

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D369/2006

**CATCHWORDS**

Work and materials – consent order – non-compliance with order – assessment of damages

<b>APPLICANT</b>	Carol Jasen
<b>RESPONDENT</b>	Maxwell David Beardsworth & Frances Marie Beardsworth t/as M & F Building Services, also t/as M & F Beardsworth Builder
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R. Walker
<b>HEARING TYPE</b>	Small Claim Hearing
<b>DATE OF HEARING</b>	28 July 2006 and 18 October 2006 (on site)
<b>DATE OF ORDER</b>	8 November 2006
<b>CITATION</b>	Jasen v Beardsworth (Domestic Building) [2006] VCAT 2207

**ORDER**

1. The proceeding is reinstated.
2. Order the Respondent to pay to the Applicant the sum of \$600.00.
3. The balance of the claim is dismissed.
4. No order as to costs.

**SENIOR MEMBER R. WALKER**

**APPEARANCES:**

For the Applicant

In person

For the Respondent

In person

## REASONS

### Background

- 1 Ms Jasen (“the Owner”) owns a two storey terrace house at 63 Spensley Street, Clifton Hill. In late 2005 she determined to replace the timber floor in the hallway and kitchen of the house which was rotting. Since it is a period house she approached a supplier who would be able to supply second hand floor boards to match those that needed replacing. That company supplied the boards and recommended the Respondent, Mr Beardsworth (“the Builder”) as a suitable tradesman to carry out the repair.
- 2 A written quotation was provided by the Builder on 11 January 2006 for a price of \$2,785.00 with the Owner to provide the floorboards. The Owner accepted the quotation. The scope of work set out in this document included:
  - Supply of sub-floor materials for repairs, concrete stumps, bearer, joists and bedding plate;
  - Labour to cut and lift kitchen floor, replace timbers and stumps as required, remove chimney base; realign floor joists; entry hall and passage; remove carpet, take up existing floor, repair sub-floor timbers as required;
  - Cut down and lay Baltic floor to total area approximately 30 sq metres.

### The work done and the delay

- 3 The Owner was unwilling to give the Builder a key to the property and it appears that the arrangement was that the work would be carried out on weekends. On 28 and 29 January 2006 the Builder removed the old floor and it was then discovered that there was a problem with rising damp at the rear of the kitchen which the Owner wished to investigate. On Monday 30 January 2006 she sent a fax to the Builder asking him not to return to install the sub floors, because the damp required inspection and rectification.
- 4 Eventually on 3 March 2006 the Owner telephoned the Builder to say that the damp proofing was to commence. She was then informed that the Builder was unable to undertake any work for the next 2 weeks due to health reasons.
- 5 On 30 March 2006 the Owner telephoned the Builder to say that the damp proofing had been carried out but he was then unavailable because of other jobs. Eventually, on 18 April 2006 the Builder rang to advise that he would recommence work on 22 April 2006.
- 6 The floor was substantially installed over that weekend and the following Monday, 24 April, the Builder worked for a further 4 ½ hours and then left. The Owner telephoned him that night asking him to not return the next day because she wanted to attend hospital. The Builder wanted to continue work and there was an argument between them. The Owner then inspected the

floor and discovered what she perceived to be defects. The following day she sent a list of defects to the Builder.

### **The defects claim and the consent order**

7 That Friday an architect, Mr McSteen, inspected the floor and provided a report which listed a number of problems. Correspondence then ensued and the Builder collected his tools from the premises. The Owner then commenced these proceedings which came before the Tribunal on 28 July 2006. On that day a settlement was reached between parties with the assistance of the Tribunal which resulted in the making of an order by consent in the following terms:

- “1. By 31 August 2006 or such later date as may be agreed between the parties the Respondent shall carry out the rectification completion works as set out in the report of McSteen Architects dated 1 May 2006.
2. The Respondent shall give the Applicant 7 days notice if he is unable to commence works on 17 August 2006. Works can proceed on Thursday, Friday, Saturday and/or Sunday or as otherwise agreed.
3. The Respondent shall pay to the Applicant the sum of \$500.00 to be deducted from the outstanding balance as a contribution towards the costs the architect’s initial inspection and report, and the architect’s inspection of the works as set out in paragraph 1 hereof.
4. Liberty to the Applicant to renew this application if the works are not completed as agreed or to a satisfactory standard.
5. Should the application be renewed by the Applicant or should the Applicant fail to make payment within 7 days of the architect confirming all works have been completed in a proper and workmanlike manner, liberty to the Respondent to file a counterclaim seeking payment of any outstanding monies.
6. The outstanding balance is \$1,785.00. After deduction of the sum of \$500.00 referred to in Order 2 the balance payable payable by the Applicant to the Respondent shall be \$1,285.00.
7. The Respondent has indicated that he intends to commence work on 17 August 2006 and the architect will inspect on 18 August 2006”.

### **Non-compliance with the order**

8 On 17 August 2006 the Builder returned to the site and lifted all of the floorboards except for a few in the kitchen, exposing the subfloor. Further work was then carried out to address matters referred to in the McSteen report. The relationship between the parties was strained to the point where the Builder’s son left the site early to avoid continuing friction with the Owner who, for a substantial period of time, was watching the Builder and his workmen at work. There is conflict in the evidence about this. The

Builder's son says that the Owner made a number of derogatory comments about the Builder which he found upsetting. The Owner denies this but acknowledges having said that the Builder was dishonest.

- 9 On the second day the Builder packed up and left before the architect arrived for the inspection.

#### **Extent of non-compliance**

- 10 When the architect arrived he found that 10 matters needed to be attended to which he listed in a supplementary report dated 18 August. At the top of the second page of this report he says:

“Once you have completed the repairs as nominated can you please contact me so that I can inspect the sub floor area prior to any flooring being laid”.

Contact details were provided.

- 11 On the same day, 18 August, the Owner listed the faults and pointed out that it was not possible to lay floorboards until the sub floor was made stable.

#### **The Owner's refusal to allow the Builder to return**

- 12 On the following day, 19 August, the Owner prepared a further fax complaining that the Builder had failed to rectify the work and had also failed to stay for the architect's inspection and concluded:

“You are not to return to my home to attempt further rectification work of a sub-standard flooring. You are quite frankly damaging, devaluing and ruining my home”.

- 13 According to the Builder, he wished and still wishes to return to the house and complete the work but the Owner will not permit him to do so. It was quite clear at the hearing that the Owner does not wish the builder to return.

#### **The Owner's claims**

- 14 The Owner now claims damages for:

Cost to rectify kitchen and hallway floors	\$6,880.00	
Less balance owed to the builder	<u>\$1,785.00</u>	\$5,095.00
Cost to rectify burnt bench top		\$120.00
Cost of timber floorboards		\$2,529.00
Painting of hallway walls		\$660.00
Damage to kitchen table		\$190.00
Cost to remove kitchen hearth		\$40.00
Meals costs – no kitchen for 5 months		\$1,400.00
Cleaning costs		\$90.00

She also claims costs as follows:

Architect's original report	\$440.00
Further report 18/8/2006 and 16/9/2006	\$600.00

Legal costs	\$348.70
Postage, faxes, phone calls, printing, ink, stationery, paper and photocopying	\$74.50
Filing fee on application	<u>\$32.50</u>
	<u>\$1,495.70</u>

### **The hearing**

- 15 The matter was listed for hearing before me on site on 3 October 2006. Mr Burgess, solicitor sought leave to appear on behalf of the Owner but I refused leave since no notice had been given to the Respondents and they were unrepresented. I did however permit Mr Burgess to remain to offer advice and assistance to the Owner as required. The architect, Mr McSteen attended and the parties pointed out various aspects of the work and commented upon them. All of the floorboards were up and it was necessary to walk and stand on the floor joists.
- 16 It appears that, in addition to the areas indicated on the Owner's sketch when the builder was engaged, it was also necessary to remove the floor of the area under the stairs because the joists under that area were continuous with the adjacent passageway. It seems quite clear that the ultimate scope of works was larger than had been anticipated. Nevertheless, the Builder was contractually required to carry out the work described in the quotation and to do it for the quoted price.
- 17 It is quite apparent from the conduct of the parties on site that it would be impossible for the Builder to return and carry out any further work due to the hostility between them. I accept Mr McSteen's evidence that the items listed in his second report need to be attended to and the Builder did not seriously contend otherwise. He claims that he has not had the opportunity to do the work.

### **What is before me?**

- 18 I am not dealing with this matter afresh. I have to consider the effect of the order made by consent of the parties and look at the consequences of what has occurred.
- 19 The order required the Builder to carry out the works set out in Mr McSteen's first report. He has failed to do so to the extent set out in Mr McSteen's second report. What consequences follow?
- 20 Leave was reserved to the Owner to renew this application if the works were not completed as agreed or to a satisfactory standard. They were not, but only to the extent set out in Mr McSteen's second report. The order also established that the outstanding balance, after allowing for a contribution of \$500.00 towards Mr McSteen's fees, was \$1,285.00.
- 21 I am satisfied that the works required by the order were not completed and I will therefore treat the proceeding as renewed. I am also satisfied that it is appropriate to allow damages in favour of the Owner equivalent to the cost of carrying out the work that the Builder ought to have carried out under the

order but did not do. Those are the items listed in Mr McSteen's second report. The problem that I have is that there is no evidence at all as to the cost of carrying out that work. The quotations produced by the Owner are for somebody else to come in, pull out everything that the Builder has installed and start again. That is not what I have to assess.

- 22 Looking at the 10 items to be attended to which are set out in Mr McSteen's second report and in the absence of any expert evidence as to the cost of attending to those matters I am unable to be satisfied on the balance of probabilities that the cost of carrying out those items is any more than the balance due under the contract.
- 23 Conversely, although there is no cross claim by the Builder, since the work has not been completed and is on any view defective, there is no evidence at all to indicate that it is of any value beyond the \$1,000.00 deposit paid.
- 24 The only hard evidence that I have of any loss is the account from Mr McSteen for his second inspection. Because of the nature of the non-compliance by the Builder with the order, Mr McSteen was required to spend considerably longer than necessary and has charged the Owner \$600.00. I will award damages in favour of the Owner against the Builder for the sum of \$600.00, representing Mr McSteen's most recent fee.
- 25 I think the balance due under the contract will in all probability be sufficient to remedy the deficiencies in the Builder's work and re-cover the floor, even allowing for some wastage of floorboards.
- 26 I should add that although the Builder has expended considerable sums in both materials and labour, I am not satisfied that the value of the work and materials to the Owner is any more than what he has received namely, the deposit of \$1,000.00.

#### **Other claims**

- 27 The claim with respect to the table is disallowed. It was the Owner's decision to place it outside. I have insufficient evidence that the sanding of the bench top is necessitated by the placing of hot tools on the bench and similarly I have insufficient evidence to justify the claim with respect to the kitchen hearth. As to the claim for the cost of meals, it is surprising that the Owner, having elected to do without her kitchen for an indeterminate period, made no arrangements to prepare her meals elsewhere in the house. The cleaning costs are not established.
- 28 In regard to the claim with respect to repainting the hallway, I was shown a number of hand prints on the hallway wall. In view of the extent of the renovation required, this is not surprising and I cannot find that they have arisen as a result of any fault on any part of the Builder.
- 29 The claim for costs will not be allowed, since this is a small claim and was ultimately found to be inflated well beyond its true value.

**Orders to be made**

30. I will order that the proceeding be reinstated and that the Respondent pay to the Applicant the sum of \$600.00.

**SENIOR MEMBER R. WALKER**