VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D275/2008

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic Building – costs plus contract – no reasonable estimate by the builder of the total amount of money the builder is likely to receive under the contract given – consequences – s.13(2) Domestic Building Contracts Act 1995 – application – whether reasonable to allow cost of work plus reasonable profit – relevant matters

APPLICANTS	Mick Fazzolari, Lynn Fazzolari
RESPONDENT	Samadah Pty Ltd
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	7 December 2009
DATE OF ORDER	29 March 2010
CITATION	Fazzolari v Samadah Pty Ltd (Domestic Building) [2010] VCAT 370

ORDER

1. Declare that:
   (a) of the sum of $95,606.97 paid into the interest bearing deposit opened by the parties pursuant to the Deed of Release and Arrangement dated 4 April 2008, $34,129.40 should be paid to the Applicants and the balance of $61,477.57 should be paid to the Respondent.
   (b) interest that has accrued on the said money in the account should be divided in the same proportions in accordance with the provisions of the said Deed.
2. Liberty to apply in regard to the implementation of this order.
3. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	Mr J. Catlin of Counsel with Ms K. Medson, Solicitor
For the Respondent	Mr J. Foster of Counsel with Mr W. Osborne, Solicitor

REASONS

Background

1. The Applicants ("the Builders") are registered domestic builders. The Respondent ("the Developer") is a company controlled by Mr Harold Joyce and his wife Deidre Joyce. At all relevant times it was the owner of land situated at and known as 46-50 Wymble Street, Seymour ("the Land").

2. In about August 2006 Mr Joyce contacted Mr Fazzolari and asked him to quote on constructing six two bedroom units at the rear of the Land ("the Units"). The Developer had earlier completed 4 units at the front of the Land and the Units were the second stage of the development of 10 units.

3. Mr and Mrs Joyce had earlier considered building the Units themselves under the supervision of Mr Joyce's relative by marriage, Mr Walsh, who is a bricklayer. However, since the Units were required for immediate sale following completion, it was necessary that they be built by a registered builder and so Mr Walsh suggested to Mr Joyce that he contact Mr Fazzolari.

4. By the time he approached Mr Fazzolari, Mr Joyce had already spoken to a number of sub-contractors whom he proposed to engage to construct the Units and obtained quotations from them. He passed on the details of these proposed sub-contractors and the quotations to Mr Fazzolari.

The contract

5. The Builders provided two quotations in September 2006 but these were not accepted. Discussions then took place between the parties that the Builders would construct the Units on a "cost plus" basis. An estimate dated 14 February 2007 was produced by the Builders estimating that the cost of the construction would be $852,568.92.

6. A "costs plus" contract ("the Contract") was entered into on 2 March 2007 and a building permit was obtained on 2 April 2007.

7. A fundamental issue in this case concerns the wording of the Contract. The parties had agreed that the Builders would charge a margin of 15% on the cost of the building works so that the Developer would have to pay the cost of the work, including Mr Fazzolari's work as a tradesman on the site, plus the Builders' margin of 15%.

8. Clause 12 of the Contract provides that the Developer must pay the Builders the "price of the building works". That term is defined on page 17 of the Contract as meaning: "the total of the cost of building works and the builder's fee".

Construction

9. On 4 and 5 April 2007 the site was pegged out and work commenced on 7 May 2007.

10. Invoices were rendered from time to time to the Developer and these were paid, although generally not within the time specified in the contract.

11. During the course of the work numerous variations were claimed by the Builders and variation documents for these were signed on behalf of the Developer.

12. Towards the end of construction the parties fell out over a number of issues. This was largely because the Units cost the Developer more than Mr and Mrs Joyce had anticipated and there were also arguments over the variations.

The settlement agreement

13. On 3 April 2008 an agreement ("the Settlement Agreement") was entered into between the Builders and the Developer to enable the Units to be handed over to the Developer and for the Builders to be paid at least the bulk of the monies they claimed. By the Settlement Agreement the Developer was to pay to the Builders $122,865.93 and also pay the further sum of $95,606.97 into an interest bearing account in the joint names of the parties' respective solicitors. Upon payment of these two sums the Builders were to hand over certificates of occupancy for each of the Units.

14. Following the signing of the Settlement Agreement the monies were duly paid and the certificates of occupancy were handed to the Developer.

This application

15. By these proceedings the Builders now seek payment of what they say is still due to them under the Contract plus interest on late payments of "approximately $25,427.58". They also seek payment of some further invoices they have received for the work done.

16. The Developer counterclaims, alleging defective and incomplete work, of $5,955.00 and liquidated damages for delay of $5,750.00.

Breach of s.13(2) 0f the Domestic Building Contracts Act 1995

17. The Developer relies upon the undoubted fact that the Contract, although a cost-plus contract, did not contain a fair and reasonable estimate by the Builders of the total amount they were likely to receive under the Contract, contrary to s.13(2) of the *Domestic Building Contracts Act* 1995 ("the Act"). That sub-section provides as follows:

"(2) A builder must not enter into a cost plus contract that does not contain a fair and reasonable estimate by the builder of the total amount of money the builder is likely to receive under the contract."

18. In completing the form of Contract the Builders inserted as the estimated price in the schedule, $852,568.00 inclusive of GST. I am satisfied that that figure was the estimated cost tom the Builders of the building work rather the overall price and that it did not include the Builder's margin of 15%.

19. I accept Mrs Fazzolari's evidence that she was confused by the form of contract and thought that she had completed it correctly. The form of contract contains two similar defined terms, namely; "cost of the building works", which does not include the builder's margin and; "price of the building works", which does include the builder's margin.

20. Although I am satisfied that it was an honest mistake the section has nonetheless not been complied with. The consequences of that are set out in section 13(3) of the Act which provides:

"If a builder fails to comply with the section

(a) the builder cannot enforce the contract against the building owner; but

(b) the Tribunal may award the builder the cost of carrying out the work plus a reasonable profit if the Tribunal considers that it would not be unfair to the building owner to do so".

Consequences of non-compliance

21. The contract has been fully executed on both sides, save for payment of any balance of monies due with respect to what the parties have done. It is not a case where the Developer could simply demand back all the money it had paid. The questions to be determined are:

a What is "the cost of carrying out the work" within the meaning of the section, as applied to this case;

b What is a "reasonable profit" for the Builders with respect to the work that has been done; and

c Would it be unfair to the Developer to award the Builders the cost of carrying out the work, plus a reasonable profit?

The hearing

22. The matter came before me for hearing on 7 December 2009 with 7 days allocated. Mr J. Catlin of Counsel appeared on behalf of the Builders and Mr J. Foster of Counsel appeared on behalf of the Developer. I heard evidence from Mr and Mrs Fazzolari and from Mr and Mrs Joyce in regard to the entering into the Contract and the construction of the Units. I also heard evidence from Mr Patrick Walsh.

23. In regard to the cost of carrying out the work and the question of what a reasonable profit would be, I heard evidence from two quantity surveyors. The quantity surveyor called on behalf of the Builders was Mr Douglas Buchanan and the quantity surveyor called on behalf of the Developer was Ms Mallika Dorape-Vithanage.

24. I was more impressed by Mr and Mrs Fazzolari as witnesses than by Mr and Mrs Joyce. Apart from their demeanour in the witness box, Mr Fazzolari's evidence in regard to the construction was supported by that of Mr Walsh and Mrs Fazzolari's evidence as to the figures and the dealings between the parties was supported by her highly detailed diaries which I have examined and do not appear to have been fabricated. The progress of the construction of the Units and the dealings between the parties appear to have been meticulously documented by Mrs Fazzolari in these books.

25. Apart from the above mistake in regard to the Contract, which was a very serious one, the construction of the Units appears to have been well organised by the Builders.

Variations

26. There were thirteen variations and all of these were documented. On the last such variation the words "without prejudice" were added. There was some considerable argument concerning whether items were in fact variations but since what I have to consider is the cost of the work it is not to the point whether they were included in the original estimated cost or not. Rather, I should simply look at the cost of what was done in order to produce the Units that the Developer now has or, in the case of four of the Units, that it has sold.

What must be shown by the Builders?

27. Mr Catlin referred me to the case of *Holland-Stolte Pty Ltd v Princess Theatre Holdings Pty Ltd* (unreported) VSC Byrne J. 17 March 1993 where Byrne J said (at p.9):

> "… In the case of a cost plus building contract the contractor must show that the costs incurred for which reimbursement is sought were honestly and reasonably incurred in the performance of its work and that they were reasonable in their measure. To the extent that they do not in whole or in part meet this standard, reimbursement will be denied".

28. This is not a case where the Builders are entitled to claim under the Contract. If they are to be entitled to anything it can only be pursuant to s.13(3).

29. Section 13(2) requires the estimate by the Builders of the total amount of money is likely to receive under the contract is entitled to be "fair and reasonable".

29. The cost of carrying out the work plus a reasonable profit can only be ordered under sub-section 3 if it is not unfair to the Developer to do so.

30. I accept Mr Catlin's submission that the section is aimed at achieving a result that is fair in all the circumstances. In this regard, I think that the term "… the cost of carrying out the work …" in sub-section 3(b) must mean the reasonable cost of carrying out the work, not what it actually cost the Builders to carry it out. It cannot be supposed that it would ever be fair to a building owner to allow to a builder an amount that the builder had unreasonably incurred which would inflate the amount that he sought to recover under the sub-section.

31. The first step therefore is to ascertain what it should have reasonably cost to build what the Developer has received.

32. The "reasonable profit" must be one that is reasonable in all the circumstances. It might not be what the parties had agreed upon beforehand although what they agreed upon is one factor that may be taken into account in determining reasonableness.

33. Having done that, the Tribunal should be satisfied that it would not be unfair to the Developer to award the total of those two amounts.

34. The circumstances contemplated by the section are where the owner did not receive a fair and reasonable estimate by the builder of the total amount of money the builder was likely to receive under the contract. That might have affected the decision by the owner to enter into the contract. It might be that he would have opted for a cheaper design or less expensive materials or accepted a cheaper quote from another builder or opted for a fixed price contract. Any of these or other circumstances, whether alone or in combination might make it unfair to the owner to make an order under the section but that will not always be the case. There will be many cases where the prejudice suffered is answered by the operation of the section that is, the builder only gets a fair price, not what he has actually paid. In such a case it would not be unfair to make an order.

35. Assessing whether there is unfairness to a building owner is a balancing exercise. Apart from the above matters, what an owner has paid must also be weighed against what he has received. Where a building has been constructed for the owner it would generally be unfair that he should get it for nothing. The purpose of sub-section (2) is to protect building owners, not provide them with an undeserved windfall. I think it would be an unusual case where an order under the section was not made.

What was the "reasonable cost of carrying out the work"

36. In regard to the reasonable cost of carrying out the work I prefer the evidence of Mr Buchanan to that of Ms Dorape-Vithanage for the following reasons:

    (a) Ms Dorape-Vithanage generally practises in the field of large infrastructure projects rather than in a domestic context which is more the province of Mr Buchanan;

(b) Ms Dorape-Vithanage used very low rates for some of the labour that she based her calculations on which I think would not reflect the fact that, according to Mr Buchanan's evidence, there was no shortage of work around at that time. The rates mentioned by Mr Buchanan were more in line with evidence generally given here in building cases;

(c) I thought Ms Dorape-Vithanage lacked detachment. She made a surprising personal attack on the independence of Mr Buchanan on page 1 of an appendix to her report, suggesting that he was "under lots of pressure" from the Builders' solicitors. The basis of this belief does not appear from the evidence and seems to be only supposition on her behalf. I could see no justification for it;

(d) There are two well known and well respected guides used in Victoria for the assessment of building costs, one being Rawlinson's and the other being Cordell's. Ms Dorape-Vithanage, who used Cordell's guide, spoke quite disparagingly of Rawlinson's guide and said that it should never be used in the context of domestic building disputes, yet it is relied upon almost daily in the Domestic Building List of this Tribunal.

(e) Generally I felt Ms Dorape-Vithanage to be acting more as an advocate than of an independent expert. The duty of experts is to the Tribunal, not to the party calling them;

(f) Whereas I thought Mr Buchanan appeared to be independent and to give his evidence dispassionately and at times made concessions, the evidence of Ms Dorape-Vithanage tended to be forceful and unyielding.

(g) Her evidence in regard to the cost of the bricklaying was said by Mr Buchanan to be unreasonably low and Mr Walsh, who did the bricklaying and was the agreed bricklayer, said that he would never have done the bricklaying at the rates Ms Dorape-Vithanage suggested.

(h) Ms Dorape-Vithanage fixed a rate for preliminaries at 3% on the assumption that the Builders would not be providing any supervision for 16 out of the 32 weeks. However on the evidence I am satisfied that the Mr Fazzolari was regularly on site and there was a full time foreman on the job.

For all of these reasons I prefer the evidence of Mr Buchanan to that of Ms Dorape-Vithanage..

What to make of the assessments

39. Ms Dorape-Vithanage provided two estimates. The first is dated 4 June 2008 and estimates the cost of the work at $1,028,445. The second is dated 13 August 2008 and has reduced the figure to $835,912. Part of the difference appears to a reduction in labour rates between Seymour and Melbourne. Mr Buchanan says that is inappropriate and produced a page in

Rawlinson's guide which clearly incorporates Seymour within the same area as Melbourne for pricing purposes. Having seen the page, I accept Mr Buchanan's evidence in this regard.

Ms Dorape-Vithanage's assessment

40. The split up of Ms Dorape-Vithanage's figures are as follows:

(i) Preliminaries

In Ms Dorape-Vithanage's first report the allowance for this was 11.1%, whereas in the second report it had been reduced to 2.96%. That is an extraordinary difference. The latter figure does not include any costs of supervision for the whole period of construction nor any warranty insurance nor the cost of the building permit which had to be obtained by the Builders.

Mr Buchanan has included these items and said that, given the nature of the project he would expect preliminaries within the range of 5-9%. The figure he allowed was equivalent to approximately 8% of the cost of the building works, 7% of the building works including site works and external services and 6% if builder's overhead and margin of 15% is included.

In cross examination he acknowledged that he could have allowed 5% but said there is no stated percentage for preliminaries. In submissions Mr Foster said that this was a concession by Mr Buchanan that 5% ought to have been allowed. I do not think that that is a fair interpretation of Mr Buchanan's evidence. Where one allows a range for an item the assessed figure could obviously be at either end. But whereabouts in the range one should look is a matter of expertise and I am not qualified to say that the amount allowed by Mr Buchanan is excessive.

Apart from the general observations above Ms Dorape-Vithanage has not included in her figure matters that ought to have been included.

Ms Dorape-Vithanage said that one reason she had reduced the allowance for preliminaries was

> "… as the builder engaged himself on other projects\commitments not attended this project on a full time basis" (sic)

That is not borne out by the evidence.

(j) Site clearing and demolition

In her first report Ms Dorape-Vithanage allowed an amount of $1,880.00 under this head but excluded it from the second report. Mr Buchanan said an allowance should be made for the removal of vegetation and I accept that evidence.

(k) Groundwork

In her first report Ms Dorape-Vithanage allowed $34,651.00 for this. In her second report this was reduced to $21,669.00 on the ground that the site

was excavated. Mr Buchanan said that the ground had to be prepared before a site cut. It is clear from the evidence that there were old tyres, parts of cars and rubbish buried under the ground and considerable excavation work had to be done in order to prepare the site and make it suitable to build upon. This does not appear to have been taken into account by Ms Dorape-Vithanage.

(l) Boundary walls and fences

In Ms Dorape-Vithanage's first report the figure for this was $16,320.00 and then it was reduced to $11,873.00. There was a dispute between the experts as to the actual length and the amount to be allowed. I have to choose between them and since I regard Mr Buchanan as being a more reliable witness I accept his evidence in this regard.

(m) Masonry

Ms Dorape-Vithanage allowed this at a rate of $90.00 per sq. metre whereas Mr Buchanan said that the proper rate was between $105.00 and $110.00 per sq. metre. Mr Buchanan said that the rate recommended in Rawlinson's guide was $108.70 for face brick work and $2.75 for cleaning down. The brickwork was carried out by Mr Walsh who was the agreed bricklayer and a relative by marriage of Mr Joyce. He said that he would not have done the work at the rates suggested by Ms Dorape-Vithanage.

(n) Carpentry

Ms Dorape-Vithanage allowed this at between $20.00-$22.00 a sq. metre for carpentry. Mr Buchanan said that the appropriate rate was $32.00 a sq. metre and he had never seen rates as low as those used by Ms Dorape-Vithanage.

(o) Joinery

According to Mr Buchanan the rates used by Ms Dorape-Vithanage are too low and you could not obtain joinery for those prices. Ms Dorape-Vithanage's response that cheap joinery could be obtained in Williamstown is reflective of a generally unrealistic and unprofessional approach. Joinery has to be made to the dimensions specified in the plans and to the design.

(p) Ceilings

Mr Buchanan said that it was unreasonable to allow a lower rate for ceiling linings than for wall linings as Ms Dorape-Vithanage had done. I am not satisfied that a lower rate should be allowed.

(q) Sanitary fixtures and fittings

This was reduced between Ms Dorape-Vithanage's two reports from $60,300.00 to $53,400.00. According to Mr Buchanan, Rawlinson's guide suggests that the cost would be over $70,000.00.

(r) **Stormwater drainage**

There was a difference here in regard to measurement and I am not satisfied that Ms Dorape-Vithanage measured the drains correctly. According to Mr Buchanan the under measurement accounts for $9,639.30 which should be added to her figure. Mr Buchanan says that Ms Dorape-Vithanage has also not made any allowance for connection of the stormwater retention which would add a further $4,500.00.

(s) **Electric light and power**

This was allowed by Ms Dorape-Vithanage at a rate of $20.00 a sq. metre which he said was the median rate in Cordell's guide. Mr Buchanan said that Rawlinson's guide suggested a rate of $49.50 a sq. metre which he said would add $28,062.00 to Ms Dorape-Vithanage's final figure.

(t) **External sewer services**

Ms Dorape-Vithanage allowed for 60 metres of external sewer. It appears that she has assumed that some pipes were already in place from Stage 1 but that is not established. According to Mr Buchanan the plans indicate 174 metres and that would add a further $11,536.00 to Ms Dorape-Vithanage's final figure.

39. It was suggested by Mr Foster that perhaps I might take the average of the two assessments but I do not regard that as an appropriate methodology. I have to find as a matter of fact what the reasonable cost was and I do that by determining what evidence to accept. In this case, apart from the matters of credibility I have the concerns referred to above about Ms Dorape-Vithanage's figures.

40. Since I prefer Mr Buchanan's evidence and since his methodology is not consistent with that adopted by Ms Dorape-Vithanage I cannot weigh one against the other. No faults were demonstrated in Mr Buchanan's figures and so I should accept his assessment.

Mr Buchanan's assessment

41. According to Mr Buchanan's evidence the reasonable costs of constructing the Units was as follows:

New building works	$666,694.00
Site works and external services	$110,079.00
	$776,773.00
Builder's overhead and margin at a rate of 15%	$116,516.00
	$893,289.00
Goods and services tax	$89,329.00
Total project cost	$982,617.00

Defects

42. There was a vast difference between the two experts in regard to the alleged defects in the six Units. Four of the units were sold off the plan and it was only the two remaining Units, 9 and 10, that the Developer still owned at the conclusion of the project. Since there is no evidence to suggest that the price of any of the four Units that were sold was reduced on account of any defects I am only concerned with Units 9 and 10, they being the only Units with respect to which the Developer can be said to have suffered any loss. If there are defects in the other four Units then claims might be made by the owners of those Units but not by the Developer. I should add that it was only Units 9 and 10 that Mr Buchanan was allowed access to.

43. I have compared each item in the list of defects for each of Units 9 and 10 between the two reports and, where provided, the photographs tendered. From this I formed the view that Ms Dorape-Vithanage overstated the value of defects in many respects. Having reached that conclusion I resolved to accept the assessment of Mr Buchanan as being, more probably than not, a fair assessment of the extent of the defects. The amount he assessed was $1,407.72 with respect to Unit 9 and $700.83 with respect to Unit 10.

Variations

44. Since I had to decide the reasonable cost of the building work carried out by the Builders it is not directly relevant how much of that was due to the scope of works as originally contemplated and how much was the subject of the variation.

45. In any event, most of the variations had been signed on behalf of the Respondent and I am satisfied that all of the work that was the subject of those variations was requested by Mr Joyce and carried out by the Builders.

Would it be unfair to the Developer to award the builder the reasonable cost of carrying out the work plus a reasonable profit?

46. The remaining question is whether it would be unfair to the Developer to allow the Builders the reasonable cost of the building work, plus a reasonable profit.

47. The most significant factor is that the Developer has taken the benefit of the Builders' work by selling four of the Units and retaining ownership of the other two.

48. As to the dealings between the Builders and Mr and Mrs Joyce, I prefer the evidence of Mr and Mrs Fazzolari. I thought that the account of Mr and Mrs Joyce as to how the Contract came to be signed was an unlikely one. I am satisfied that they knew it was a cost-plus contract they were signing and that they knew what that meant. I also do not accept their evidence that they would not have entered into the Contract if a fair assessment had been given. Such an assessment would not have included the variations and the figures would not have been as different as they ultimately turned out to be.

49. Apart from the variations, the cost of the building work was largely dictated by the subcontractors and suppliers. Many of the quotations for these had already been obtained by Mr Joyce and he knew the cost of them. I do not think that Mr Joyce was so lacking in understanding in building matters as he would have had me believe.

50. Further, despite the evidence of Mr and Mrs Joyce, I am not persuaded that they were unaware that the Builders were to receive some payment for their work in addition to what it would cost them to pay the sub contractors and suppliers. I do not accept their evidence that they were unaware that they were to pay the cost of the building work plus a 15% margin, nor do I accept that there was to be any "cap" on what the Builders would charge.

51. The progress claims that were made clearly included the Builders' margin and these were paid, although usually late. There was continual trouble in regard to finance for the project and it was clear that Mr and Mrs Joyce, their bank and their accountant were keeping close track on the cost.

52. In all these circumstances it is not unfair that the Builders should be awarded the reasonable cost of the work.

What is a fair profit?

53. The agreed margin was 15%. That is an indication of what the parties themselves regarded as fair in the circumstances at the time the Contract was signed. It was not suggested that 15% was not a fair margin if a margin were to be allowed. Indeed, it is well within the range usually allowed to builders in domestic building cases. For the reasons stated, it would not be unfair to the Developer to allow the Builders a reasonable profit with respect to the work that they have done. They undertook personal responsibility for the whole project and the quality of the work and materials.

54. I think it is appropriate to allow a profit of 15% in addition to the reasonable cost of the building work.

The claim for interest

55. The claim for interest cannot be allowed because it is a claim brought under the Contract and the Contract is not enforceable against the Developer.

Liquidated damages

56. I do not need to decide whether, since the Builders may not enforce the Contract against the Developer, it would be inequitable to allow the Developer to enforce it against them. I am satisfied on the evidence of the Applicants, and also the evidence of Mr Walsh, that Mr and Mrs Joyce requested that work be halted on Units 9 and 10 due to problems with finance. It is clear from the records kept by Mrs Fazzolari that the delays in the work were due to Mr and Mrs Joyce not the Applicants.

How should the money in the account be divided?

57. The Builders should therefore be allowed the reasonable cost of the work plus a reasonable profit which I think is the margin of 15% that the parties agreed upon. From this there must be deducted an allowance for the defects on Units 9 and 10 and also the amounts that the Developer has paid.

58. I calculate the figure as follows:

Total project cost, including Builders' profit of 15% and GST:	$982,617.00
Less defects in Units 9 and 10	$ 2,108.55
Balance due	$980,508.45

Orders

59. The Developer has paid a total of $1,041,986.02, of which $95,606.97 is in an interest bearing account. It therefore follows that, of the money in the interest bearing deposit, $34,129.40 should be paid to the Builders and the balance of $61,477.57 should be paid to the Developer. Declarations will be made accordingly. Costs will be reserved.

SENIOR MEMBER R. WALKER