

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL CLAIMS DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D557/2006

CATCHWORDS

Domestic building, defects, provisional sums, variations.

APPLICANT	Hummer Constructions Pty Ltd
RESPONDENTS	Euan Murphy, Sarah Murphy
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	9 November 2006
DATE OF ORDER	28 November 2006
CITATION	Hummer Constructions v Murphy (Domestic Building) [2006] VCAT 2375

ORDER

- 1 Hummer Constructions Pty Ltd (ABN 45 006 916 552) C/- Derek Hummer, PO Box 314 Wandin 3139, is joined as the Second Applicant to these proceedings on the Tribunal's own motion pursuant to s.60 of the *Victorian Civil and Administrative Tribunal Act 1998*, as a party with sufficient interest in the outcome of the proceeding, and the making of this order shall be sufficient notice to the parties.
- 2 The Second Applicant must restore to the Respondents the taps referred to at item 6 of the Counter-claim by 5 December 2006.
- 3 The Respondents must pay the Second Applicant \$988.00 on or before 12 December 2006, but if the taps referred to in Order 2 are not restored to the Respondents before the date for payment, they must pay only \$906.00 to the Second Applicant.
- 4 There is leave to apply only on the question of whether the taps have been restored to the Respondents.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant

Mr D. Hummer in person

For Respondents

Mr E. Murphy and Mrs S. Murphy in person

REASONS

- 1 This proceeding concerns a claim by the Second Applicant Builder (although expressed to be by the First Applicant care of the Second Applicant) for the outstanding sum claimed of \$3,475.00, and a counter-claim by the Respondent Owners against the Second Applicant for \$6,248.26. The parties agree that if the work had been satisfactorily completed, \$3,475.00 would have been payable by the Owners to the Builder.
- 2 By a contract dated 30 November 2005 the Builder agreed to undertake certain additions and renovations to the Owners' home at 727 Old Warburton Road, Wesburn. The contract price was \$70,109.00. There were some agreed variations, but there were also allegedly some changes to the bargain between the parties that were not reduced to writing.
- 3 On or about 23 May 2006 the Owners paid the Builder all amounts owing under the contract as varied, with the exception of the amount now claimed by the Builder. On 11 August the Builder commenced this proceeding, stating that \$3,475.00 had been "... held back because of damage caused by electricians to the pantry in the kitchen; every attempt has been made to rectify damage, but have been denied [access] by owner. Also a [sic] extra charge above PC amount for plumbing has been also argued against..."
- 4 In the details of the claim, the Builder wrote:
 1. Scratch to pantry back claim of \$1140 by owner to repair (denied access to repair).
 2. Extra \$1340 above PC [this is actually a provisional sum] amount in contract for plumber (this extra charge is in response to changes of plan by Owners).
 3. Damage to laundry bench top (was not part of my scope of works in contract). Value \$607.
 4. Balance of \$388 Owners' miscalculation of above

Scratch to pantry

- 5 The parties agree that there is a scratch at the back of the pantry above the double power point and that it was probably caused by the electrician, for whom the Builder was responsible. The scratch is approximately 20 mm long and 5 mm wide at its widest point. The Owners say that the cost to repair the scratch is \$1,140.00, being \$607.00 for Silkwood, their cabinet-maker, \$375.00 for the plasterer and \$158.00 for the electrician.
- 6 The cabinet was made by the Owners' cabinet-maker. Mr Hummer gave evidence that his cabinet-maker could repair the scratch for \$165.00 with \$300.00 for the plasterer. He said that he offered to place a new panel in front of the existing one, or to install an extra power point, or to allow the

Owners \$400.00 for the scratch. He said that he was denied access and the denial of access was unreasonable.

- 7 The history of the scratch repair negotiations, as disclosed by letters between the parties, is that on 12 June 2006 the Owners wrote to the Builder about a number of matters that concerned them, including a claim for items totalling \$1,140.00 as described above. On 19 June 2006, the Builder replied that the electrician had agreed to “remove and replace the power point to rectify the damage”, and concluding “I am unable to accept other contractor’s quotes for the above mentioned repairs, when we have not been given the opportunity to rectify the problems.” The Builder also requested that the Owners make contact within seven days.
- 8 On 30 June 2006 the Builder wrote to the Owners, offering the following alternatives:
 - a. Place an extra piece in front of the scratched section of cupboard back and re-cut a hole for the power point,
 - b. Place a bigger power point to cover the scratch,
 - c. Add another power point to cover the scratch,
 - d. Deduct \$400.00 from the contract price as compensation for putting up with the scratch, or
 - e. Have Silkwood do the cabinet work, with plastering and electrical work to be done by the Builder, and \$607.00 deducted from the contract price to enable the Owners to pay this sum to Silkwood.

Again the Builder asked the Owners to respond within seven days.

- 9 On 8 July the Owners chose option e. above, but said that they did not wish the work to proceed until a copy of the original contract and the plumbing certificate was provided to their solicitor.
- 10 On 16 July 2006 the Builder wrote to the Owners about various matters including the pantry. The letter advised that the contract and plumbers’ certificate had been provided to the Owners’ solicitor and attached a copy of a letter to Silkwood. It sought notification of a starting date as soon as possible.
- 11 On 24 July 2006 the Owners wrote to the Builder to say that they would not allow any repairs to take place “until all other matters have been rectified, which will be outlined by our solicitor in a forthcoming letter.”
- 12 The Owners are entitled to have a pantry that does not bear a scratch of the size of the one which it has suffered. However it is also found that the Owners have been unreasonable in failing to allow the Builder to return and rectify the pantry. The amount allowed to the Owners is thus the likely cost to the Builder of having the repairs undertaken. \$607.00 is allowed for Silkwood, and \$300.00 for the plasterer. Given the parties agree the scratch was most likely caused by the electrician, it is likely that the Builder would

have had the electrician return without cost. The Builder must therefore allow the Owners \$907.00 for this item.

Provisional Sum for Plumbing

- 13 The Builder identified the amount in dispute as \$1,340.00, but did not explain how this figure was calculated. The contract allowed a provisional sum for plumbing of \$4,015.00. According to the Builder's invoice 493 of 23 May 2006, the total sum for plumbing was \$5,699.00 - \$1,684.00 greater than the provisional sum. When GST is deducted from \$1,684.00 the remaining sum - \$1,530.91 – is the amount which appears beside “plumbing allowance” in that invoice.
- 14 The Builder identified a number of extra items for plumbing which had not been contemplated when the original contract price was agreed. The design did not show the types of toilets to be installed and the builder assumed standard cistern type, but one supplied had a hidden cistern (cistern placed in the wall with just the flush button surface mounted) and the bath shown on the drawings was standard, but the Owners supplied a spa bath. The Builder also claimed that the vanity unit for the bathroom was to be standard but the Owners supplied a pedestal-type basin, and that an extra tap was installed outside the laundry window. Ideally allegedly different or additional items should be charged as variations rather than adjustments to a provisional sum, but it is acknowledged that for some builders it can be difficult to determine where the provisional sum ends and the variation begins.
- 15 Mr Hummer said the spa-bath required extra work to place the pump and to move the taps to suit the bath, installing the in-wall system required more work than a wall-hung cistern, and the taps did not fit the pedestal basin. In the absence of better evidence, it is accepted that the Builder's actual charge is reasonable, to take into account the extra plumbing items, if done properly.
- 16 The Owners said that they were willing to pay extra for plumbing – it is found that there were a number of changes to the plumbing as designed at the request of the Owners – but they were not happy to pay \$434.50, being the cost of a replacement plumber when the first plumber failed to properly complete the work. There is also a sum of \$250.00 included in the plumbing adjustment for sourcing and finding stormwater, which is also mentioned at item 5 of the counter-claim. The Owners also complained that there were a number of incomplete or defective items included in the sum for plumbing. These are:

Amount paid to new plumber

- 17 The amount paid to the new plumber Mr Peter Peluso, is only relevant if it is all or partly the cost of re-doing work of the first plumber. Should this be so, the Builder is not entitled to that part of the second plumber's account.

- 18 The evidence about this item is decidedly poor. The only evidence about the second plumber's account was an unsworn letter of 26 October 2006 from Mr Peluso to "to whom it may concern" stating that the scope of his work was to finish various items and to check the first plumber's work, which he found to be satisfactory. Mr Peluso did not appear to give evidence for the Builder, and while very little weight is placed on this letter, it does at least admit that some work done by him was checking the first plumber's work. This is work that the Owners should not be charged for, because it should have been unnecessary to have another plumber check the first plumber's work.
- 19 As to the remainder of Mr Peluso's account, the burden of proving that they are entitled to retain the sum for the second plumber falls on the Owners, which they have not done, so in the absence of better evidence, the Owners are allowed \$100.00 only for this item, being the cost attributed by me to the second plumber checking the first plumber's work.

\$250.00 for finding and repairing storm water

- 20 Having seen photographs taken by Mr Hummer of the area where the storm water pipe was broken, I am satisfied that the pipe was likely to have been broken by the Owners' septic tank contractor. This was one item of work which was not to be done by the Builder and for which the Owners let a separate contract. No refund is allowed to the Owners for this item.

Spa pump not bolted down

- 21 The Owners provided a photograph of the spa pump which shows that the metal plate upon which it sits has not been bolted to anything. In the absence of evidence as to actual cost, \$25.00 is allowed for labour and materials for this item.

Waste for the vanity in the WC

- 22 The Owners provided a photograph which showed a section of plastic pipe in an otherwise chrome fitting to the waste pipe beneath the basin in the WC. Mr Hummer's evidence is accepted that this cannot be seen by a person who is standing or sitting in that room. While a mixture of materials should be avoided, in this case it is found that there is no defect and no allowance is made.

Toilet in the WC not bolted down

- 23 It is accepted that the toilet has not been bolted down. In the absence of evidence as to actual cost, \$25.00 is allowed for labour and materials for this item.

Laundry bench is chipped at the corners when cut to fit the sink

- 24 The parties agree that the laundry bench was cut by the Builder's carpenter when asked directly by the Owners to do so. There are small chips at the four

corners and the parties also agree that no variation was charged or paid for this work. The Owners gave evidence that the carpenter was asked to do the work in the presence of Mr Hummer and therefore they asserted it was part of the Builder's responsibility. Mr Hummer said that this was not so and that he had no knowledge of the complaint regarding the laundry bench until he sent the final account and it was discussed by the parties on or about 25 May 2006. On the balance of probabilities Mr Hummer's evidence is accepted and it is found that the damage to the laundry bench is not the responsibility of the Builder.

OTHER COUNTER-CLAIMED ITEMS:

- 25 These items follow the order in which they are set out in the Owners' counter-claim dated 7 September 2006:

Skirting boards and picture rails

Skirting boards

- 26 For the purpose of these reasons it is assumed that the front door faces north. The Owners' evidence is accepted that the skirting boards at the end of a wall facing the north-east corner of the family-dining room is larger than the skirting boards in the remainder of that room. Mr Hummer's evidence is accepted that there were two different sizes of skirting board in the house before work commenced and that the profile of pre-existing skirting in the dining room was smaller. The stamped plan shows a door across the entrance from the hall-way (previously the bathroom) into the dining room, and if that door had remained in place, there would not have been a problem, because there would have been a logical break between the new hall-way and the dining room. When the contract was varied to take out the door, there was no such logical break. Ideally, the Builder should have asked the Owners for instructions and charged a variation based on the instructions given.

Picture rail

- 27 Mrs Murphy agreed that she had removed the picture rail installed by the Builder. She said it did not match the old one, but failed to establish how. No amount is allowed for this item.
- 28 The Owners have sought \$800.00 for both these items. To take into account the likely greater cost of rectifying the skirting now rather than at the time of installation, the Builder must allow the Owners \$100.00.

Hire of a portable toilet

- 29 Mr Murphy said that the quotation called for two portable toilets - one for the use of the Builder's workers and one for the use of the Owners. It is agreed that Mrs Murphy was in the last stages of pregnancy when the work was being done and that having their own toilet was very important.

\$297.00 was claimed by the Owners for this item as three months' hire for a portable toilet.

- 30 The parties agreed that it was a term of the contract that the Builder would provide the two toilets, but Mr Hummer claimed he more than fulfilled this obligation by temporarily hooking up the toilet in the bathroom to the new septic tank so that the Owners would not have to go outside. While Mr Hummer appears to be a witness of truth both Mr and Mrs Murphy contradicted his evidence and there was no written variation to support Mr Hummer's contention. An important reason for written variations is that they minimise the opportunity for conflicting evidence. The Builder must allow the Owners \$297.00 for this item.

Two doors not supplied

- 31 The Builder conceded \$96.00 for this item.

Alleged crack to spa bath

- 32 Mr Murphy claimed that there is a crack in the spa-bath which prevents it from holding water and that he found it by the end of May 2006. This evidence was inconsistent with a letter he wrote to the Builder on 12 June 2006 which listed a few items that the Owners were concerned about but also stated "overall we are happy with the construction". It defies belief that the Owners would be "happy" with an item as major and expensive as a cracked spa bath. Mr Murphy's evidence is not accepted on this item. No amount is allowed.

Storm water

- 33 The item claimed for the alleged over-payment of \$250.00 regarding the storm-water pipe has been dealt with above.

Taps supplied by Respondent not used

- 34 The parties agree that taps were purchased by the Owners which were not used. Mr Murphy said they were chosen by the Owners but bought on Mr Hummer's account. Mr Hummer said they were not. It is agreed that the taps are in the possession of the Builder, and Mr Hummer's recollection is preferred to Mr Murphy's. The Builder must restore the taps to the Owners within seven days of this determination, failing which the Builder must allow the Owners \$82.00 for this item.

Alleged necessary re-wiring under the sink

- 35 The Owners' evidence is accepted that the electrician used the hole provided for the sink waste (from under the sink, through the wall to the rear garden) for wiring. This work is found to be defective. The Builder must allow the Owners \$90.00 for rectification.

Alleged unnecessary re-wiring

- 36 The parties agree that re-wiring work additional to that called for in the contract has been undertaken and that the Owners have paid the Builder for this item. The amount claimed by the Owners is \$3,133.26.
- 37 “Electrical” was a provisional sum item for which \$1,650.00 was allowed in the contract. In the Builder’s invoice of 25 May 2006 the total charge for electrical work was stated as \$5,929.00, which included “Extra work to rewire house and meterbox requirements for owner.” The difference between the provisional sum and the actual cost was \$3,890.00 exclusive of GST, or \$4,279.00 in total. Mr Murphy gave evidence that he had a phone call from Mr Hummer saying that it would be necessary to upgrade safety switches for about an extra \$200.00. He also said that the Owners had asked the Builder to install some extra down-lights and power points. He said that the first the Owners knew about the re-wiring was when they received a letter from Mr Cameron Newman of V&N Power of 25 May 2006; the same date as the invoice from the builder charging for that item.
- 38 Mr Hummer said there was no schedule of power and lighting and that he based the provisional sum on an hourly rate. He referred to a letter from Mr Newman of 5 October 2006 addressed to “To whom it may concern”. It is noted that the letter is unsworn and that Mr Newman did not attend to be cross-examined by the Owners. This means that the letter bears less weight in proving the Builder’s case than it otherwise might. The letter states in part:

After completion of initial cable rough in, I returned to the property to ‘fit off’ and ‘liven up’ extension works. I was then asked by Derek Hummer on behalf of the clients to install new power points where requested in kitchen as well as wire an oven circuit which I did.

I was then asked by Mrs Murphy to install extra power points in the lounge room and main bedroom. While doing this I discovered that the existing wiring was in substandard condition, as the cabling was of rubber type. I explained to Mrs Murphy that rubber cabling is renowned for causing problems ... There was also no earthing system. To comply with current standards all appliances ... must be earthed ...

I was then asked by Mrs Murphy to install new light fittings to the main bedroom, hallway, ... Upon this request I noticed that the lighting circuit was of rubber cabling and without an earthing system as well.

I then notified Mrs Murphy that I could earth all of the light fittings and power points to comply with current standards but advised against doing so as I had to run an earth to each point I may as well re-wire the circuits in new cabling which would be far more advantageous for the Murphys in the long run.

I notified Mrs Murphy verbally that to re wire the front of the existing house would cost between two to three and a half thousand dollars not

including works that had already been performed. She agreed to do this as it brought their house up to a safe and current standard. ...”

- 39 The letter’s assertion that Mr and Mrs Murphy knew of the work to be undertaken and agreed to it does not sit well with the letter from Mr Newman to the Owners of 25 May 2006. The relevant parts are:

We write to advise you of the work carried out at the above property initiated through Derek Hummer. Our invoice can be justified by the amount of time and work we had allocated to your project.

Firstly, the condition of the old rubber wire was in a very bad state and needed to be re-wired due to the danger it proposed [sic] and the risk of fire hazard. No earthing system was ever installed to the original house, therefore creating a dangerous hazard (not complying with regulations) and so new earth wiring had to be installed.

Some of the work included:

... [Lists installation of safety switches and various lights, circuits and switches including re-wiring]

Please note that all the work requested was completed.

- 40 The plain meaning of the letter is that this was the first time the Owners had been advised of the re-wiring. Re-wiring of the existing house was not a task contemplated by the contract to build an extension, and should have been treated as a variation to the contract rather than an adjustment to the provisional sum, however it is noted that both parties agree that the whole sum for the electrical work has been paid, so s38(6) of the *Domestic Building Contracts Act 1995* (“the Act”) does not apply. S38(6) provides:

A builder is not entitled to *recover*^{*} any money in respect of a variation asked for by a building owner unless –

- (a) the builder has complied with this section [given written notice regarding the variation which has been signed by the Owners]; or
- (b) the Tribunal is satisfied –
 - (i) that there are exceptional circumstances or that the builder would suffer a significant of exceptional hardship by the operation of paragraph (a); and
 - (ii) that it would not be unfair to the building owner for the builder to recover the money.

- 41 I have added emphasis to the word “recover”. The section might prevent the builder from getting paid for a variation which is not in writing, but it does not expressly give the building owner a right to claw back the amount, once paid.

- 42 The difficulties with respect to the amount for electrical works lead me to s53(1) of the Act which provides:

* Emphasis9 is added

The Tribunal may make any order it considers fair to resolve a domestic building dispute.

When considering fairness, I have regard to the letter from the Respondents to the Applicants of 12 June 2006 which said in part:

We have noticed however, that we have overpaid for electrical works, as we have paid the amount of \$5,929.00 not the amended amount (which was pointed out by yourself) of \$5,082.00. Could you please refund the difference of \$847.00 at your earliest convenience.

- 43 It is found in the circumstances that the Builder must repay \$847.00 to the Owners.

CONCLUSION

- 44 Amount due if all work completed in accordance with standards of reasonable workmanship: \$3,475.00

Deductions

Rectification of scratch to pantry	\$907.00
Second plumber's work in checking work of first plumber	\$100.00
Bolt down the spa pump	\$25.00
Bolt down the toilet	\$25.00
Skirting board rectification	\$100.00
Portable toilet	\$297.00
Two doors not supplied	\$96.00
Re-wiring under the sink	\$90.00
Alleged unnecessary re-wiring	<u>\$847.00</u>
	<u>\$2,487.00</u>

The Owners must pay the Builder \$988.00 on or before 12 December 2006, but if the taps referred to in Order 2 are not restored to the Owners before the date for payment, they must pay only \$906.00 to the Builder.

SENIOR MEMBER M. LOTHIAN