

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE: D271/2005

CATCHWORDS

Risk for loss of materials belonging to Owners, set off

[2005] VCAT 1711

APPLICANT: Bruno Joseph Fabre
SECOND APPLICANT: Sofie Fabre
FIRST RESPONDENT: Initial Homes Pty Ltd
WHERE HELD: Melbourne
BEFORE: Senior Member M. Lothian
HEARING TYPE: Small Claim Hearing
DATE OF HEARING: 6 and 14 July 2005
DATE OF ORDER: 18 August 2005

ORDERS

1. The Builder must pay the Owners \$9,477.13 forthwith.

MEMBER M. LOTHIAN

APPEARANCES:

For the Applicants: Mr & Mrs S Fabre, in person
For the Respondent: Mr W Bonney

REASONS

1. Mr and Mrs Fabre (“the Owners”) entered a contract (“the Contract”) with Initial Homes Pty Ltd (“the Builder”) on or about 18 August 2003, whereby the Builder agreed to build a house for the Owners at 7a Rathmines Street, Fairfield. The house was to be built in accordance with the Contract and the Owners agreed to pay the contract price of \$382,596, adjusted in accordance with the Contract.
2. The conditions of contract are the standard form published by the HIA, being the New Homes Contract of July 2002.
3. The Owners’ claim against the Builder is for \$9,938, being \$3,938, an extra payment claimed for paint, which they say they were forced to pay at hand over, and \$6,000 for agreed damages for late completion of 24 weeks at \$250 a week. The Owners say that both sums were paid to the Builder under protest.
4. The Builder counter-claimed \$3,369 being \$3,000 for a fire place which was purchased by the Owners, but credited twice by the Builder. The parties agree that this occurred. The \$396 was claimed by the Builder as the balance of invoice 272. On the day of the adjourned hearing, Mr Bonney, a director of the Builder, explained that he had made an accounting error and abandoned the claim for \$396.
5. The Owners amended their claim to claim a set-off against the \$3,000. The total of the set-off is \$6,629.44.
6. Mrs Fabre said that she and her husband chose to claim at VCAT for less than \$10,000 to avoid an expensive and lengthy procedure. In these circumstances, the most they can recover is the \$9,938 claimed, and any other amount that they might have been entitled to is treated as abandoned.

The claim for paint

7. In the application the Owners say:

“we had an agreement on the additional cost of paint, then the builder gave us a bill for additional \$3,580 + gst after painting was finished. The items on bill were neither approved nor valid as they were already in contract/understanding”.

8. The Owners’ home is double storey Victorianate with a number of colours in each room. It is the Owners’ evidence, which is not contradicted by the Builder, that the Owners provided a schedule of paint colours for the whole house, headed “Interior paint colours for 7a Rathmine Street” some time before 5 August 2004.

9. The Owners received a document headed “Variation” and dated 5 August 2004. The relevant parts are:

“Please find below the cost for the application of multiple paint colours at your new home.

• To finish all doors to 1 st floor in 3 colours	3,500.00
• For multiple paint colours to various rooms including staining picture rails	<u>700.00</u>
	4,200.00
	<u>420.00</u> GST
	\$4,620.00”

10. Mrs Fabre gave evidence that she and her husband chose to paint the doors themselves to save the \$3,500 plus GST of \$350.

11. The Owners received a further document headed “Variation” and dated 9 September 2004. The relevant parts are:

“Further to our variation letter of 05/08/04.

Please find below further additional costs relating to painting works.

1. To apply timber stain in addition to two coats of polyurethane to all downstairs timberwork	
Material -	350.00
Labour	1,500.00
2. To apply timber stain in addition to two coats of polyurethane to staircase	
Material -	30.00
Labour	200.00

- | | | |
|----|---|----------|
| 3. | Additional cost for the purchase of Taubmans paints in lieu of Dulux | 1,500.00 |
| 4. | Extra cost for additional coats of wall paint to not being able to gain coverage with 2 coats | TBA” |

12. The evidence of Mrs Fabre is accepted that the painting had been done, with the possible exception of re-coating mentioned in item 4, before this “variation” was sent and that the Owners were not advised of a possible increase in costs before the work was undertaken. It is accepted that all items listed on the variation of 9 September 2004 were known to the Builder before the written variation of 5 August 2004, with the possible exception of “timber stain to staircase”. The staircase has not been included in the “Interior paint colours..” schedule provided by the Owners, or in the specification prepared by the Builder. At item 21.7, painting preparation for timber is noted as:

“Type 1 Downstairs 2 coats of polyurethane
Type 2 Upstairs 2 coats of acrylic by Dulux”.

13. It is reasonable that the Builder should have asked the Owners whether the stairs were to be stained in circumstances such as these. As both parties have been mistaken in failing to check that this item was included, the Builder is allowed half the amount claimed for this item, being \$115.00.
14. With respect to item 3, claiming a loading for substitution of Taubmans for Dulux, the evidence of Mrs Fabre is accepted that her investigations indicate that the retail cost of comparable paints by both manufacturers is very similar. It is also noted that Taubmans was on the “Interior paint colour ...” schedule, that Mr Bonney told her Taubmans would be more expensive because of a trade deal that the painter was able to obtain and that when she offered to choose the equivalent Dulux paints, she was told by Mr Bonney that it was too late because the painter had already mixed the paints. Her evidence is further accepted that the \$700 plus GST agreed to be paid under the variation of 5 August 2004 included an allowance for the change of brand.

15. The evidence of Mrs Fabre is accepted that the recoating in item 4 was necessitated by the use of a dissimilar undercoat. No allowance is made for this item.
16. The Owners are entitled to \$3,823 for paint, being refund of the amount of \$3,938 paid under protest less \$115 allowed to the Builder under paragraph 13 above.

The claim for agreed damages for delay

17. The contract allowed 230 days for completion, which included 10 days for inclement weather and 67 days for weekends, public holidays, rostered days off and any other foreseeable breaks in the continuity of work. Clause 10 of the Contract required the Builder to commence work within 21 days of the last to occur of receiving:

- essential information from the Owners, being
 - satisfactory evidence of title to the land,
 - full details of any easements, restrictions or covenants affecting the land,
 - evidence of the Owners' capacity to pay the contract price,
 - details of any lending body (there was none – the contract notes that the project is to be owner financed) and
 - copies of any town planning approval if the Owners were to obtain planning approval, and
- all necessary building permits.

18. It was the evidence of the Owners that work commenced on either 30 August 2003 or 9 September 2003, there were no claims for extension of time under clause 34 of the Contract and that the work was completed on 17 December 2004 and they received the keys on that date. In their claim the Owners say:

“builder finished the house on 17 December 2004 and started on 9 September 2003. The contract was for 280 days. We have allowed a few weeks of delays, but not six months.”

19. The Builder did not question the commencement or completion dates. Mr Bonney asserted that some delays were caused by the Owners in arranging a separate contract for the kitchen and mortice locks on doors, and also over some variations. The Owners' evidence contradicts the Builder's and is preferred, and even if it were not, it is noted that, given a commencement date of 9 September 2003, the work should have been completed by 27 April 2004. The 24 weeks claimed takes the date to 12 October,

still more than 5 weeks short of the actual date upon which the Owners obtained the keys to the house. If there were delays caused by the Owners, they are well compensated by the five weeks not claimed for agreed damages.

20. The Owners are entitled to \$6,000 for agreed damages for delay.

The set-off items

21. As mentioned above, the Builder's claim is for \$3,000 to which the Owners agree it would be entitled but for the set-off items. The Owners also pointed out two more items that were double credited by the Builder totalling \$866.00. The amount being set-off against is therefore \$3,866.00.

22. The set-off items are as follows:

1. The Owners claim that they overpaid the Builder \$635.37 on a previous account, The Builder admits to \$369.

Allow to Owners

\$369.00

2. The Owners paid the Builder \$229.15 for a saw cutter and jack hammer for protruding foundations from the neighbour's property. Although the possibility of the problem arising was discussed before the Contract was signed, the extent of the problem was not determined until afterwards. No allowance is made for this item.
3. The Owners paid the Builder \$394.24 being half the cost of modifying a window. The Owners said that a window was to be placed lower than it was built, but that they allowed it to be bricked up. Mr Bonney said that Mrs Fabre wanted the window opening bricked up and it was

agreed that it the cost of doing so should be shared, half each. No allowance is made for this item.

4. The Owners paid the Builder \$1,071.84 to shift internal doors on the first floor as directed. The Owners' evidence is accepted that the design called for decorative blocks at the corner of the architraves, and because of the placing of the doors, the architraves and blocks would have had to be cut in half. A photograph of a block in position cut in half shows that it was most unsightly and was clearly not in accordance with standards of reasonable trade work.

Allow to Owners \$1,071.84

5. The Owners paid the Builder \$184.80 twice, a total of \$369.60, for "additional works required to hinge 6 external doors". While the first charge is reasonable, the double charge is not.

Allow to Owners \$184.80

6. The Owners paid the Builder \$1,629.57 to modify verandah rafters and to replace decorative posts on a balcony that did not allow for a balcony rail. While it is found that the roof problem is a design defect for which the Owners' architect or draftsman is responsible, the cost of one set of posts and their replacement should be allowed at a cost of \$580.70 plus 12% (\$69.68) = \$650.38, plus GST of \$65.04 = \$715.42

Allow to Owners \$715.42

7. The Owners paid the Builder \$369.60 for reduction of the height of the floor joist in the kitchen, and laundry to

enable the finished floor to be level with adjoining floors. It is reasonable to assume the Builder would provide this result without a specific item in the specification.

Allow to Owners

\$369.60

8. The Owners say that they would have chosen Dulux if they had been aware of the extra cost of Taubmans, so claimed a refund of the extra \$700 plus margin and GST, being \$862. This amount was for additional colours in the rooms as well as the change in paint brand. No allowance for this item.

9. The Owners claim \$1,100 as a negative variation. They said that they requested a quote to install timber decking at the rear of their house in lieu of terracotta tiles, and that the Builder went ahead without providing a quote. 15 square meters at \$35 per square meter is allowed.

Allow to Owners

\$525.00

10. The Owners claim \$550 to move a front down pipe. It has not been placed in accordance with the design, but mouldings on the neighbour's house which project onto the Owner's property would not permit them to be placed correctly. There is no allowance for this item.

11. There are two items totalling \$284.47 which were supplied by the Owners but stolen while the Builder had possession of the site. Some items of the Builder's were stolen at the same time. It is unlikely that the loss was caused by the Builder's negligence, and no evidence has

been provided to support negligence. Further, the property belonged to the Owners, and the rule is that loss lies where it falls unless there is a reason to place it elsewhere. The Builder was obliged by Clause 20 of the Building Contract, to “insure in the names of the Builder [and] the Owners...against liability for physical loss...the goods and materials on the Land”. If the Builder fails to arrange such insurance it is therefore liable for the loss.

Allow to Owners	<u>\$284.47</u>
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Total allowance to Owners as set-off:	\$3,520.13
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Allowance to Builder:	\$3,866.00
Less Owners’ set-off	<u>\$3,520.13</u>
Nett allowance to Builder	\$ 345.87

Owing to Owners for paint and and	
Agreed damages for delay	\$9,823.00
Less nett allowance to the Builder above	<u>\$ 345.87</u>
	\$9,477.13

The Builder must pay the Owners \$9,477.13 forthwith.

SENIOR MEMBER M. LOTHIAN