

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D374/2007

CATCHWORDS

Domestic building Contract –defective and incomplete work – assessment of damage - ceiling slightly lower than plans required – difference not perceivable – no loss of amenity – nominal damages allowed – extra work neither done under Contract nor at owners’ request not chargeable – unused materials on site the property of the builder unless Contract provides otherwise

FIRST APPLICANT	John Charles Leonard
SECOND APPLICANT	Maryann Leonard
RESPONDENT	Matthew John Noy
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	8 July 2008
DATE OF ORDER	15 July 2008
CITATION	Leonard v Noy (Domestic Building) [2008] VCAT 1478

ORDER

1. Order on the claim that the Respondent to pay to the Applicants \$4,521.40. Order on the counterclaim that the Applicants to pay to the Respondent the sum of \$9,388.70. The two orders shall be set off and it is ordered that the Applicants pay to the Respondent the sum of \$4,867.30.
2. Further order that order that, after setting aside from the bricks on site sufficient to relay the wall on the south façade, the remaining unused bricks on site may be collected by the Builder at a mutually convenient time. Liberty to apply in regard to this part of the order.
3. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	Mr A. Ritchie of Counsel
For the Respondent	Mr A. Beck-Godoy of Counsel

REASONS

Background

- 1 The Applicants (“the Owners”) are the owners of the dwelling house situated at and known as 115 Panorama Road, Longwood East (“the House”). The Respondent (“the Builder”) is a registered builder.
- 2 In August 2006 the parties entered into discussions for the construction of a 6 metre extension to one end of the House to create a dining room and a bedroom with an ensuite bathroom and walk in robe. The Owners also wanted the kitchen to be extended into the area of the existing laundry and the adjacent toilet area to be converted to a pantry. A bedroom in the existing house was to be converted into a new laundry.
- 3 Apart from some rough preliminary sketches by the Owners no detailed plans were prepared save for a single sheet drawn up by the Builder (the Plan”).

The Contract

- 4 On 28 August 2006 the Builder provided a quotation which the Owners accepted to carry out the work in accordance with the Plan for a total of \$48,517.70, inclusive of GST. The quotation was accepted and a written contract (“the Contract”) was entered into in early September 2006.
- 5 The Contract is undated and there were no specifications. The price was as quoted and was payable as \$13,000.00 for base and frame stages, \$15,000.00 for lock up and fixing stages and \$20,517.70 upon completion. The Owners were to obtain the building permit, do all painting, supply underground power and a new meter box and supply taps and fittings. Sewerage, stormwater, water and electricity were otherwise to be supplied by the Builder. Prime cost items were \$450.00 for a vanity basin and \$30.00 per square metre for floor and wall tiles. The period allowed for the construction was 34 days but the Contract provided there would be no liquidated damage or prolongation costs if that should be exceeded.

Subsequent events

- 6 The work was substantially carried out and various sums were paid. A certificate of final inspection was issued by the Shire of Strathbogie on 14 November 2006.

- 7 On 13 December 2004 the Builder delivered a final invoice to the Owners claiming an amount of \$9,453.70. The Owners declined to pay the invoice and said that they would have the work inspected by a building expert and by the appropriate regulatory authorities.
- 8 The work was inspected by a building expert, Mr Arends who found a number of defects but provided no costings. Correspondence then ensued between the parties and their respective solicitors, the thrust of which was that the Owners demanded a return of \$10,000 said to have been paid prematurely. They also demanded that the Builder return and rectify the defects and complete the work. The Builder demanded the balance of the Contract price but suggested that a portion could be retained pending rectification of the defects. This was not agreed to and a stalemate then ensued.
- 9 The Owners served notices purporting to terminate the contract. It is unnecessary to go into the question of termination because nothing turns on it. There was no allowance in the Contract for liquidated damages nor any evidence of loss arising through delay, defects or incomplete work other than those assessed by the experts.

This Proceeding

- 10 The Owners issued this Application seeking to recover an amount of \$25,731.30 with respect to allegedly defective work and also sought unspecified general damages. The Builder counterclaimed for the amount of his final invoice namely, \$9,453.70.
- 11 The matter came before me for hearing on 8 July 2008. Mr Ritchie of Counsel appeared for the Owners and Mr Beck-Godoy of Counsel appeared on behalf of the Builder. I heard concurrent evidence from the two experts and also evidence from each of the Owners and the Builder.
- 12 I think all witnesses did their best to give truthful evidence and I do not make any adverse findings as to credit. However recollections will often differ and I must sort out what I think is most likely to have occurred.

Expert evidence

- 13 Expert evidence was given by Mr Arends on behalf of the Owners and by Mr Watkins on behalf of the Builder. In his report Mr Watkins adopted the numbering in Mr Arends' report and I will do the same.
- 14 In most cases the existence of the defect was not disputed and it was a case of arriving at an appropriate figure for rectification. In this regard the process of having the experts give evidence simultaneously and, effectively, discuss each issue between themselves at the Bar table was found to be of great assistance. My finding as to the amount to be allowed for each item arises from a weighing of what each expert said as to that item although I will occasionally add comments. I make the following findings:

Item 1.2.1-3 To refix the front doors I allow \$180.00.

Item 1.2.4 This relates to one of the flywire doors. It has a strip of timber fitted to the top to increase its size to that of the door opening. It does not appear that this would be apparent after painting but the suggestion is that a door of the proper size should have been fitted. The issue here was that whether this door was within the scope of works. Certainly the Builder has supplied flywire doors to this and four other doors and has only charged for the one in the laundry. There is nothing in the Plan or the Contract document that requires flywire doors to be fitted but the Owners assumed they would be included with the doors. In the end, the Builder supplied flywire doors to the four doors shown in the Plan and each one is built up with a strip of wood in the same way.

The laundry door was supposed to be moved from the existing laundry and reused but it was found to be unusable. The parties sensibly agreed that the Builder would supply a new door to match the other doors and that this would be at an extra cost.

Mr Arends says that, whatever the scope of works might have been, since the Builder has fitted flywire doors to the other four doorways, those doors should have been fitted in a proper and workmanlike manner. However such an obligation can only arise under the Contract and if the flywire doors were not part of the subject matter of the Contract no such obligation arises. Certainly, to the extent that he supplied the doors that are there, the Builder gave in on the question of whether the doors should be installed but unless those doors he supplied were part of his contractual obligation he is not liable in contract if the Owners do not like them. Since I find that they were not within the scope of the Contract I am not satisfied as to this item.

Item 1.2.5 To fit the window properly to the south wall, I allow \$20.00. This seems modest but the only problem here is that it has not been fully fitted and is presently held by two nails. Although minor the work is so obviously incomplete that the Builder must have been aware of it.

Item 1.2.6 The ceiling in the extension is slightly lower than in the rest of the House. There was a dispute as to how much lower it is. Mr Arends measured it at 70mm whereas Mr Watkins' measurements, the height of the ceiling in the existing house was 2430mm and the height of the ceiling in the extension was 2385mm. Mr Arends pointed out that under the building code the minimum height allowable for the ceiling of a habitable room is 2400mm. Mr Watkins agreed that this is a

“deemed to comply” figure for the height requirement but said that the Code would nonetheless permit this very slight reduction since the constructed height met the performance requirements. The drawings require a ceiling height of 2400mm.

The Builder said that he constructed the ceiling in this way because it was impossible to do otherwise if the same external roof line was to be maintained. He said that he discussed the matter with the Owners who agreed with the method of construction adopted. I am not satisfied that it was impossible for the Builder to have constructed it to the contract height of 2400 but I do find that he considered that it would be impracticable to do so and that the parties agreed to the change, albeit orally and not in accordance with the contractual provisions as to variations.

Both experts agreed that, since the two areas are separated by a bulkhead the difference is not noticeable unless one actually measures it.

Mr Ritchie submitted that I should find that there has been a loss of amenity arising from the lower ceiling height but the difference is so slight that I do not think I could make such a finding. In any case I am not satisfied that it would be reasonable to pull the whole roof off and reconstruct it, which is the scope of works that Mr Arends has costed. Since the Owners appear to have agreed to the change I am not satisfied that there is any breach of Contract so I am not satisfied as to this item.

Item 1.2.7-

1.2.10 This is for the reconstruction of a doorway and the refitting of the door. It has the same scope of works as the first and I will allow the same amount of \$180.00.

Item 1.2.11 This is another window that requires refitting and, as with the last, I will allow \$20.00. It has the same problem in that it has not been fully fitted and is presently held by only two nails.

Item 1.2.12 The track of the sliding door in the master bedroom bent downwards and the Owners had to pack it up. There does not seem to have been any expense incurred by the Owners in this regard but I will allow nominal damages of \$10.00 for breach of Contract.

Item 1.2.13 This timber frame has not been fully fitted and again I will allow \$20.00.

Item 1.2.14 This is a timber batten across the floor but I am not satisfied that it was left there by the Builder.

- Item 1.2.15 The architrave inside the pantry door has not been fitted. I allow Mr Arends' figure of \$19.00.
- Item 1.2.16 The Builder has installed a false ceiling in the pantry but it is not suggested that there is anything wrong with it. The plans are silent as to what the height of the ceiling should be in the pantry. The Builder said that the existing ceiling was damaged and needed to be covered. He has not claimed an extra for the cost of doing so. I find no breach of contract. In any case it would be quite unreasonable to demolish it and reinstate the original ceiling because there would be no practical purpose in doing so.
- Item 1.2.17 Skirtings were not fitted to the family door at the corner of the pantry. The Builder says that he cut the piece for the Owners' kitchen contractor to fit and the contractor has not done so. The skirtings in question do not seem to be in the right place for that explanation to be right. There is always a difficulty where the scope of works is divided between the Owners and the Builder but this is a carpentry item in an area worked on by the Builder and it should not have been left like that. I will allow Mr Arend's figure of \$55.00.
- Item 1.2.18 The laundry door needs to be refitted and I accept Mr Arends' figure of \$55.00.
- Item 1.2.19 There is a timber batten missing from the external flywire door. Unlike the other flywire doors this was within the scope of works because of an agreed variation. This item is allowed and I accept Mr Arend's figure of \$14.00.
- Item 1.3.1 Plastering around the power point. This needs to be sanded and repainted. I note the Owners did their own painting but the plaster should have been more neatly finished. I will allow Mr Arends' figure of \$11.00.
- Item 1.3.2 This is another contentious item. There is a bow in the ceiling in the north western corner and a vast difference between the two experts as to what is to be done about it. Mr Arends has costed the removal and reconstruction of the whole ceiling whereas Mr Watkins has costed the repair of the affected area only. Mr Arends acknowledged that it might only cost that much but one would not know until one removed the offending plasterwork. Mr Arends' figure was little over \$2,000.00. Mr Watkins's figure was \$174.00. Depending upon the actual cause which neither expert was able to state with any substantial degree of assurance it may be expensive or it may be cheap. I must make some allowance for a risk factor here in the form of a contingency sum. Mr Arends'

solution is somewhat drastic to remedy what may turn out to be only a cosmetic item. I will allow \$750.00.

Item 1.4.11 An end support needs to be provided to shelves in the walk in robe and I accept Mr Arends' figure of \$60.00.

Item 1.4.2 Five shelves need to be replaced. Mr Arends' figure is \$155.00 but says that it may be a bit less. Mr Watkins' figure is \$60.00. I will allow \$100.00.

Item 1.5.1 The shower head in the ensuite was installed too close to the rear wall making showering very difficult. The Builder's reason for this was that he understood that the Owners were to have a removable shower caddy installed which would occupy the centre of the relevant wall and source the water from the side where the outlet has been placed. In the end however the Owners have put an ordinary shower rose on. I note that the Contract required the Owners to provide all of the sanitary fittings.

The fittings were on site after the plumbing rough in and they included an ordinary shower rose. The Builder acknowledged that, when he discussed the matter with Mr Leonard the Owners were undecided about what they were going to provide. In these circumstances I think the Builder should have put the outlet in the middle where it would have suited either type of fitting or resolved the question one way or the other. The present situation is unacceptable. I accept Mr Arend's figure of \$344.00 because there is too much risk that Mr Watkin's rectification method would work.

Item 1.5.2-3 These relate to ceiling and leak prevention. The leak prevention is not costed in Mr Arends' figure nor has it been costed by Mr Watkins. I should allow time for a plumber to fix both items and since there is some element of uncertainty I will allow \$150.00.

Item 1.6.1 Vertical and horizontal junctions of the tiling had been grouted and need to be filled. I will allow \$25.00.

Item 2.1.1 Floor joists to the deck require additional support. I will allow Mr Arends' figure of \$160.00.

Item 2.1.2 This is another flywire door issue and for the reasons already given I am not satisfied that this is within the scope of works.

Item 2.1.3 The living/dining room window frame is installed too low and needs to be raised. I will allow Mr Arends' figure of \$55.00.

Item 2.1.4 This is another flywire door item which is rejected for the same reason.

- Item 2.2.1 The sub-floor ventilation grilles have been placed too high. Unfortunately, this is an all too common problem in building cases. I will allow Mr Arends' figure of \$190.00.
- Item 2.2.4 The brickwork to the south far side is of poor quality and needs to be relaid. There are also gaps in the mortar joints and excessive dagging mortar on the underside of the window sills which needs to be removed. It was not seriously suggested that the wall does not need to be re-laid. Mr Arends' figure for this was originally \$3,000.00 but he was not aware that there were sufficient bricks on site to do the work. In the end, the experts appeared to consider that the cost would be \$1,300.00 and I will allow that figure.
- Item 2.2.7 The cutting of the brickwork to the laundry door was crooked and needs to be fixed. There will be a bricklayer on site. I will allow \$80.00.
- Item 2.3.1-3 These items relate to articulation joints and I will allow Mr Arends' figure of \$30.00 for each one.
- Item 2.4.1 The roofer has used the existing bull nosed roof capping to the southern end of the new roof. I will allow Mr Arends' figure of \$238.00.
- Item 2.5.1 The steel lintels to the windows are starting to rust and require treatment. Painting was not within the scope of works but the lintels should have been cleaned free of rust and primed ready for painting. I will allow \$60.00.

The television connection

- 15 Apart from the defects referred to above the Owners claim an amount of \$565.40 for the cost of wiring the television points that have been installed in the new extension. This was not in the Application but it was claimed in opening. The parties are here and the matter has been ventilated and argued so I will deal with it. An invoice from the Contractor who did the work has been tendered which totals this sum. It is clear from the evidence that although the wall plates incorporating the sockets were installed, the wiring was not run to them. From the evidence it seems likely that this arose as a result of a dispute the Owners had with the first electrician but it was the Builder's responsibility to ensure that the work was done and the plaster should not have been hung on the walls until the television cables had been run. To install them afterwards is undoubtedly more expensive and accounts for the significant sum now claimed.
- 16 Looking at the invoice only two items call for some consideration. The first is a booster costing \$150.00. This seems to relate to the strength of the television signal in the area and since there was nothing in the Contract documents requiring the Builder to provide this it is not recoverable. The other item is an "eight way splitter" which must be to split the antenna

cable between the new and existing outlets. It is clear that there were existing outlets in the house. There was a receiver bowl and also a television antenna on the roof and two new points put in the extension. To accommodate these two extra points would necessitate some sort of splitter so I will allow that item. The figure to be allowed is therefore \$415.40, being the amount of the invoice less the booster.

Downlights

- 17 They Owners also claim that downlights were to be installed in the Living room and extension. No such lights were installed and the Owners have had some installed at their expense. There is nothing in the Contract or the Plan requiring the installation of downlights. The Owners allege it was orally agreed at the time the quote was given. The Builder acknowledges that downlights were mentioned and says that he suggested that they should raise that with the electrician. Downlights are not specified in his quotation. Since there is a conflict in the oral evidence and nothing in the contractual documents I am not satisfied that the installation of downlights was within the scope of works.
- 18 The total to be allowed to the Owners on the claim is therefore \$4,521.40. There was also a claim for \$715 for Mr Arend's fees but if that item is claimable, it is an item of costs.

The counterclaim

- 19 The Builder's counterclaim is calculated as follows:

Contract price	\$48,517.70
<u>Variations</u>	
Laundry door	\$169.00
Laundry flywire door	\$226.00
Handles for the doors	\$65.00
10 metres of trench for underground power	<u>\$76.00</u>
	\$49,053.70
Less credits for the following materials supplied	
By the Owners:	
Shower basin screen	\$700.00
Toilet suite	\$300.00
Vanity basin	\$450.00
Credit for replacement of food spoiled by Builder	<u>\$150.00</u>
	<u>\$1,600.00</u>

Balance of adjusted Contract price	\$47,453.00
Less payments received	<u>\$38,000.00</u>
Balance said to be due	<u>\$9,453.70</u>

- 20 I am satisfied that the Owners requested the replacement of the laundry door and it is not suggested that the amounts claimed are in themselves excessive. They denied that they never agreed to pay for the new door and flywire door but they requested them and they were installed by the Builder. Reliance is placed upon s38(6) of the *Domestic Building Contracts Act* 1995 but these are Owners' variations and it does not appear that the procedure for variations to be adopted by the Owners in subsection (1) was followed. In the circumstance the Builder is entitled to a fair and reasonable price for the extra work done at the Owners' request.

The trench

- 21 I am satisfied that 10 metres of trench for underground power was dug by a workman at the request of the Builder in exchange for two slabs of beer which cost the Builder \$76.00. Although this may have been a reasonable thing for the Builder to have done in the ordinary sense it was nonetheless not done either at the request, or with the agreement, of the Owners. Certainly they have taken the benefit of the work but they really had no choice since the power had to be laid in the position excavated. Hence it is not a case of unjust enrichment. Whatever one might think about the rights and wrongs of the situation, since the Owners did not request the work to be done on their behalf they are not required by law to pay for it. This variation is not allowed.
- 22 The credits allowed to the Owners by the Builder are acknowledged so the balance becomes \$9,388.70. Setting this sum off against the amounts due to the Owners there is a balance of \$4,867.30 outstanding to the Builder.

The remaining bricks

- 23 One final issue to be dealt with is the disposal of the bricks remaining on site. It is beyond argument that these are the property of the Builder. It is a builder's obligation to build in accordance with Contract and for that purpose it brings materials onto the site. Whatever is built into the structure becomes the property of the owners according to the terms of the contract but any material left over is the property of the builder unless there is something to the contrary in the contract. In this case there is not. The return of the bricks was not sought in the counterclaim but I have allowed the additional claim on behalf of the Owners for the television aerial which was also not part of their claim and the return of the bricks was sought by Mr Beck-Godoy in his final address.
- 24 There will be an order that, after setting aside from the bricks on site sufficient to relay the wall on the south façade, the remaining unused bricks on site are to be collected by the Builder.

25 Costs will be reserved for further argument.

SENIOR MEMBER R. WALKER