

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION**

DOMESTIC BUILDING LIST

VCAT Reference: D856/2007

CATCHWORDS

Domestic Building Contract – no building period specified – work to be done within a reasonable time - work delayed – identity of builder – evidence – claim for interest – nature of award of interest – whether damage was suffered

APPLICANT: Kasim Khan

FIRST RESPONDENT: Chris Kimitsis t/as Quest Building - Registered Building Practitioner No. DBU 14853

SECOND RESPONDENT: Billy Seri

WHERE HELD: Melbourne

BEFORE: Senior Member R. Walker

HEARING TYPE: Hearing

DATE OF HEARING: 20 – 21 April 2009

DATE OF ORDER: 28 April 2009

CITATION: Khan v Kimitsis trading as Quest Building (Domestic Building) [2009] VCAT 912

ORDER

1. The Claim against the Second Respondent is dismissed,
2. Order the First Respondent pay to the Applicant \$86,510.71.
3. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant: Mr. T. Sedal of Counsel

For the First Respondent: Mr. Kimitsis, in person

For the Second Respondent: Mr. Seri in person

REASONS

Background

1. The applicant Mr Khan (“the Owner”) is the owner of land at 245 Moonlight Place, Tarneit. The First Respondent, Mr Kimitsis, (“the Builder”) was at all material times but is no longer, a registered building practitioner. He is a qualified carpenter and bricklayer and has worked in the building industry for many years.
2. The Second Respondent, Mr Seri, is the Owner of a number of businesses.
3. The subject of this proceeding is a substantially completed house built on the Owner’s said land, either by the Builder or by Mr Seri. The Owner’s main contention is that it was built by the Builder but, in view of the Builder’s denials and assertions that it was really Mr Seri who built the house, Mr Seri has been joined as the Second Respondent.

The contract

4. The written form of contract pursuant to which the claim is brought is dated 30 March 2005. The copy tendered bears what appears to be the signature of the Builder and purports to be between the Owner and the Builder. However, the Builder denies having signed the contract document and suggests that the signature on it purporting to be his is a forgery. He suggests that it was put there by Mr Seri. Mr Seri said that he took the contract to the Builder after the Owner had signed it and that he saw the Builder sign it.
5. Although the Owner signed the contract document in March, he says that it was not until April that he received the specifications. Also in April his loan was approved. He says that work commenced in May and that he received the Certificate of Insurance on about 9 June. Soon afterwards he was told by Mr Seri that the slab for the house was completed.

The negotiations

6. According to his written statement, the Owner’s negotiations with respect to the house were made by him with Mr Seri and with a friend of his, Mr Sayed, who arranged the finance for the purchase of the land and the construction of the house. He said that he was told by Mr Sayed that Mr Seri would build the house for \$180,000.00 but this is hearsay. He says that he assumed that it was Mr Seri who would be building the house and that he was not told about the Builder. Again, it is unclear how he formed this opinion since he appears to have been relying upon Mr Sayed. Mr Seri says that the Owner was told that the house would be built by Quest Building. In view of the contract that was signed nothing turns on it but the Owner’s evidence about these negotiations appears second hand and quite confused.
7. As a result of the negotiations a meeting took place at the Owner’s home between the Owner, his wife, Mr Seri, Mr Sayed and a finance broker named Hussein. In the course of this meeting Mr Seri produced the

building contract which the Owner then signed. According to the Owner, the contract was already signed by the Builder but this is contrary to Mr Seri's evidence and the date of contract that was on the application for insurance. I prefer Mr Seri's evidence in this regard.

8. The price stated in the contract was \$220,500.00. According to the Owner, when he pointed out that this was not the price they had negotiated, Mr Sayed told him that the price was really only a \$180,000.00 and the contract said \$220,500.00, so that if he sold the house he would get a higher price.
9. This seems a most unlikely explanation and I doubt first, that something so improbable would have been said and secondly, that the Owner would have believed it if it had been said. Mr Seri does not specifically deal with this allegation in his witness statement but does acknowledge that at some time during construction, the Owner objected to the price
10. It is unclear when work started. No money was drawn from the Owner's account until January 2006. All money that was then drawn down went into Mr Seri's account and was used, he said, to pay for the materials and labour used on the job, although he did pay some money – he said “about \$10,000” - to the Builder.
11. In about October the Owner objected to the price. In a letter dated 11 October 2005 to Mr Seri he asked Mr Seri to stop building the house because he (the Owner) was taking Mr Sayed to court. After some negotiation it was agreed that the price would be reduced to \$197,550.00. This agreement was confirmed by a letter apparently signed by the Builder and dated 18 November 2005. The Owner says that, during the meeting where that was agreed, Mr Seri made a promise “to the effect that he would use good quality building materials and extras such as a skylight, feature walls and good quality carpet.” No claim seems to be based on that.
12. On 6 September 2006 the Owner negotiated a variation to the kitchen cabinets which increased the price by \$2,000.00. The price then became \$199,550.00.
13. Some time after that the work appears to have stopped although I cannot find precisely when that occurred. According to Mr Seri, the Builder had become uncontactable and he did not have the expertise to finish the job himself.
14. The contract is silent as to a completion date. According to a letter dated 6 October 2006 written to the Builder by the Owner's solicitors, the Owner was told at the time the contract was signed that the work would be completed before March 2006. Indeed, in the complaint to Building Advice and Conciliation Victoria which the Owner signed, the complaint is that the works were not completed by March 2006.
15. What is clear from all this is that the whole process from negotiation, contract documentation and construction was extraordinarily amateurish and followed a most unusual course.

Who was the builder?

16. The contract document identifies the Builder as the person contractually bound to do the work and purports to have been signed by him. Further, the Certificate of Insurance was issued pursuant to an application for domestic building insurance that was completed and signed by the Builder. The application for that insurance sets out in the Builder's handwriting all the details of the contract but states that the contract was dated 9 May 2005. It says that the "declared insurance value" was \$220,500.00, that being the price stated in the contract. The Builder was named in the certificate as being the person to carry out the work.
17. There are two distinct versions of how this house came to be built, depending upon whether I believe the Builder or Mr Seri.

Mr Seri's version

18. According to Mr Seri, he was anxious to learn about building and, at the invitation of the Builder, he entered into an arrangement whereby the Builder would enter into the contract with the Owner to build the house but that Mr Seri would supervise its construction under the guidance and with the advice and assistance of the Builder. The money required to finance the construction would be provided by Mr Seri who, it appears, is a successful businessman.
19. A joint bank account was opened for this purpose by the Builder and Mr Seri in January 2006. An initial amount of \$20.00 was paid into the account but no other sums have been paid into or drawn out of it. According to Mr Seri, that was because the Builder informed him that he was having matrimonial problems and faced litigation with a number of other parties and he did not want money to be in an account in his name. Hence, the account was never used and instead, the receipts and payments with respect to the construction passed through Mr Seri's account. As stage payments fell due, payments would be made by the lender into Mr Seri's account. According to Mr Seri all of this money has gone out to pay tradesmen and suppliers. It is not suggested that any of these suppliers or tradesmen has not been paid.
20. After about Lock up stage the Builder became very difficult to contact and took no further interest in the construction.

The Builder's version

21. According to the Builder, he knew nothing about the project. Although he admits having signed the proposal for domestic building insurance, he says that document was prepared for a particular purpose namely, to give to the Owner's broker as evidence that he, the Builder, was a legitimate builder. It was not intended to be sent to the insurer.
22. The Builder says that that he found out in late 2005 that Mr Seri had obtained the insurance in his name and with his insurer and had entered into the contract. He admits that he did not tell the Owner about that and says

that he did not do so because he was preoccupied with personal problems at the time. His failure to do that is significant because the first payment was not made by the Owner until early 2006. At that time the Builder was well aware, even on his own evidence, that this contract had been entered into naming him as the Builder and that his insurer had issued a Certificate of Insurance rendering itself liable for any deficiencies in the work.

23. The Builder says that he met with Mr Seri who asked for his help in “getting out of the mess”. He says that he agreed to help Mr Seri subject to certain conditions which he put in writing but Mr Seri refused to agree to them. Mr Seri denies these allegations.

Which version to accept

24. In choosing between these two versions I prefer that of Mr Seri, for the following reasons:
- a I do not believe the Builder’s account as to how he came to fill in the proposal for the insurance. If the Owner’s broker needed to be satisfied that the Builder was registered, inquiries could have been made in the usual way or some proper documentary evidence could have been provided;
 - b Had the contract really been entered into in the Builder’s name without his knowledge or consent, one would expect that he would have immediately informed the Owner about it. It is clear even on his own evidence that he discovered it later that year before the work had progressed to any substantial degree and before any money had been paid. Further, he ought to have informed his insurer. Since he did nothing, it is more likely than not that the contract was indeed entered into by him;
 - c In a number of conversations that the Builder had with an investigator from Consumer Affairs, Ms Kehoe, he admitted that he had allowed Mr Seri to use his building registration and referred to him during these conversations as “his agent”;
 - d When Consumer Affairs became involved and meetings on site were held, the Builder attended and agreed to complete and rectify the work. That agreement was not fulfilled but to agree to do that is inconsistent with the notion that the contract had been entered into behind his back and without his knowledge;
 - e He told Ms Kehoe that he would complete the work within 4 weeks and did not say to her that he had been unaware of the project;
 - f According to the evidence of Mr Abou-Eid, who quoted for the plumbing work on the construction, it was the Builder, not Mr Seri who asked him to quote. The quotation is dated 10 June 2006. Mr Abou-Eid said that, after the work was done, he had difficulty getting paid and eventually the Builder directed him to Mr Seri who paid him.

- g An undertaking was prepared by the Department of Consumer Affairs for the Builder to sign but it was never signed because he disputed its terms. I doubt that negotiations between the Builder and the Department would have reached that stage had the Builder genuinely thought that the contract had been entered into by Mr Seri behind his back and without his authority.
- h When the house was inspected by Mr Stan Webb at the request of the Department, access to the property was provided by the Builder, who opened the doors and allowed access. After the inspection Mr Webb had to return to the house to take further photographs and to this end he contacted the Builder to arrange access. The Builder informed him where the key was hidden. This indicates some control over the project which is inconsistent with the notion that the Builder was a stranger to the contract to build the house.

Enforceability of the contract

- 25. The Builder argues that the contract is in any event unenforceable because the copy in evidence is not signed by the Owner. I do not accept that argument. Mr Seri said that the form of contract was given to him by the Builder and that he, Mr Seri, completed the contract in the presence of and on the instructions of the Builder. The uncontradicted evidence of both the Owner and Mr Seri is that the Owner signed the contract. Further, Mr Seri's evidence is that he took the contract back to the Builder. The copy in evidence purports to have been signed by the Builder and I am satisfied that is his signature.
- 26. It therefore appears that both parties have signed the contract, albeit they have signed different copies of it. The date of the contract specified in the insurance documents may indicate the date upon which the Builder signed his copy but there is really no evidence as to when that occurred. As a consequence, the Builder is bound by the contract and is liable in damages for any breach. The fact that he used Mr Seri to do much of the work is irrelevant. He was the builder.

Damages

- 27. Evidence as to the present state of the building was given by an expert Mr Atchison. According to Mr Atchison there are a number of defects which he sets out in his report and a number of instances of incomplete work. He has provided costings of each of these and he was not cross-examined in regard to any of them. To complete the work he says will cost \$27,606.00 and to rectify the defects will cost a further \$32,623.00. In the absence of any other evidence I accept these figures.

Damages for delay

- 27. There is also a claim for damages for delay. Had the Owner the means and the money to do so, he could have had the house made habitable quite quickly and moved in, thereby avoiding most of this loss. However no

argument was raised about mitigation of loss and the Builder made a number of promises to finish the house.

28. The form of contract used provides that the building work is to be completed within a building period intended to be set out in Item 1 of Schedule 1. Since no period is provided, there is no “building period” within the meaning of Clauses 11 and 34 of the contract. Another difficulty with the claim is, that by Clause 10, commencement must occur within 31 days after the Builder receives (amongst other things) payment of the deposit under Clause 9. It does not appear that the deposit was paid until 20 January 2006. Had there been a building period it would therefore not have started until the 10 February.
29. Generally, where a contract does not provide a time for completion then, in the absence of any evidence to the contrary, the law would imply a term that work would be done within a reasonable time in all the circumstances. However the circumstances in this case are very hard to ascertain.
30. First, no money was paid until January, over seven months after the Owner claims work commenced. Secondly, there is the letter of 11 October 2005 from the Owner to Mr Seri asking him to stop work. It was not until the 18 November 2005 that the dispute about the price appears to have been resolved. There is no evidence of when he was asked to resume work.
31. On 4 July 2006 the Owner completed a product selection form at Satellite Ceramics in Mentone. I note that someone has written on top of this form: “the house will be completed in 2 weeks”.
32. In early September 2006 the Owner requested changes to the kitchen. At about the same time Mr Seri told the Owner that the house would be completed by January 2007. The Owner says in his witness statement that he did not object to that because he didn’t want to cause problems.
33. On 13 September 2006 the Owner wrote to “Quest Building” pointing out that he had been told that the house would be ready by “late February or early March” of 2006. He added that before any upgrading was done he should be given a quotation.
34. The Owner said that he attempted to contact Mr Seri at various times but had difficulty doing so. There does not appear to have been any real complaint from the Owner about delay until his solicitors became involved in October 2006. On 6 October 2006 the Owner’s solicitors wrote to the Builder stating:
 - (a) that the Owner was told when he signed the contract that the work would be finished by March 2006;
 - (b) the respects in which the work was still incomplete;
 - (c) that the Owner had been compelled to lease alternate premises to live in; and
 - (d) that the contract rate for late completion was \$250 per week.

The letter closes by asking for an explanation for the delay.

35. On 15 November 2006 the Owner's solicitors referred the matter to the BACV but the property was not inspected until September the following year. This extraordinary delay is not explained in the Owner's witness statement.
36. Following the inspection, agreement was reached with the Builder to do further work and the shower screens, wardrobe and driveway were completed. The Owner agreed to pay an extra \$2,700 for the completion of the driveway. Thereafter the Builder refused to do anything further.
37. I cannot allow liquidated damages under the contract as sought by the applicant because there is no date specified in the contract for completion (*Halsbury: Laws of England 4th Ed. Vol 4 para. 1182*). In the absence of a specified completion time, completion must be within a reasonable time (*Halsbury: Vol 4 para. 1182*). Failing to complete within a reasonable time will be a breach of contract for which the Builder is liable for unliquidated damages (*Halsbury: Vol 4 para. 1186*). The damages sought in this case are rental and rates paid by the Owner on alternate accommodation from six months after the signing of the contract until judgment.
38. As to the period, I find on the evidence of the Inspector Mr Webb, that construction should have taken only 5 to 6 months and that, to complete the work would now take 6 to 8 weeks. However the time line has been interfered with by the Owner and there have been variations as late as 6 September 2006. I will therefore allow delay damages only from 8 weeks following that date, which is 1 November 2006.
39. According to the Owner's evidence, he resided at 44 Mason Street, Newport and paid rental of \$750 per month plus rates until January 2007 and thereafter, he has paid \$800.00 per month plus rates. Rental paid would therefore have been:

From 1 November 2006 to 31 January 2007 (3 months)	\$2,250
From 1 February 2007 to 25 May 2009 (26 months and 25 days)	<u>\$21,445</u>
Total rent paid	<u>\$23,695</u>

40. The accounts tendered for City West Waterrates are only for usage and drainage charges which would have been incurred wherever the Owner was living and would not have been incurred on the subject property at the same time because it was vacant. The only Municipal rates proven are:

Hobson's Bay Council

1/7/08 – 30/6/09 (pro rata to date of judgment)	\$753.95
1/7/07 – 30/6/08	<u>\$769.30</u>
Total for which evidence has been given	<u>\$1,523.25</u>

Interest

41. There is also a claim for interest. The power to award interest is conferred by s.53(2)(b)(iii) of the *Domestic Building Contracts Act 1995* which provides that the Tribunal may order the payment of a sum of money by way of damages in the nature of interest. Interest is awarded to compensate the aggrieved party for having been deprived of the amount awarded from the date that it should have been paid until the date of judgement.
42. It must be borne in mind that it is not a liquidated claim to enforce a contract to pay interest but a head of damages and, apart from punitive or exemplary damages, damages are compensatory. Here what the Builder ought to have done is finish the house within a reasonable time but I have already assessed damages for that. The cost of fixing the defects and completing the house has not been expended yet by the Owner so he is not out of pocket for those sums. However he is out of pocket for the rent and rates that he has paid so I will allow interest on that.
43. These moneys have been disbursed in small amounts over the relevant period. Although the payments were somewhat irregular and not equal in amount, to make the calculation practicable I will calculate interest on the basis that it was paid out evenly over the relevant period. On that basis I assess interest at \$3,888.46.

Conclusion

44. I find that the Owner and Builder entered into the building contract which is in evidence, that the house is still incomplete and that some aspects of the work are defective. As a consequence, I find that there is no contract entered into between the Owner and Mr Seri and the claim against Mr Seri must be dismissed.
45. There will be an order in favour of the Owner against the Builder for damages for the cost of completing and rectifying the work, less the balance due under the contract. I find that the contract price was, as stated, \$197,550.00 plus \$2,000.00 for the variation with respect to the kitchen and \$2,700 for the driveway. The total contract price is therefore a \$202,250.00. The Owners have paid a \$199,425.00, leaving only \$2,825.00 of the contract price to be paid. The amount to be awarded is therefore \$86,510.71, calculated as follows:

Cost of completion	\$27,606.00
Cost of rectification	\$32,623.00
Damages for late completion	\$25,218.25
Interest	<u>\$ 3,888.46</u>
Total damages and interest	\$89,335.71
Less balance due under contract	<u>\$ 2,825.00</u>
Amount awarded	<u>\$86,510.71</u>

SENIOR MEMBER R. WALKER