the Builder asked Mr Eid at various times for payments and some money was paid.
- 20 These requests for payment were made as work was done. The Contract provided for an unusual schedule of payments which do not accord with the maximum amounts allowed for in the *Domestic Building Contracts Act 1995* ("the Act"). Section 40 of the Act defines the stages, on a contract where the whole house is to be constructed, as deposit, base stage, frame stage, lock up stage and fixing stage. Each of those terms is defined. The form of Contract used states that, if the stage with respect to which a claim was made was not the same as that set out in s.40(1) of the Act, it should be stated what the stage means. There is no such description.
- 21 The stages set out in the Contract are:
- | | |
|-----------|-----|
| Deposit | 10% |
| Sub floor | 10% |
| Frame | 20% |
| Lock up | 15% |
| Plaster | 10% |

Fixing	20%
Painting	10%
Final	5%

- 22 By sub floor, is presumably meant the base stage. Frame and lock up are terms defined in the Act. “Plaster” should form part of “Fixing” and “Painting” would form part of “Final”. On this basis, the amounts payable by the Owner to the Builder as per the Contract can be compared with the maximum amounts that, in a normal case, would have been payable under s.40(2) of the Act, according to the following table:

Stage	Contract	Running Total	The Act	Running Total
Deposit	\$16,840	\$16,840	\$8,420	\$8,420
Base stage	\$16,840	\$33,680	\$16,840	\$25,260
Frame	\$33,680	\$67,360	\$25,260	\$51,520
Lock up	\$25,260	\$92,620	\$58,940	\$110,460
Fix	\$50,520	\$143,140	\$42,100	\$151,560
Completion	\$25,260	\$168,400	\$16,840	\$168,400

- 23 This shows that, in terms of money, the Builder was running ahead in the early stages but, by lock up, he would be well behind what he would have been had he adopted the breakdown contemplated by the Act.
- 24 The extent to which the Owner was to provide materials and some labour would justify some variation to the usual schedule of payments. The approach in s.40(3) might have been thought to have been more appropriate, that is, that the Builder must not demand or receive any amount or instalment not directly related to the progress of the work being carried out.
- 25 In any event, as will be apparent from the foregoing table, the Owner would have been substantially ahead, financially, at lock up stage if that stage had been reached. It was not disputed that the sub floor framing had not been straightened and the floor boards were not laid, and so the work was not at lock up stage. As a result, the Builder was not entitled to be paid for lock up.

The dispute

- 26 A dispute arose when Mr Eid paid the Builder \$5,000 towards the lock up payment but refused to pay any more. By that stage a total of \$72,360 had been paid.

- 27 Work ceased in about April 2003. On 16 April 2003 the Owner had the work inspected by a building expert who produced a report that is in evidence.

The variations and the counterclaim

- 28 In his counterclaim the Builder claims that there were \$15,400 worth of variations. Of these, he said that \$8,500 was in regard to the variation of the roof. He also claims a variation to upgrade the existing sewer connection from earthenware to PVC, in the sum of \$5,500 plus GST.
- 29 It is clear from the photographs that the Builder has done a great deal of additional work in the roof. The plans provided that the new window to be inserted in the roof was to be cosmetic only and yet the Builder has framed stud walls and put in floor joists for a room there which does not appear on the plans. He has also reconstructed the roof in this area using substantial oregon beams in order to construct a cathedral type ceiling so as to maximise the useable roof space. None of this was in the plans and I accept the Builder's evidence that it was done at the request of Mr Eid. I am not satisfied that the upgrade of the sewer was a variation.
- 30 There was no documentation of any variations at the time the work was done as required by the Contract and by s.37 or s.38 of the Act. There were no experts' reports tendered to justify the amount claimed for the extra work or any other sum. Mr Rob Lees does not deal with it. Since the Builder's documents have all long since been discarded he was unable to give detailed evidence as to the time taken or the materials used.
- 31 In these circumstances, it is simply not possible for me to quantify any claim in regard to the extra work nor is the Builder able to establish that his claim falls within the exemptions in s.37(3)(b) or s.38(6)(b) of the Act. Accordingly, the counterclaim fails through lack of evidence. That might seem unfair to the Builder but the problem is of his own making.

Subsequent events

- 32 On 29 April 2003 Mr Eid organised for a temporary fence to be constructed at the front of the site and disconnected all electrical power and a pit excavated for the sewer pipe was covered.
- 33 The House was inspected by the Building Commission and then, on 8 May 2003 the Owner's solicitors served a notice upon the Builder pursuant to Clause 46.1 of the Contract setting out an extensive list of alleged breaches. Nothing further was done by the Builder and a further notice terminating the Contract was served. The copy of this second notice that has been tendered has no date but, according to the evidence of Mr Eid, it was "issued" on 23 May 2003.

This proceeding

- 34 That date is significant because this proceeding was not issued until 21 May 2009, only 2 days within the limitation period, assuming the Contract was

in fact determined on 23 May 2003 as Mr Eid asserts. Mr Adam gave no contrary evidence and so I must accept that it was.

- 35 Directions were given for interlocutory steps and Points of Defence and Counterclaim were filed on behalf of the Builder. However shortly before the date fixed for the hearing the Builder's solicitor withdrew.

The Hearing

- 36 The matter came before me for hearing on 5 July 2010 with 7 days allocated. Mrs Johnston, solicitor, appeared on behalf of the Owner and Mr Adam appeared on his own behalf.

- 37 I heard evidence from Mr Eid and from the Builder. Expert evidence was given for the Owner by Mr Charles Lee, a Building Expert and by Mr Murray Hamilton, a Quantity Surveyor. Expert evidence was given on behalf of the Builder by Mr Rob Lees, a Building Expert.

- 38 As to the lay witnesses, I was more impressed with the evidence of the Builder than that of Mr or Mrs Eid. I thought that Mr Eid's general tone was somewhat forceful and he professed a certainty as to his recollection that seems unlikely when one considers that the events occurred between 6 and 7 years ago. Mrs Eid gave little evidence beyond supporting the evidence of her husband. Her account of sharp loud noises in the sub floor of the House due to frame shrinkage seems unlikely to be true.

- 39 The Builder frankly admitted that he did not remember much of the detail of what happened and said that he has discarded his papers in regard to the matter. He was prepared to make concessions and he impressed me as being an honest witness. However his poor recollection and lack of any supporting documentation have severely limited his ability to defend the claim and made it impossible for him to prosecute his counterclaim.

- 40 The evidence of the Quantity Surveyor was partly based upon the evidence of Mr Charles Lee and the contents of a Building Commission report ("the BCAV report") and partly upon what the Owner had done since the Builder left the site. He costed all of the work that had been done at 2003 rates.

- 41 The author of the BCAV report was not called but it is consistent with Mr Charles Lee's own report and Mr Rob Lees had no issues with it. Both Mr Charles Lee and the BCAV inspector carried out their inspections of the House at the time the Contract was terminated and I accept the evidence contained in the two reports.

The claim

- 42 The most striking thing about the Owner's claim is the size of it when one considers the number of defects alleged, which are not particularly numerous or serious, and the stage the work had reached, which was approaching lock up. The contract price was \$168,400 of which the Builder had been paid \$72,360. Yet the amount claimed in the amended Points of Claim, after allowing for the balance of the contract price, was \$308,038.51

which looks highly inflated. Although Mr Rob Lees said that the Builder had under-priced the job, the size of this claim in these circumstances would suggest that it requires very careful examination.

Site visit

- 43 I visited the site with the parties. Mr Charles Lee and Mr Hamilton also attended but Mr Rob Lees was not there. It is apparent that the work done at the House that I saw is now almost complete except for a few fitting off items and what I saw seems to be well in excess of the scope of works under the Contract.

The defects and the incomplete work

- 44 Mr Rob Lees inspected the House together with the Builder on 17 November 2009. He has gone carefully through Mr Hamilton's report and reassessed the cost of completion and rectification on the basis of the scope of works under the Contract and also the contents of the BCAV and Mr Charles Lee's report. In cross examination he accepted that he had made some calculation errors which he then corrected. With these corrections I accept Mr Rob Lees' assessment.

Excavation

- 45 There was substantial argument concerning the rear drainage. The Owner's concerns in this regard are confused but since there was so much reference to it I should deal with it specifically.
- 46 The site slopes slightly to the street and the plans provided for the floor in the extension to step up by 250mm to take account of this fall. This would have allowed for less excavation at the rear, and so less expense to the Builder, but it would also have meant that there would be two floor levels in the house.
- 47 The Owner's complaint was that the Builder excavated the site to a lower level so as to allow for a level floor instead of the 250mm step up as provided by the plans. I am satisfied that this variation, albeit undocumented, was discussed and agreed to between the Builder and Mr Eid. I also accept Mr Rob Lees' evidence that it resulted in a better outcome for the Owner.
- 48 During construction, while the Builder was on site, there was water ponding in the excavated area. I accept that this was the case and also that it should not have been allowed to occur. However there is no evidence that it has caused any damage to the sub-floor.
- 49 The Owner complains that the extra excavation has caused additional cost to the drainage system. The property was to drain through a drainage easement along the fence on the driveway side. This was found to be too high and had to be lowered. However this would have needed lowering anyway. The photographs indicate that it was lowered considerably more than the 250 mm that the extra excavation would have required.

- 50 The Owner complains about sub floor ventilation. The Builder was to clear the site and excavate to a level of approximately 350mm under the bearers. It was not suggested that he did not do so.
- 51 The Owner complains that the sub-floor is wet. This was not apparent on site and this has been a wet year. In any case, it is not excavation that causes soil to be wet but water being allowed to accumulate on it. The external site works including the level of those works were the responsibility of the Owner.
- 52 The Owner complains that the floor boards are affected by moisture from the sub-floor, evidenced by some patches of whitening visible under the clear floor varnish. Since the installation of the floor and the completion of the work was undertaken by the Owner, that is not the Builder's responsibility.
- 53 In any event, the answer to all of these claims is that the Owner agreed to the lowering of the floor level at the rear.

Damages

- 54 In regard to damages I accept the evidence of Mr Charles Lee as to the defective and incomplete work. I also accept Mr Hamilton's assessment of the scope of works that he was asked to assess. What draws the two together is the report of Mr Rob Lees who has compared the assessment of Mr Hamilton with the scope of works under the contract.
- 55 The amounts to be allowed therefore are those assessed by Mr Hamilton as qualified by the evidence of Mr Rob Lees, both in his report and as qualified in cross-examination. I will allow the adjusted cost to complete and the cost of rectification of defects. The former is allowed because the Builder left the site because he was not paid the Lock up payment. He was not entitled to that because the work had not reached lock up. Had he followed the correct procedure in regard to the extra work that he did, that might well have resulted in him being paid the money that he was seeking, but he did not do that.

The cost of completion and of rectifying the defects

- 56 The calculation appears at pages 62 to 65 of Mr Lees' report. There was a substantial error in the report arising from a transposition of figures. This is corrected in the following figures:

Cost to complete assessed by Mr Hamilton:	\$193,100.00
Less figures that should not be allowed:	<u>\$ 54,640.52</u> \$138,460.48
Defect rectification assessed by Mr Hamilton:	\$167,574.00
Less figures that should not be allowed:	<u>\$118,147.90</u> \$ 49,426.10
Total adjusted figure	\$187,886.58
Add further adjustments agreed to in cross-examination:	

Fencing hire (allow 3 months)	186.18	
Tiling - extra allowance	1,250.00	
Window	98.00	
Small veranda	93.88	
Bird boards	641.00	
Bottom weatherboards	641.00	
Cistern fans	<u>288.00</u>	<u>\$3,198.06</u>
		\$191,084.64
Less further deduction for carpet removal		\$ <u>938.00</u>
Total adjusted cost		\$190,146.64
Less balance of contract price		<u>\$ 96,040.00</u>
Loss		<u>\$ 94,106.64</u>

The Claim for liquidated damages and damages for delay

- 57 There is no provision in the contract that the Builder had to complete the work by any particular time so it had to be done within a reasonable time in all, the circumstances. The expert witnesses have not made any assessment as to when, in all the circumstances, it ought to have been completed or whether the Owner, after having terminated the contract, ought to have completed it within whatever time was left of the construction period.
- 58 In any case, in view of the extra work requested by Mr Eid and the parts of the work that the Owner was to undertake herself it would have been extraordinarily difficult for any expert to have given a credible assessment in that regard.
- 59 On this state of the evidence it is not possible for me to make any allowance for liquidated damages or damages for delay.

Conclusion

55. There will be an order that the Builder pay o the Owner \$94,106.64. Costs will be reserved.

SENIOR MEMBER R. WALKER