

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D651/2008

**CATCHWORDS**

Work and labour done – work not done in a proper and workmanlike manner – Respondent given particulars of defects and an opportunity to rectify – failure to rectify – Applicants entitled to rescind contract and engage alternate contractor – work done by Respondent worthless – Applicants entitled to refund of money paid

|                         |   |
|-------------------------|---|
| <b>FIRST APPLICANT</b>  | Jacinda Kehmann   |
| <b>SECOND APPLICANT</b> | Peter Anderton  |
| <b>RESPONDENT</b>       | Maurice Cafra   |
| <b>WHERE HELD</b>       | Melbourne   |
| <b>BEFORE</b>           | Senior Member R. Walker   |
| <b>HEARING TYPE</b>     | Small Claim Hearing   |
| <b>DATE OF HEARING</b>  | 1 May 2009 and on site at 6 Maxwell Court<br>Toorak on 18 June 2009 |
| <b>DATE OF ORDER</b>    | 20 July 2009  |
| <b>CITATION</b>         | Kehmann & Anor v Cafra (Domestic Building)<br>[2009] VCAT 1196      |

**ORDER**

1. Order the Respondent to pay to the Applicants \$10,000.
2. The counterclaim is dismissed

**SENIOR MEMBER R. WALKER**

**APPEARANCES:**

|                    |           |
|--------------------|-----------|
| For the Applicants | In person |
| For the Respondent | In person |

## REASONS

### Background

1. The Applicants are the owners of the dwelling house at 6 Maxwell Court Toorak.
2. The Respondent is and was at all material times a renderer with many years experience.
3. On 4 March 2008 the Respondent provided a written quotation to the Applicants to render the house for a price of \$19,000.00. In the same document prices were quoted for other work, most of which was carried out, but this proceeding relates only to the rendering.
4. The scope of the rendering works, as set out in the quotation, was:
  - a. "Rendering of house "total" area. Two coats render, one texture (colour), any present grooves to be retained and brick features also. Fence not included".
5. The Applicants accepted the quotation and paid the Respondent \$11,800.00, of which \$10,000.00 related to the rendering.

### The dispute

6. The work was commenced out by the Respondent's workmen but, as it proceeded, the Applicants were dissatisfied with it and complained to the Respondent.
7. The Applicants' complaints during the course of the work are set out in their letter of 14 April 2008. This lists the following 9 issues:
  1. Render mortar lines are not of consistent width and depth.
  2. Render mortar lines are not straight.
  3. Colour is not consistent.
  4. Finishing detail is of poor quality and not to a reasonably acceptable industry standard.
  5. Finish against soil beds does not accommodate soil level and in places is above finished soil levels.
  6. Overall detail and finish is not to an acceptable industry standard.
  7. Excessive rubbish distributed throughout the building site is dangerous and unacceptable.
  8. Extensive damage to property, plants and fixtures.
  9. Workmanship generally not to a minimum acceptable standard resulting in excessive devaluation of the property.
9. The letter requests the Respondent to answer the complaint within seven days and advise the method and program he intends to adopt in order to rectify the work and bring it to a satisfactory standard in a timely manner.

10. Following receipt of this letter a meeting took place between the Respondent and the Applicants and it was agreed that the Respondent would attend to the complaints made. The Applicants say that he did not do so and that it was agreed that they would hire somebody else to take his place. The Respondent denies this and says, in effect, that he was ordered from the site.
11. The Applicants had the work redone by another contractor. They now seek to recover the sum of \$10,000.00 they paid. The Respondent has counterclaimed for what he says is the balance of the contract price.

### **The hearing**

12. The matter came before me as a small claim hearing on 1 May 2009. I heard evidence from the Applicants and from the Respondent and then adjourned the matter to an on site hearing when I inspected the external front of the house.
13. The Applicants have tendered a number of photographs showing the quality of the Respondent's work. These showed a generally rough finish, poorly cut grooves of inconsistent width and depth, uneven lines in the rendering, rough surfaces, obstruction to floor vents and fairly careless preparation. There is a photograph of one wall which shows a clear line of very patchy work from roof to ground level. There are also photographs showing large amounts of rubble and mess in the yard.
14. The Respondent gave evidence as to his experience as a renderer. He said that his employees were experienced and the quality of the workmanship was of a reasonable standard. He provided photographs of other houses in Toorak which, he said, the same people had rendered. Certainly these photographs show a very different standard from the work shown in the photographs tendered by the Applicants.
15. It occurred to me at the first hearing that perhaps there were difficulties with the house that ought to be taken into account in assessing whether the Respondent's work was to a reasonable standard and so for that reason I sought an on site hearing. Quite obviously, I was only able to inspect the work that had been done by the replacement contractor but I was able to assess the difficulty of the job and see what finish the replacement contractor had been able to achieve. I could then compare that with what I saw in the photographs of the Respondent's work.
16. Upon viewing the property as it is now, it is clear that the replacement contractor has done an excellent job of rendering the house without any of the faults that I saw in the photographs depicting the Respondent's work. Certainly, as the Respondent pointed out, the replacement contractor was not required to cut grooves in the render but that was only one aspect of the work. Even though his task was simpler in some respects, the quality he achieved is vastly superior in all respects. Further, the fact that a job is difficult might justify a higher charge but it does not justify defective work.

## **Findings**

17. I am satisfied that the Respondent failed to carry out the work in a proper and workmanlike manner. Indeed, the work was sloppy and to a very poor standard indeed. Whether it was agreed that the Respondent would leave the site or whether the Applicants terminated the contract is not to the point. The quality of workmanship was particularly bad and the Respondent was given an opportunity to rectify it and failed to do so. In these circumstances I think the Applicants were entitled to bring the contract to an end and have another contractor carry out the work.
18. The work carried out by the Respondent's workmen was entirely worthless and so it is appropriate to order the Respondent to refund the amount the Applicants have paid him.

## **Order**

19. I order the Respondent to pay to the Applicants the sum of \$10,000.00. The Respondent's counterclaim for the balance of the contract price will be dismissed.

**SENIOR MEMBER R. WALKER**