

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. BP183/2015

**CATCHWORDS**

Domestic Building – Claim for final payment – Home owner claim for a reduction in final payment arising from defects.

<b>APPLICANT</b>	Mr Zivojin Zack Kelic
<b>RESPONDENTS</b>	Mr Edward Surendra and Mrs Sharon Surendra
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	K. Campana, Member
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	21 April 2015 & 29 July 2015
<b>DATE OF ORDER</b>	29 July 2015
<b>DATE OF WRITTEN REASONS</b>	14 August 2015
<b>CITATION</b>	Kelic v Surendra (Building and Property) [2015] VCAT 1257

**ORDERS**

1. The Respondents must pay the Applicant the sum of \$655.00.
2. No order as to fees.

K. Campana  
**Member**

**APPEARANCES:**

For Applicant	In person
For Respondents	In person Ms Evangeline Surendra

## WRITTEN REASONS

- 1 On 29 July 2015 I heard a claim by Zivojin Kelic, builder, against home owners, Edward and Sharon Surendra (“the Surendras”), for the final payment owing under a contract for additions to an existing premises and the construction of a garage, carport and front fence.
- 2 The Surendras took issue with the workmanship of the builder raising a number of items as defects and sought to reduce the claim by offsetting the costs to repair.
- 3 At the conclusion of the hearing, I gave oral reasons for my decision and made the following order:
  1. The Respondents must pay the Applicant the sum of \$655.00.
  2. No order as to fees.
- 4 On 4 August 2015, Mr Kelic wrote to the Tribunal seeking “*a detailed list of each deduction made from my main amount that I was awarded so that there is no issues in the future and something that I can have for my personal record.*”
- 5 I have taken this correspondence as a request for written reasons.
- 6 At the end of the hearing I returned all documents to the parties. The following is taken from the notes I made of the decision I handed down.

## THE CLAIM

- 7 In June 2014, Mr Kelic was engaged by the Surendras to build a carport and garage at their Noble Park property and carry out renovations to an existing home. There were a number of variations to the agreement and contracts for additional works. The works under the main contract were completed by the end of October 2014, with a Certificate of Final Inspection issued on 20 November 2014.
- 8 The claim by Mr Kelic was for \$4,035, which included the final invoice payment of \$3,700 plus \$165 for works by Telstra as agreed between the parties and a further \$170 for two additional electrical points provided.
- 9 Mr Kelic also sought damages of \$364.70 for late payment of the final invoice and reimbursement of the application fee of \$158.90.
- 10 The Surendras filed a counterclaim but had not paid the fee associated with the claim or served the paperwork on Mr Kelic.
- 11 At the start of the hearing, I advised the parties that I would only deal with the matters raised in the counterclaim by way of a defence and set-off. This meant that any claim by the Surendras that was successful, would be taken into account and would reduce any amount awarded to Mr Kelic. However, there would be no order in favour of the Surendras.

- 12 I considered all of the evidence that was provided over the two days of the hearing including the video, photographs, quotations, and evidence and submissions of the parties.
- 13 I found the evidence of both Mr Kelic and Mr Surendra to have been both truthful and forthright. Concessions were made about various matters during the course of the hearing and there were no speculative assertions or exaggerations. Both were credible and reliable and I have taken both at face value.
- 14 What was disappointing in the evidence was the lack of any independent assessment of the items raised as defects or any reliable independent quotation of the costs of rectification. Mr Kelic provided a cost estimate of his own charge to fix the work which I consider was grossly undervalued, while the quotations provided by the Surendras differ so greatly as to undermine their value as a true cost estimate.<sup>1</sup> As a result, the Tribunal was left in the position of providing an “*educated guesstimate*” of the costs to rectify any works held to be defective.
- 15 I was satisfied that Mr Kelic was entitled to the final payment under the contract. The works that were contracted for - were completed. As such, the amount of \$3,700 on the final invoice was owed by the Surendras. I was also satisfied that the additional amounts of \$165 and \$170 related to works that were requested by the home owners that were outside the specifications of the contract and that the charges were reasonable.
- 16 In relation to the damages claim under the contract, I was not persuaded that there was an entitlement to this amount. There were and remain a number of items that need to be rectified.
- 17 In relation to the disputed items raised by the Surendras, the burden of proving that they are defects fell on the homeowners.
- 18 I will deal with each item raised in turn.

## **GARAGE ROOFING/PLUMBING**

- 19 I was satisfied that there is inappropriate flashing and guttering on the garage, causing water ingress into the garage at the ceiling height and also around the windows.
- 20 I was of the view that an amount of \$880 was reasonable for remedial works to be carried out to the flashing and guttering and a further \$600 to patch and paint the plaster of the ceiling and fix the skirting boards in the garage. A total amount of \$1,480 is allowed for the repair works related to the leak in the garage.

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<sup>1</sup> By way of example - to repair and patch the ceiling in the garage and fix the water leak, one estimate was for less than a thousand dollars, while the other was just shy of \$5,000. The great difference in price between the two quotes meant that it was difficult to make an assessment as to the reliability of either.

## **ROOFING SHEETS ON GARAGE**

- 21 The Surendras complained that the end of the roofing sheets were not cut straight. Taking into account the limited photographic evidence shown, I was not satisfied that the cut to the sheets was not straight, or outside acceptable standards. I disallowed this item.

## **LOUNGEROOM & DINING ROOM CEILING**

- 22 I was satisfied that the ceiling in the lounge room required some repairs. However, I was not satisfied that the builder had carried out any works to the dining room ceiling or had caused any damage to that part of the building. The Surendras suggested that the dining room ceiling had suffered damage as a result of the roof being opened for a period of time. Mr Kelic denied doing any works on the roof in that area of the house. The Surendras comments about the cause of the damage arising from having the roof open were merely speculative. There was no evidence provided to substantiate that (a) either the roof had been opened or (b) what had caused the ceiling damage.
- 23 An amount of \$440 will be allowed for the patching and repair works to the ceiling in the lounge room.

## **SENSOR LIGHT**

- 24 Mr Kelic conceded that a sensor light installed by his electrician was not working properly. He did not dispute the amount of \$250 as a reasonable cost to fix the light. I allowed this charge as a deduction.

## **TIMBER FLOORING**

- 25 The contract included the removal of a non-load bearing wall in the home and the patching of the timber floorboards. The Surendras were responsible for sanding and polishing the floor. I was satisfied that the contract only provided for patching the floor and the works that were carried out were an acceptable way to fill the gap. While the works are not aesthetically pleasing, they are structurally sound and appropriate, taking into account what was agreed. I dismissed this claim.

## **WINDOWS**

- 26 The Surendras claimed that when glass in a window in an older part of the house was broken by the builder, Mr Kelic had replaced the entire window with another window in the property. Mr Kelic admitted that one of his workers broke the glass pane of the window but said that the glass only was replaced. Issues were taken with the ability of the window to open. I found that the window was old and that any issues with the sliders sticking was more likely to be related to the age of the window rather than the replacement of a pane of glass.
- 27 There was however a window that was purchased and installed by Mr Kelic which I was satisfied needed replacing because of issues associated with it

opening. The Surendras sought a reduction of \$130 for the removal and replacement of this window. I was of the view this amount was more than reasonable and it was allowed.

### **GAPS IN BRICKWORK AROUND THE WINDOWS**

28 The Surendras complained about the existence of gaps around many of the windows, between the bricks and the flashing. I found that there were some gaps, but that those gaps were only inside and were minimal. A deduction of \$110 was allowed for caulking works to be carried out around the windows and along the cornice in the garage, where there was a slight bow in the brickwork.

### **BRICK REMOVAL AND CLEANING**

29 Some bricks had been left on site by the builder and there were still splashes of mortar on some external brickwork. An amount of \$40 for the removal of the bricks and a further \$250 for brick cleaning was allowed.

### **SOIL REMOVAL AND LEVELLING**

30 The Surendras complained that the soil in the backyard had not been levelled sufficiently. I was not satisfied that there was any issue with the levels of the soil in the backyard, and rejected this claim.

### **WINDOWS AND DOORS**

31 I was not satisfied that any other window or sliding door required replacement or rectification. This part of the Surendras claim was dismissed.

### **FLOATING FLOORBOARDS IN GARAGE**

32 Additional works outside the terms of the contract had been agreed between the parties. These additional works included the supply and installation of floating floorboards in the garage. The Surendras paid a deposit of \$1500 for this work and the floorboards were delivered. A dispute between the parties arose shortly afterwards and, apart from some underlay, the floorboards were not laid. Taking into account the amount paid by the builder for the floorboards and some work carried out by him (including collecting the boards), I found the reasonable cost incurred by the builder was \$820. Therefore the Surendras were entitled to be reimbursed \$680<sup>2</sup> being the overpayment made by them by reason of the payment of the deposit.

### **CAPS ON GARAGE POSTS**

33 Mr Kelic brought to the hearing, two caps to be placed on garage posts which he admitted to failing to provide previously. No order was required in relation to this item.

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<sup>2</sup> \$1500 less \$820 = \$680.

## CONCLUSION

- 34 The Surendras are entitled to a reduction of the amount payable to Mr Kelic of \$3,380 comprising the following:
- (a) Garage roofing/plumbing repairs - \$1480
  - (b) Loungeroom ceiling repairs - \$440
  - (c) Sensor Light - \$250
  - (d) Window replacement - \$130
  - (e) Caulking around windows - \$110
  - (f) Brick removal and cleaning - \$290
  - (g) Part refund of deposit paid for flooring - \$680.
- 35 The claim by Mr Kelic of \$4,035, reduced by \$3,380, brought the total amount payable by the Surendras to \$655.00.
- 36 As Mr Kelic had not been substantially successful, the claim significantly reduced by reason of the defects raised by the Surendras, I did not make any order that the Respondents reimburse the application fee paid<sup>3</sup>.

K. Campana  
**Member**

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<sup>3</sup> Section 115C of the *Victorian Civil and Administrative Tribunal Act 1998*.