

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D236/2008

CATCHWORDS

Domestic building – work by subcontractor – renderer applying render onto surface prepared by others – defective finish – whether due to render or faulty substrate – scope of works

FIRST APPLICANT	Zoran Kotruc t/as West Melbourne Rendering
SECOND APPLICANT	Bisera Kotruc t/as West Melbourne Rendering
RESPONDENT	Mod Homes Pty Ltd (ACN: 108 294 891)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	17-19 September 2008
DATE OF ORDER	2 October 2008
CITATION	Kotruc v Mod Homes Pty Ltd (Domestic Building) [2008] VCAT 2181

ORDER

1. Order the Respondent pay to the Applicants \$8,400.
2. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	Mr A.. Singh, Solicitor
For the Respondent	Mr D. Filipovic son of Mr I. Filipovic, Director

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D237/2008

FIRST APPLICANT	Mod Homes Pty Ltd (ACN: 108 294 891)
SECOND APPLICANT	Delilah Wolter
RESPONDENTS	Zoran Kotruc and Bisera Kotruc t/as West Melbourne Rendering
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	17-19 September 2008
DATE OF ORDER	2 October 2008
CITATION	

ORDER

The application is dismissed.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	Mr D. Filipovic, husband of the Second Applicant and son of Mr I. Filipovic, the Director of the First Applicant.
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For the Respondent	Mr A.. Singh, Solicitor
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REASONS

Background

- 1 Mr and Mrs Kotruc (“the Renderers”) carry on business as subcontract renderers under the name “West Melbourne Rendering”. In proceeding D236/08 they seek to recover \$11,000.00 from Mod Homes Pty Ltd (“the Builder”) for rendering a house at 120 Sanctuary Lakes South Boulevard, Sanctuary Lakes which was being built for Delilah Wolter (“the Owner”).
- 2 The Builder and the Owner claim that the work was incomplete and defective and that windows on the house were damaged during the rendering process. They claim that to replace the windows and re-render the house will cost \$85,360.00. In proceeding D237/08 they seek to recover that sum from the Renderers together with the costs of obtaining inspections from Archicentre and a building expert, Mr Paul. These sums total \$89,655.00.
- 3 The director of the Builder is Mr Ivan Filipovic (“Mr Filipovic”). He is the Owner’s father in law. He is a registered builder but said that he has only built 8 houses in the last 20 years. It appears that all of these were built for the purpose of resale and none of them was built pursuant to a contract with a third person. He described his principal occupation as “heating and cooling” and said that he is a registered plumber.
- 4 The contract price was \$25,000.00 and agreed extras were \$1,800.00. The rendering work was carried out by Mr Kotruc and his assistants, Mr Inia and Mr Micevic. The Builder made two payments during the progress of the work but the final invoice rendered at the end of the work has not been paid on account of the allegations of incomplete and defective work.
- 5 The amount of the final invoice the Renderers seek to recover is \$9,280.00 plus a further of \$620.00 for some extra styrene boards at the front of the house and some blue board in the garage. They also seek to recover a further \$1,100.00 for additional work for which they have not previously charged, which brings their total claim up to \$11,000.00.

The hearing

- 6 The two claims came before me for hearing on 17 September 2008. The Builder and the Owner were represented by Mr David Filipovic, Mr Filipovic’s son and the Owner’s husband. For the Owner and the Builder, evidence was given by:
 - (a) Mr Filipovic;
 - (b) the Owner;
 - (c) the Builder’s carpenter Mr Fomin who, has had experience doing carpentry work but is not formally qualified as such;
 - (d) a building expert, Mr Robert Paul.

A report was also tendered from Archicentre but the author of that report, Mr Mamone, was not called and so was not available for cross examination. I informed the parties that although I would receive the report into evidence I would take into account the fact that its author had not been cross-

examined. Reference is also made in Mr Filipovic's witness statement to an expert report from a Mr Zivkovic a Building Surveyor. He was also not called and his report was not formally tendered. The Builder and the Owner were not legally represented and the report was attached to and formed part of the Application. I have therefore looked at it but in the absence of the author being called it is of limited use because so much of what he says requires explanation. In particular, the comment towards the end of the report that the house is: "one of the best built houses in the estate" is simply not credible.

- 7 Each of the Renderers gave evidence and they were supported by:
- (a) Mr Molloy, an employee of a company called Unitex, which is a supplier of rendering material, although not the material used on this job;
 - (b) Mr Campana, a builder and qualified carpenter;
 - (c) The Renderers' workmen, Mr Inia and Mr Micevic;
 - (d) a building expert, Mr Mladichek;
 - (e) Mr Juhac, a builder and qualified carpenter.
- 8 The hearing proceeded for 2 days at the Tribunal's premises and there was then an on site inspection on Friday 19 September 2008 at which the parties pointed out various aspects of the work. At the conclusion of the on-site inspection I informed the parties that they would receive a written decision.

The witnesses

- 9 I had the following concerns about Mr Filipovic's evidence:
- (a) He said that the meeting with Mrs Kotruc was to show her what was wrong with the job. I think this is unlikely. She is not a renderer herself. Her version that she went there by arrangement to collect a cheque is much more likely. If she had been going there to discuss defects she would have taken Mr Kotruc with her, not her young children.
 - (b) In response to many questions he said that he did not remember, which makes me wonder how good his recollection is.
 - (c) I thought he appeared evasive at times in his evidence. In regard to the critical issue whether he asked the Renderers not to put in a horizontal construction joint he said in the witness box that he had not done so. When a more detailed allegation was made by Mr Kotruc on site and I asked for Mr Filipovic's response to it, he did not answer the question directly but simply said that a joint had to be put in. He said it in a way that made me think that he did not want to answer the question. I found his manner evasive.
 - (d) He did not directly deny a number of the Renderers' assertions

10. Since the real dispute between the parties was whether the work was defective or incomplete I suggested that the Builder and the Owner present their evidence first and this was done, although witnesses for both sides were interposed several times to suit the convenience and availability of those witnesses.

Conclusion

11. I find that the only faults in the work that are proven to be the fault of the Renderers are the construction joints cut in the render which are not of a uniform width and depth, the foam block work around the windows which was not cut as evenly as it should have been and the render is slightly uneven in some places where it meets the flashing. As to all of the other faults with the final finish, and there are many, there is insufficient evidence that these are due to defective work on the part of the Renderers. Indeed, in most instances it appears much more likely that they were due to other causes for which the Builder is responsible, notably:
 - (a) the failure of the Builder to build the house properly and to construct the walls to be straight and plumb prior to having them rendered;
 - (b) causing damage to the final finish by splashing paint on it which the Renderers were then asked to repair;
 - (c) reworking some surfaces after they had been rendered and then calling the Renderers back to re-render those areas, which added to the general patchy appearance;
 - (d) the Builder's failure to remove rubble from the rear of the house which made part of the wall inaccessible so that, when these areas were rendered following removal of the rubble, they were not quite the same colour.
12. There will be a reduction in the amount of the Renderers' claim to take account of the three respects that their work was proven to be defective. I will allow \$1,500. I am not satisfied as to their belated claim for \$1,100 which was only charged when the parties were in dispute and was not originally part of the claim. It is not suggested that this was an agreed sum and there is insufficient evidence both of the calculation of the amount and of the circumstances in which the work was done to support the implication of a promise to pay this amount as a reasonable sum. The reduction will therefore be off the final invoice amount of \$9,280.00 plus the further sum of \$620.00 which I find are established. When the allowance of \$1,500 is deducted, the claim becomes \$8,400 and there will be an order for this sum in proceeding D236/08. Proceeding D237/08 will be dismissed because the complaints made in that proceeding, insofar as they are justified, are taken into account in the other proceeding.
13. Costs will be reserved but only because I have heard no argument about costs. However the Renderers should be aware that costs are not usually

awarded in the case of a small claim in this list and the Builder and Owner were unrepresented.

14. The reasons for this conclusion follow.

The issues

15. The main issue was the state of the house as presented to the Renderers for rendering. The render to be applied was approximately 6mm thick. Such a thin surface would not be capable of covering up anything more than a very small irregularity in the surface. Further, the contract was to apply foam blocks to the existing upper storey frame and then render both the brickwork and the foam. It was not to do the work of any other trades. In these circumstances I think that a competent builder would not present a surface to a renderer for rendering until it was even and regular, any more than he would present a plaster wall to a painter for painting before it had been stopped and sanded.
16. There were two entirely different surfaces. The brickwork, was to be directly rendered over. Since the render coat to be applied was thin, the brickwork should necessarily have been straight and even if a good final appearance were to have been achieved.
17. Most of the upper floor of the house was simply a timber frame to which the Renderers had to attach polystyrene blocks which were then to be the substrate for the render. Since these are merely polystyrene, they derive their structural integrity from the timber frame to which they are attached. Being screwed to the frame, they will necessarily follow the line of the frame so that if the frame is out of plumb, the panels will also be out of plumb when are screwed onto it.
18. I accept the evidence of Mr Mladichek and Mr Campana that it is the job of the carpenter and not the renderer to straighten the frame ready for the attachment of the polystyrene panels. This was not done in this case and the frame was substantially out of plumb. That is proven by the evidence of Mr Kotruc, Mr Inia and Mr Micevic and they are supported in this by Mr Juhac, a carpenter who worked on the site who said that the walls were not straight. Mr Fomin, the unqualified carpenter responsible for constructing the walls said that they were straight but the weight of evidence is to the contrary.
19. As to the brick walls, Mr Kotruc said that he pointed out to Mr Filipovic that they were not straight and, at his suggestion, Mr Filipovic called the bricklayer back. The bricklayer demolished one wall under a window and rebuilt it but according to Mr Kotruc it was still out of plumb. Mr Kotruc says that he warned Mr Filipovic that since the brick work and the frame were not straight the rendering job would not be 100% and Mr Filipovic asked him to do his best. He is supported in this by the evidence of Mr Inia and Mr Micevic. In addition, Mr Kosevski gave evidence that the brickwork was not straight and that he told Mr Filipovic about that.

20. Considering that the walls were not straight to begin with, it is remarkable that the final surface is as level as it is. The best evidence as to the degree to which the walls were out of plumb is to be found at the front of the house where the misalignment of surfaces between the vertical window pillar and the horizontal base brickwork under the window is clear to see. When this was put to Mr Paul he suggested it might be a design feature but it is quite clear that it is not.

Reworking of the surfaces

21. The pillars on two corners at the front of the house were designed to be finished in some other way but, after the render above them had already been done, they were rendered at Mr Filipovic's request. According to Mr Kotruc's evidence the planes of the rendered surfaces above did not match the vertical window pillars below and the foam had to be substantially cut back and an attempt made to disguise the fact that they were twisted and considerably out of line. This seems to have been the area which is subject to much of the criticism from the Builder's experts.
22. Apart from the pillars the Renderers had to go back and re-render areas above the windows where gaps had been left by the Builder for some unknown purpose but which Mr Filipovic later decided to render. They also had to redo the garage pillar because it was so far out of vertical that it had to be built up on one side with blue board and then rendered over. The Builder also spilled paint over the walls after they had been rendered and asked the Renderers to come back and patch over them.
23. Another later addition was foam around the windows at the front. The lack of accuracy in cutting this foam is one of the three complaints about the Renderers' work that I have found proven.
24. The later insertion of the band around the bottom of the walls is referred to below.

The absence of a construction joint

25. Mr Kotruc says that he told Mr Filipovic that there needed to be a horizontal construction joint to separate the brickwork from the foam above. He says that Mr Filipovic told him that he did not want that because he wanted to create the appearance to any purchaser of the house that the whole of the outside of the house was brick. Mr Kotruc says that he told Mr Filipovic that the render would crack where the foam and the brick met but Mr Filipovic told him that he was not concerned about that because he would have sold the house by then. This is a very serious allegation. At first, in his evidence in the witness box, Mr Filipovic denied that he had said that he did not want a horizontal articulation joint. Then on site, when the allegation was repeated and I asked him for his response he was quite evasive and did not directly deny the allegation.
26. Mr Mladichek's evidence and also that of Mr Campana was that the joint needs to be flashed and that this must be done by a licensed plumber. It

cannot be done by a renderer. There is no contrary evidence on that point and I find this to be the case.

The windows

27. Mr Paul said that the render on the window frames needs to be cleaned off. The Technisearch report says that the surfaces of the windows have been “damaged/tarnished” but offers no opinion as to what should be done about that. The Builder and the Owner claim that the windows need to be replaced but the expert evidence does not establish that. Moreover I noted at the inspection that although there were small amounts of render on some of the frames, there were much greater deposits of mortar on them from the brickwork. Indeed, the traces of render were commonly on top of dust and brick mortar.
28. The Renderers claimed that it was the Builder’s job to mask the window frames to protect them from render. Mr Kotruc’s evidence was that he applied masking tape to the frames but in many instances they were already so dirty that it came off. There was some photographic evidence to show that at least some tape was used.
29. It is clear that no steps were taken by the Builder to protect the window frames when the brickwork was laid and I cannot see that the presence of additional small amounts of render on the frames has made any difference.

Whether a clear coat of sealer was applied.

30. The scope of works included a clear coat of sealer. The Builder and the Owner claimed that it had not been applied but this seems to be nothing more than suspicion. The Renderers’ evidence was that it had been applied and I have no reason to doubt that evidence. I am satisfied that the Renderers applied the coat of sealer.

The complaints about the work

31. Allegations as to the work are contained in Mr Paul’s report and also the report from Archicentre. The particular allegations were as follows:
 - (a) The render band around the perimeter of the bottom of the house

This is of a slightly different shade at the rear of the house and partly on one side but I am satisfied that this is due to the failure of the Builder to properly co-ordinate the works and call the Renderers onto the site when the house was ready for rendering. I am satisfied that the ground around the house was not cleared of rubble to provide the Renderers with clear access down to ground level and the Renderers complained to the Builder about it a number of times. Although not much rubble is seen in the photographs of the sides of the house I think it is more probable than not that they rendered down as far as they could in the circumstances presented to them. It was not in their interests to have to come back later and finish at the bottom. Even if

some blame were to be attached to the Renderers in this regard, and I am not satisfied that there is, the extensive patching of the render, the need to insert a horizontal articulation joint and the damage caused to the render in a number of places after the Renderers left the site would warrant the re-rendering or repainting of the whole house in any event. I am not satisfied on balance that this complaint is the fault of the Renderers but even if it were, since the house needs to be re-rendered or repainted anyway it would have been of no consequence.

- (b) Some weepholes have been covered by render or not put in place by the bricklayer and are unevenly spaced.

The weepholes were installed by the bricklayer, not by the Renderers. Some of them are indeed inappropriately placed. One is above the internal floor level and so will be serving no purpose. Others are high up in a wall above a window but below a balcony. Being on a protected wall it would seem that they would serve no purpose. The other weepholes are of widely varying widths and where obstructed, this is largely by mortar, not render. I am not satisfied that these problems are the fault of the Renderers.

- (c) The V joints over the articulation joints not vertically straight.

I am satisfied that some of the V joints are not perfectly uniform in that the depth is not quite the same throughout nor is the width. The Renderers should have executed them with more care. However I am not satisfied that they are wrongly positioned. It seems clear that some of the walls are widely out of position. In particular, the pillar next to the garage where this complaint was raised was on such a lean that an extra piece of blue board had to be attached to one side and the wall was re-rendered. Even that was not adequate to make up for the degree to which the wall was out of plumb because a further piece of blue board now appears between the rendered pillar of the garage opening and the side of the garage door. This will need to be rendered at some future time. It appears that this was put in position after the Renderers left the site.

- (d) Vertical corners of the house have a greater than 4mm tolerance.

I could not see this on site but since the thickness of the render is only 6mm it is unlikely that any problem in excess of 4mm is due to the render. It is more probable than not that it is due to the substrate which was generally very substandard.

- (e) Horizontal window sills are very uneven.

This was not particularly noticeable but considering how bad the brickwork was, I am not satisfied on the balance of probabilities that this is due to defective workmanship on the part of the Renderers. The render necessarily follows the brickwork.

- (f) The house being symmetrical the corners are not plumb.

The brickwork and timber framing were so out of plumb that I cannot be satisfied on the balance of probabilities that any deficiency in this regard in the corners is due to defective work on the part of the Renderers. Contrary to the Builder's suggestion, the photographs support the Renderers' evidence that metal corners were used.

- (g) Window sills and ledgers are uneven.

The same comment is applicable here.

- (h) The window borders are uneven.

These were polystyrene blocks cut by a saw by the Renderers and then rendered. I am satisfied that they were not cut as straight as they should have been. Although the defect is not readily apparent it is noticeable and should not be there. I am satisfied that the moulding will have to be replaced and re-rendered. There is no evidence as to what that will cost but since the house will need to be re-rendered anyway and the supply and attachment of these blocks was a relatively small extra, it should not be a great deal.

- (i) The render is "only 2-3 mm thick in some places".

Mr Paul did not say how he arrived at this conclusion. Wherever the thickness of the render was visible it seemed to be considerably thicker than that. However, the walls were so irregular that if the Renderers were to attempt to cover irregularities, as I believe they must have, the render will be thicker in some places and thinner in others if the irregularity in the wall is not to be entirely repeated in the final surface. I do not know what to make of this criticism. The evidence is insufficient to establish defective workmanship or any quantifiable loss.

- (j) The render is uneven where it meets the flashing.

This is demonstrated from the photographs. Although the problem is relatively minor I have included a deduction for this in the allowance made.

- (k) Walls are out of plumb by approximately 20mm in some places.

Since the render is only 6mm thick this is certainly not the fault of the Renderers.

- (l) Vertical articulation joints are not straight.

They all appear to be straight but some are not perpendicular. The Renderers' evidence is that they followed the articulation joints cut by the bricklayer. Generally one would be slow to find that a bricklayer had left articulation joints like that but here the surface presented to the Renderers for rendering was so bad that it is not surprising. An articulation joint in render must necessarily follow the joint in the brickwork and the mere fact that it is not straight does not entitle me

to ignore the sworn evidence of the Renderers that they followed the brickwork.

- (m) Styrofoam has not been screwed into studs and has been screwed into ply bracing thus reducing the structural integrity of the ply.

No details of this allegation were given by Mr Paul but he concluded in his report by recommending that the manufacturer be requested to inspect and comment on the installation and workmanship of the finished product. The only evidence that I have in this regard is that of Mr Molloy who said that, although he did not carry out a detailed inspection when he was on site, he observed the Styrofoam panels screwed in place and they appeared to him to have been correctly installed. Mr Paul does not say that the manner in which the Styrofoam panels have been installed requires them to be removed and reinstalled in some other way.

- (n) The Renderer has nailed blocks in place without packing allowing the blocks to overlap each other thus allowing an uneven rendering to the external face.

The evidence was that these blocks are quite thick and so any overlapping would be very obvious indeed. I saw no evidence of that on site. The “packing” that was done was by means of plywood pieces given to the Renderers by the Builder. Had the Builder properly packed and straightened the frame itself this would not have been necessary. I am not satisfied that the uneven framework and the packing are the responsibility of the Renderers.

- (o) No horizontal articulation joint has been installed between the ground floor brickwork and the first floor foam board, nor has any articulation joint been installed at other places where the foam board meets the brickwork.

Mr Kotruc’s evidence was that this was at the specific direction of Mr Filipovic in order to create the illusion that the whole of the house was of rendered brick. I accept that evidence. Having been directed to perform the work in this way I find no breach in this regard on the part of the Renderers. Questions of illegality aside, it is not beyond the contractual competence of a builder and his subcontractor to agree that the latter will perform defective work for the former. Anyone alleging that such a contract was entered into bears the onus of proving it, but that is discharged in this case. The Builder will ultimately be responsible to others for the consequences of the defective work but as between himself and the sub-contractor, if he contracts for something to be done he must pay for it if it is done in accordance with that contract.

32. The following additional criticisms are made in the Archicentre report.

- (a) Rendered reveals around window and door openings are wavy, displaying jagged edges as well as displaying crooked lines around the window and door openings.

All of the window and door openings were inspected on site and the only rough finishes to those openings I saw are those windows where the Builder had installed blue board after the initial rendering had already been done and then called the Renderers back to re-render around them. There may have been other rough finishes the author of the report saw that I did not notice but the problem with all questions of finish is that I cannot know whether what I now see is the original job or the result of reworking the surface at the request of the Builder.

- (b) A large number of aluminium windows and aluminium doors had been damaged/tarnished from render application to walls, causing damage to the surface of the aluminium frames resulting from the render applicator not adequately protecting the windows and doors of the house during render application.

As stated above, I saw little evidence of splashing with render and a great deal of evidence of splashing with mortar. I saw no staining. I am not satisfied that the Renderers have caused any damage to the frames behind what the bricklayer had already done. It seems extraordinary that the Builder took no steps to protect these windows from either the bricklayer or the Renderers. The Renderers did apply tape to the windows but by then I think any damage had already been done, although not by them.

- (c) Soffits under first floor projections above the ground floor dining room sliding door display inconsistent texture finish right across the rendered surface.

There is no first floor projection over the ground floor dining room sliding door so this must be a reference to other soffits. I could not see any problems with the soffits during my inspection.

- (d) Rendered masonry return wall of the kitchen bay displays a wavy/crooked floor surface with approx. 25mm depressions across the surface of this wall.

This reinforces the overwhelming weight of the evidence that the walls when presented for rendering were very irregular. A surface containing 25mm depressions is not the fault of the renderer who is applying only a 6mm render.

- (e) There are numerous patches to the rendered finish.

This is consistent with the evidence that the Renderers had to go back and re-render over the paint drops on the rendered walls and rework other surfaces.

- (f) Rendered compressed foam wall panels at the corners of the living room walls and the family room walls displaying wavy surface of undulations visible across the surface of these compressed foam panel walls. The surface of these compressed foam walls varies in horizontal alignment by up to 20mm in parts.

Again, irregularities of that magnitude are due to the substrate, not to a 6mm render.

33. Both expert reports relied upon by the Builder and the Owner address the final appearance of the render and seem to leave the reader to assume that that is due to the render itself. They do not go into the underlying cause but blame the Renderers without saying why it is their fault. A good example of that is the weepholes. It is preposterous to suggest that uneven widths of weepholes which are constructed by the bricklayer are due to the “exceptionally poor workmanship” of the renderer.
34. The persuasive effect of the Archicentre report is weakened first, by the very general nature of the descriptions which appear to simply repeat the same thing for each of the elevations of the house and secondly, by the sweeping generalisation in the conclusion that:

“These defects are the direct result of exceptionally poor workmanship performed during the application of the render to masonry walls and to compressed phone panel walls”.

That is a conclusion which is not believable given the thickness of the render and the scope of the works that the Renderers had.

SENIOR MEMBER R. WALKER