

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT Reference: D364/2005

CATCHWORDS

Work and labour done – standard of workmanship –no implied term – work to be done in a proper and workmanlike manner using good and sufficient materials

[2006] VCAT 5

APPLICANT: Linda Joy Holt

RESPONDENT: Clifford Bonnet (trading as AAA Deluxe Painting)

WHERE HELD: Melbourne

BEFORE: Senior Member R. Walker

HEARING TYPE: Small Claim Hearing

DATE OF HEARING: 11 January 2006

DATE OF ORDER: 16 January 2006

ORDERS

1. The description of the Respondent is amended to read “Clifford Bonnet trading as AAA Deluxe Painting”.
2. Order the Respondent to pay to the Applicant the sum of \$1,575.00

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant: In person

For the Respondent: Mr Clifford Bonnet in person

REASONS FOR DECISION

Background

1. The Applicant claims damages for allegedly defective painting work carried out by the Respondent painter at her house at 16 Westley Street, Ferntree Gully.
2. The house had suffered storm damage including damage to the paintwork and the Applicant obtained a quotation from the Respondent for \$2,700.00 to carry out the required repainting. She submitted the quotation to her insurance company in support of her claim with respect to the damage and received a cheque for \$2,500.00 towards the cost. The remaining \$200.00 was the excess she had to pay under the policy.
3. She gave the cheque to the Respondent and the work was carried out in October 2004. There is a dispute as to whether it took 1 ½ or 3 days to carry it out but nothing turns on the point. At the conclusion of the work the Applicant asked the Respondent to paint the soffit lining under the eaves and the fascia boards around the house. The Respondent agreed to do the work for \$400.00 and used some left over interior paint on the soffit lining but an exterior paint purchased for the purpose for the fascia boards.
4. The Respondent says that at the conclusion of the work the Applicant was happy with the job and paid the balance plus the extra \$400.00 for the eaves. The Applicant says that she complained about a number of aspects of the work and it is common ground that the Respondent's painters returned and repainted some rooms. The Applicant was still dissatisfied and so commenced these proceedings.

Agreement to rectify

5. Following mediation an agreement was reached whereby the Respondent would return to the site and paint the interior of the house with an additional coat. The work was to be carried out by a particular date and it is common ground that it had not been completed by that date. The Applicant then requested that these proceedings be reinstated. The application for reinstatement came before me on 17 November and there was no appearance by the Respondent. He said in evidence that he did not receive a copy of the notice of hearing of the reinstatement application but the Tribunal file shows that it was sent both to his former post office box and his home address and was

not returned. In the absence of the Respondent an order was made reinstating the proceeding and directing the filing and service of material for the hearing. The substantive proceeding then came before me for hearing on 11 January 2006.

The hearing

6. I heard evidence from the Applicant and her daughter and also from the Respondent and one of his employees who worked on the job. At the outset it appeared that, although the proceedings had been taking against a business name “AAA Deluxe Painting” that name was, according to the Respondent’s evidence, a business name under which he personally carried on business. I thereupon indicated that in the final order I would amend the description of the Respondent to read “Clifford Bonnet trading as AAA Deluxe Painting”.
7. After hearing from the parties it was apparent that there was a substantial disagreement as to the quality of the work and also the nature and extent of the matters about which the Applicant was complaining. I therefore adjourned the proceeding to the subject premises and inspected the work myself. I went through the rooms with the parties and examined the various matters that were of concern to the Applicant. I also examined the soffit lining and fascia at the exterior of the premises. I then informed the parties that I would provide a written decision.
8. In general terms, I think that, although there is some substance in many of the Applicant’s complaints, the work is not nearly as bad as she indicated in her evidence.

The law

9. At the outset, the point should be made that the law does not imply into a contract for work and materials, a term that a tradesman do a perfect job. As to the standard of work to be achieved in a contract for work and materials, I repeat what I said in the case of *Classic Concrete Design Pty Ltd v. Draper* (C5352/2004 - 31 May 2005 - unreported):
“In a contract for work and materials, it is always open to the parties to agree that, in the carrying out of the work, a particular standard will be achieved. In the absence of such an agreement, the obligation of a contractor doing building work is not to achieve a perfect job or a result according to any other particular

standard. He is required to carry out the work with all reasonable care and skill using good and sufficient materials. If he does so, the work should be of a reasonable standard. What is reasonable care and skill in any particular case is a question of fact and depends on all the circumstances including the precise terms of the contract and the price the other party has agreed to pay. Any fault in the work that could have been avoided by the exercise of reasonable care and skill or the use of good and sufficient materials is a defect for which the contractor is responsible.”

10. I will now deal with the individual items claimed.

The painting itself

11. There was a report tendered from Archicentre that was prepared by a Mr Stewart Carter, architect, in November 2004. This report detailed respects in which Mr Carter considered the work to be unsatisfactory but it has been overtaken to some extent by the return of the Respondent's tradesman and the repainting of the kitchen/dining area in a different colour and the laundry, toilet and bathroom in a high gloss white.
12. The entry and passage appears to be in the same state it was at the time of Mr Carter's inspection. He said there were paint smudges on the dark 'suede' finish and there were tonal variations, unfilled cracks in the wall, that the ceiling was unfinished close to the light fitting and that there were painting gaps to the skirting. Having inspected the passageway I accept the comments of Mr Carter and believe that there will have to be some remedial work carried out. Apart from his comments however, the work appears to be generally satisfactory.
13. Concerning the lounge room, Mr Carter refers to unfilled cracks in the wall and the wall not being coated above the skirting. He also refers to paint on the skirting and frames and visible patching to the ceiling and paint on electrical fittings. The paintwork in the lounge room now appears to be satisfactory, subject to some touching up around the window and the light fittings. The visible patching to the ceiling was made by the Applicant's plasterer and although it was visible, it felt smooth when I touched it with my hand. A painter must not paint over rough plaster work and preparation would

include reasonable sanding. I think that, with proper sanding, a better result could have been achieved. The paint on the skirtings and frames is not confined to the paint applied by the Respondent. It is quite apparent that there has been careless painting by previous owners. Nevertheless, some allowance should be made for the cost of removing any paint for which the Respondent was responsible. The spots and smears of paint appear to come off fairly easily but the Applicant will nonetheless have to pay a tradesman to remove them.

14. In the kitchen Mr Carter refers to very thin paint on the walls, “possibly one coat only”. This is no longer the case since the walls have been repainted. I did not see any unfilled cracks of consequence. A power point was painted over and should not have been but the paint could be easily removed. The paint spots on the floor referred to in Mr Carter’s report arose when the Applicant’s daughter painted a cupboard in the room.
15. Mr Carter’s comments about the laundry was that the paint finish on the walls varied from thick to very thin and there were unfilled holes in the wall. I think the problems have been largely rectified. Mr Carter also says that the stained skirtings in the toilet have been painted over but on a close inspection it is clear that they were painted at some earlier time and the Respondent has simply covered the old paint work. A piece of skirting is missing where the vanity was removed. This was produced by the Applicant and it is apparent that the Respondent used it to stir paint. The paint will have to be removed.
16. In bedroom one, there are still paint spots on the stained timber work and paint on the door, some electrical fittings and the timber curtain rails. None of this is significant but it will have to be removed.
17. In bedroom two, the end of the cupboard is finished in melamine and this has been painted. The Respondent said that the Applicant asked him to paint it to match the walls and that he advised her that it should not be painted. The Applicant denies this conversation. Even if it occurred the Respondent, if he agreed to paint the end of the wardrobe, ought to have used a painting method that would ensure that the paint adhered to the melamine. It is now coming off and will all have to be removed. The

Applicant's complaint about this is justified. Again, in this room, there are minor paint marks on two of the timber curtain rail and some of the timber work.

18. In bedroom three the unfilled hole in the wall referred to in Mr Carter's report is still there but it is very small and a touch up job to repair. The paint marks on the electrical fittings and stained timber are very minor and the poor finish around the ceiling electrical fitting referred to in Mr Carter's report is also very minor and amounts to a slight lack of sanding. Again, it is more a touch up job to repair.
19. The paint on the bathroom walls is generally satisfactory although in an area where there was an en suite and shelving it looked very poor indeed. Since it appears that the agreement to do the work was entered into at a time when these fittings were in place, I do not think that it was within the scope of the contract for the painter to make good this wall and paint it in the area where the shelving and en suite were then located. The paint on the wall tiling is relatively minor but will still have to be removed.
20. As to the external work the interior paint used by the Respondent on the underside of the soffit lining seems to have held well despite the fact that it was interior paint and painted over a year ago. Nevertheless, its expected life is questionable and it is questioned in Mr Carter's report. I think that provision should be made for the possible shorter life of the interior paint on the soffit lining. I accept that it was agreed that the interior painted be used in this application but it was for the Respondent as a painter to advise the Applicant in this regard. The painting of the fascias appears to be satisfactory.

Other claims

21. I now turn to the other items claimed by the Applicant. They were as follows:
 - (a) Five door stops missing. These were small plastic wedges commonly used to hold doors open. There is no apparent reason why the Respondent's tradesmen should steal door stops. In the absence of some evidence that it was the Respondent that took them this part of the claim is not made out.
 - (b) A nine foot long plastic coated curtain rod was said to have been damaged. This

was not shown to me on site. The rods that I saw were all timber and none of them appeared to have been damaged, apart from the odd splash of paint which I think is easily removable.

- (c) A valance and matching pillow case have paint spots on them. I was shown these items and the paint is there. I think an allowance should be made for the replacement of the valance and the affected pillow case.
- (d) There was yellow paint on a hand made lace curtain in the dining area. The splash of paint is fairly small but the curtain is a feature and I think I should allow for its replacement.
- (e) The lace curtain in bedroom one was said to have "paint all over it". I was not shown that but I was shown two tears which were consistent with the Applicant's account of the Respondent's workmen having tied the two curtains together to hold them out of the way while the painting took place. There was no other apparent explanation for the tears in the positions where they are and although the curtain looks as though it is quite a few years old it would no doubt have been serviceable for some years to come and I think I should allow for its replacement. Unlike the dining area curtain this seems to have been made up of scrim which should be inexpensive and readily obtainable.
- (f) The lounge room curtain was said to have been torn by one of the Respondent's workman when he removed it for the purpose of the painting. When I inspected the curtain no tear was visible. The Applicant explained that it had been repaired. It would seem that the curtain was torn because the rod holding the lace curtain is supported in the middle by a cup hook and when one unhooks the rod one needs to be careful to also unhook the lace curtain. It is not apparent from the appearance of the curtain that one would have to do that. The extent of whatever damage the curtain suffered is not apparent nor can I find that there is any negligence by the Respondent's workman. This part of the claim is not made out.
- (g) There was said to be a tear in the linoleum where the Respondent's workmen

pulled the stove out. I examined the linoleum under the feet of the stove but could see no tear, although there was a depression where the weight of the stove had borne down on the linoleum in the position of the foot of the stove.

- (h) The Applicant also pointed to a number of small spots in corners that the painter had missed. None of these were significant but will all require touching up.

The claim

22. The Applicant's claim was as follows:

Complete repainting of the house	\$7,680.00
Replacement of all curtains in the house	\$2,552.55
Replacement of the linoleum throughout the house	\$1,700.00
Cost of Archicentre report	\$295.00
Repair of skirting board used to stir paint	\$30.00
Replacement of pillow case and valance	\$50.00
Photocopying, stamps, envelopes and telephone calls	\$30.00
Telephone calls	\$30.00
Travelling and parking	<u>\$20.00</u>
	<u>\$12,357.55</u>

23. There is no justification for a claim of this magnitude. None of the defects are significant and the remedial work will consist of touching up and removing paint spots. The cost of replacing the two damaged curtains is justified, but not the cost of re-curtaining the entire house. There is no justification for the replacement of any of the linoleum.

Conclusion

24. For the reasons given above, I will allow \$250 for the curtains, the \$50.00 claimed for the pillow case and valance, the \$30.00 claimed for the piece of skirting, the \$295 for the Archicentre report, \$200.00 for the use of interior paint on the soffit linings and \$750.00 to remove the paint smears and spots and touch up the defective areas. These add up to \$1,575.00 and there will be an order for that sum.

25. The other amounts referred to are costs items and this is a small claim where orders for costs are not usually made. The Archicentre report was obtained to identify the problems with the work rather than for the conduct of the proceeding. Indeed, it led to the Respondent agreeing to carry out rectification work. I think it is more in the nature of an item of loss and damage arising from the defective work than an item of costs. In any case, there is often a strong policy reason for allowing the cost of an expert's report because otherwise a case could not be proven.

Rohan Walker
Senior Member
Domestic Building List