

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. BP572/2015

BUILDING AND PROPERTY LIST

CATCHWORDS

Domestic building work – scope of works – defective work - evidence

APPLICANT	Luck Empire Pty Ltd (ACN 141 841 3030)
RESPONDENT	Ms Sarah Lewis
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF ORDER	23 June 2015
DATE OF WRITTEN REASONS	25 September 2015
CITATION	Luck Empire Pty Ltd v Lewis (Building and Property) [2015] VCAT 1510

WRITTEN REASONS SUPPLIED AT THE REQUEST OF THE RESPONDENT

1. This matter came before me for hearing on 23 June 2015. After hearing evidence I made an order and gave extensive oral reasons for the order that I made.
2. The Respondent has now requested written reasons. The following is an edited version of the oral reasons that were given at the time.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr C. Marcus, Solicitor
For the Respondent	Mr N. Lewis, brother of the Respondent

REASONS

Background

1. The Applicant (“the Builder”) is a company controlled by one Alex Marcus (“Mr Marcus”), who is a domestic building contractor of 25 years experience. He is a registered domestic builder.
2. The Respondent (“the Owner”) is the owner of a period weatherboard house (“the House”) in St Georges Rd, Northcote. It is in an historic area where there are many similar period houses and the House is subject to a heritage overlay
3. In about mid 2014. the Owner asked Mr Marcus if he would quote to construct an attached rumpus room at the back of the House in an area where there was a very old and run down sleep-out, external laundry and external toilet. He had previously done work at the House for the Owner in the bathroom and on a deck.
4. The construction of the rumpus room work was to be done to a budget. Mr Marcus prepared a quotation of \$38,160 plus GST, making a total contract price of \$41,976. The Owner went to the bank and arranged finance for it.

The contract

5. It was contemplated by the form of quotation, which the Owner signed, that there would be a formal domestic building contract prepared and signed but that never happened. The only contractual document in existence is the signed quotation, plus the plans.
6. At the time the quotation was prepared, there were no plans, but these were prepared before the quotation was accepted. Had the quotation been accepted before the plans were agreed upon, then they would not have formed part of the contract because they would have post dated it, although it would have been an implied term of the contract that the plans to be prepared should accord with the contractual terms. Since the plans were in existence and agreed upon when the quotation was accepted, that problem does not arise.
7. The plans are dated July and the quotation was accepted on the 15th of September 2014.
8. A building permit had to be obtained and, because the House was subject to a heritage overlay, a planning permit was also required. Mr Marcus obtained the building permit and a soil test, and the Owner obtained the planning permit.

Payments

9. Three payments were made by the Owner before work commenced; one of \$2,500.00 on the 6th of October, one of \$10,000.00 on the 14th of November and one of \$2,600.00 on the 15th of November.

10. After work started on the 16th of November, there were three further payments made of \$10,000.00 on the 26th of November, \$2,600.00 on the 1st of December, and \$3,536.00 on the 10th of December.
11. A total of \$31,236 has therefore been paid. It does not appear from the evidence why this regime of payments was made. It is not what is contemplated by s.40 of the *Domestic Building Contracts Act 1995*. There have been numerous breaches of that Act by the Builder but this is not a prosecution. I have to decide whether the work was done, whether it was defective and what it is going to cost to complete and make good any defects.

Performance

12. Although there is no completion date set out in the quotation the intention of the parties was to have the work finished by Christmas 2014. However, when Mr Marcus went overseas in December 2014 the work was incomplete.
13. The big concertina door and window on the southern side of the extension that opens onto the backyard was quoted to be supplied by the Builder. However the Owner works for a manufacturer of aluminium windows and doors and she wanted to supply them herself. It was agreed that the windows and doors would be taken out of the contract. There was some conversation between them as to what the allowance should be for that but nothing was finally agreed. Mr Marcus said that he told her it was \$2,700.00. The Owner says she was told that it was \$3,000.00 plus \$120.00 for each door, making a total allowance of \$3,240.00. Neither of them suggested that the other agreed to any particular figure.
14. Since there was no agreement as to the amount of an appropriate credit, I must fix what an appropriate adjustment of the contract price should be. Quite obviously, there should be one.
15. Because the doors and windows were not in, the skirtings and architraves had also not been put on. Generally, one puts the doors and windows in and then puts the skirtings and architraves around them.
16. These were the works that were incomplete when Mr Marcus went overseas.
17. At that time, the Owner had already complained about a box gutter but that complaint had not been addressed.
18. When Mr Marcus came back, there were further communications and the relationship deteriorated to the point where eventually it broke down altogether.
19. Mr Marcus did some extra work but then would not come back and do anything more without being paid further amounts that he claimed to be owed. The Owner said that she was not going to pay him because of the problems she saw in the work.

This proceeding

20. The Builder brought these proceedings seeking an injunction to restrain the Owner from rectifying the work herself and covering up the defects. When it came before me I refused an order for an injunction, fixed the matter for hearing and gave directions.
21. The matter came before me for hearing on 23 June 2015. Mr Marcus and his solicitor appeared for the Builder and the Owner appeared in person.
22. The evidence proceeded until late in the afternoon, when I gave an oral decision with supporting reasons.

The respective cases

23. The amount that Mr Marcus says the Builder's claim should be awarded was \$8,265.00, calculated as follows:

Contract price		\$41,976.00
Less: Credit for concertina doors	\$ 2,700.00	
Amount paid	<u>\$31,236.00</u>	<u>\$33,936.00</u>
Balance		\$ 8,040.00
Plus exhaust fans for the toilet		<u>\$ 225.00</u>
Balance due		<u>\$ 8,265.00</u>

24. The Owner disputed the credit for the doors, she said that the claim for the fan is excessive and she claimed damages for defective workmanship.
25. As to the credit for the doors, I accept the figure of \$2,700.00 for the concertina door and the Owner's evidence that Mr Marcus told her that the two small doors were allowed at \$120.00 each. That increases the allowance for the doors by \$240.00.
26. As to the fan, the Owner said that it has just been wired into the circuit for the lights and that should not have cost as much as \$225.00. However Mr Marcus said that that is what he was charged by his electrician and I accept that evidence.
27. As to the defects, although Mr Marcus has offered to go back and rectify at least some of these the relationship between the parties has broken down. He has left the site and the contract is at an end. He has no right to return and although I could make an order that the Builder rectify defects it would not be practicable in this case. What I have to assess is what it is going to cost the Owner to finish the work and rectify the defects.

The box gutter

28. A proper box gutter should have been constructed at the interface between the wall of the extension and the skillion roof at the back of the House, sufficient to intercept and dispose of the water running off the roof. That

was not done and the Owner had to engage a plumber to construct it at a cost of \$800.00.

29. I understand that the roof was very old and there were difficulties but a sufficient gutter properly flashed was nonetheless required and I will allow the \$800.00 claimed by the Owner for constructing that.

Rubbish removal

30. The Builder ought to have removed his rubbish from the site. That was not done and the Owner had to hire a skip and dispose of the rubbish at a cost of \$430.00. That will be allowed.

The door alignment and steps

31. There was a claim for \$3,061.30 for replacement of plaster, repositioning of a doorway and the construction of steps. I am satisfied that the wrong plaster was used and that the repositioning of the doorway was necessary. I am not satisfied that that the steps were included in the price because they were not specified in the contract documents.
32. The overall cost, including the steps, of \$3,061.30 is not split up, so doing the best I can, I will allow \$2,000.00 of that for the plaster and the repositioning of the doorway.

The missing stump

33. There is one stump missing under the extension. Where it should have been there are two pieces of pine nailed together. That is a clear defect and the amount of \$970.00, which is the cost of installing the missing stump, will be allowed.

By-passing the gulley trap

34. It was claimed by the Owner that the gulley trap under the extension has been cracked and is now leaking. She claimed \$715.00 being the cost to by-pass the gulley trap. I do not have enough evidence on this issue. It was not established that the gulley trap was cracked by the Builder and it was not in the contract that the gulley trap be by-passed so I cannot allow the cost of doing that.

Redirecting the drainage

35. The Owner claimed that the Builder damaged the spoon drain that runs under the extension. She claimed and that the surface storm water now has to be redirected at a cost of \$715.00.
36. I initially thought that the spoon drain went right down the side boundary, in which case the stump holes dug by the Builder would seem to have penetrated it. However on further examination, it does a dog-leg under the House and misses those stumps. It was therefore going to go under the extension anyway. There is nothing in the contract that required the Builder to redirect the drainage and so I cannot allow the cost of doing so.

Connecting storm water to the storm water pit

37. As part of the scope of works, the storm water had to be connected to the storm water pit but that was not done. Mr Marcus produced a quote from his plumber for a little over \$500 to do it. That compares with two quotations obtained and produced by the Owner, the lower of which was \$1,232.00.
38. Examining these, I think on the balance of probabilities that the quote provided by the Owner is more likely to be right. The much lesser sum quoted to Mr Marcus, which is less than half of the other two quotes may well be what Mr Marcus' plumber would have charged him but the Owner is going to have to get this done by someone else. The claim of \$1,232.00 will be allowed.

The windows

39. The window in the west wall is leaking and the Owner claims that it needs to be replaced. Although I am satisfied that it is leaking, there is not enough evidence for me to know why. Of course a window should not leak and if it does, that is a defect for which the Owner is entitled to compensation. However it is for the Owner to prove her loss and there is not enough evidence to establish that the window requires replacement. It is a new window and the problem might be something as simple as resealing between the glazing bead and the glass. I will allow \$250.00 for stopping the leak.

Steps

40. The Owner argued that, because the height of the new room above the back garden, steps are required. However no steps were required by the contract and the Builder was not to do the whole of the work.

Conclusion

41. The allowances for the Owner are:

Increased allowance for doors	\$ 240.00
Box gutter	\$ 800.00
Rubbish removal	\$ 430.00
Door alignment and plaster	\$2,000.00
Missing stump	\$ 970.00
Storm water	\$1,232.00
Leaking window	<u>\$ 250.00</u>
Total	<u>\$5,922.00</u>

42. When this is deducted from the balance of the contract price there is a balance of \$2,343.00 to go to the Builder.

SENIOR MEMBER R. WALKER