

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D74/2009

**CATCHWORDS**

Domestic Building List – claim for work performed and materials supplied – allegation of defects and failure to complete work – counter claim and set off for delay and rectification.

<b>APPLICANT</b>	Shane McLeod t/as Retro Roof'n (ABN 80 034 559 525)
<b>RESPONDENT</b>	Onley Constructions Victoria Pty Ltd (ACN 073 488 258)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Member D. O'Halloran
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	24 June 2009 and 4 August 2009
<b>DATE OF ORDER</b>	20 August 2009
<b>CITATION</b>	McLeod trading as Retro Roof'n v Onley Constructions Victoria Pty Ltd (Domestic Building) [2009] VCAT 1731

**ORDER**

- 1 The respondent pay to the applicant the sum of \$2,316.40 by 07 September 2009.
- 2 All other claims dismissed.

**MEMBER D. O'HALLORAN**

**APPEARANCES:**

For the Applicant	Mr S. McLeod and Ms K. Waterson in person
For the Respondents	Mr P. Onley and Mr J. Bartles in person

## REASONS

### Background

- 1 The applicant is a sub-contractor roof plumber who has performed work for the respondent, a building company, over several years.
- 2 The respondent's business is located in Narre Warren, southeast of Melbourne. The applicant's business is located in Drouin, even further southeast of Melbourne. Most of the work performed by the applicant for the respondent was in the area southeast of Melbourne.
- 3 The evidence before the Tribunal was that the relationship between the parties soured over the project at Molesworth Drive in Highton, Geelong, approximately one hour to the west of Melbourne. The respondent alleged that the applicant used a sub-sub-contractor to carry out the roof plumbing work for him. The applicant did not dispute this allegation and did not dispute that he was responsible for the work performed by his sub-sub-contractor.
- 4 Both parties were anxious for me to hear evidence of large amounts of money owed that impacted on each of their ability to conduct their respective businesses. It was the respondent's contention that they were unable to invoice their client for the Molesworth Drive project because there were defects in the work performed by the applicant's sub-sub-contractor and the applicant would not attend at the site to rectify the defects or to complete the work required. The respondent declined to pay the applicant until the work was completed.
- 5 The applicant in turn gave evidence that the respondent owed him a large amount of money. He gave further evidence that he had rectified any defects complained of and had completed works and where he had not, it was because the projects had not reached a stage where he could perform his work. The applicant contended that the respondent and/or its other sub-contractors caused any delays.

### The Applicant's Claim

- 6 The applicant's claim is for payment for work he says he has performed and materials he has supplied. Six invoices with a combined total amount of \$6,996.90 define the claim. The invoices relate to work carried out at five different building sites.
- 7 The applicant's invoices can be summarised in the following way;
  - 298D, 16/01/2009, \$587.40, Tyndall Street, Cranbourne.
  - 384D, 16/01/2009, \$518.10, Serra Close, Langwarrin.
  - 297D, 16/01/2009, \$587.40, Tyndall Street, Cranbourne.
  - 369v, 24/11/2008, \$455.49, Stanhope Avenue, Berwick.

301D, 11/11/2008, \$1,908.50, Molesworth Drive, Highton.

358B, 1/11/2008, \$2,940.01, Amanda Close, Cowes.

- 8 The invoices in question do not separate the labour component from the cost of goods supplied component. Each invoice details the amount claimed for supply and installation of the goods described, including the labour component.
- 9 The respondent accepts that the applicant has completed the work in a satisfactory fashion and supplied the goods referred to in invoices 298D, 384D and 297D. The respondent says that they have not made payment in regard to these invoices as they have offset the applicable amounts against rectification, which they say has had to be carried out with regard to other work performed by the applicant at the Molesworth Drive site.
- 10 The respondent made the concession in relation to the invoices 298D, 384D and 297D on the first hearing day. During the course of the hearing the respondent lead evidence of defects and delay at Molesworth Drive and another site, 115 Caspian Chasse, Pakenham.

#### **The Respondent's Counter Claim**

- 11 The respondent has lodged a set off and/or counter claim for \$10,137.00.
- 12 The respondent's counter claim has a number of component parts. The bulk of the claim relates to the work performed by the applicant or his sub-sub-contractor at the Molesworth Drive site.
- 13 The first aspect of the respondent's counter claim is a claim in the sum of \$1,375.00 for legal fees. The respondent gave evidence that the fees related to advice obtained by the respondent in relation to the applicant's *Victorian Civil and Administrative Tribunal* (VCAT) application. The second aspect of the respondent's claim was the sum of \$1,750.00. The respondent gave evidence that the amount was the reduction in the contract price paid by their client, for the Molesworth Drive site, because of delays in completion of the contract. The respondent attributed the delays to the applicant.
- 14 For the sake of brevity, the remainder of the respondent's counter claim is grouped. First, the respondent claimed the cost of rectification of defects completed at the Molesworth Drive site. This work consisted of: fixing carpenter - \$200.00; painter - \$55.00; lift hire - \$485.00; roof plumbing - \$1,231.50. Second, the respondent claims amounts it paid to sub-contractors who attended at the Molesworth Drive property but were unable to perform work, due to the applicant's delay: plaster (Lafarge PlastaMasta) - \$495.00 and heating and cooling sub-contractor (Hallidays) - \$825.00. Third, the respondent claims for rectification work at Molesworth Drive, still to be completed; leaking downpipe and veranda - \$880.00; replacement

of veranda roof sheeting - \$900.00, travel to measure sheets - \$250.00, mobile hydraulic platform hire - \$550.00 and a painter for the down pipes and gutter - \$550.00.

- 15 There is an additional claim of \$500.00 relating to the rectification of alleged defects at another site, Lot 115 Caspian Chasse, Pakenham: \$250.00 to fix a leak to the flashing over the veranda and \$250.00 to fix a leak to the flashing over the meals and kitchen area.

### **The Evidence of defects**

- 16 The respondent produced a series of photographs taken at the Molesworth Drive premises. The photographs clearly show defects in flashing, capping and downpipes; an absence of clips in spouting and guttering; screws not in line; various holes and screw marks in plaster sections. Mr Onley and Mr Bartles identified the defects in each case. The applicant's evidence was that any defects, including those within the photographs, were rectified, after the photographs were taken.
- 17 The respondent produced a report obtained by the owner of the Molesworth Drive premises. The report was prepared by Ken Bowen of Homebase Inspections Pty Ltd. Mr Bowen was not called to give evidence. As the area or extent of his expertise was not detailed either in the report or to the Tribunal the report does not comply with the *Victorian Civil and Administrative Tribunal's* Practice Note in respect to Expert Evidence.
- 18 The report detailed a number of defects in the building works, which are allegedly the responsibility of the applicant. In addition to the defects shown in the photographs, the report referred to loose roofing screws left within the spouting. The respondent alleged that this was likely to lead to early deterioration of the spouting. This allegation was not challenged by the applicant and I accept the allegation. The report further alleges spouting out of alignment and spouting of incorrect size and fitting. The report was not challenged by the applicant, save that the applicant says the defects have been rectified.
- 19 The respondent produced emails from the owners of the Molesworth Drive premises setting out their complaints in relation to the construction of the home. The emails again emphasised the alleged defects referred to above and further raise problems of a leak in the verandah downpipes and water not flowing properly in the guttering, together with dents in the verandah roofing and mud and scuff marks to the guttering edges.
- 20 In his evidence, the applicant accepted that there were a number of defects in the work carried out by his sub-sub-contractor at the Molesworth Drive site. However, the applicant says that the bulk of these defects have been rectified by him or his sub-sub-contractor.

- 21 The applicant has provided photographs that show completed work in good condition. The applicant's photographs are not of exactly the same area or locations as the respondents.
- 22 The parties fundamentally disagree on this point. The applicant says that he rectified the plumbing problems by returning to the site and performing rectification work and his photographs show that he has done so.
- 23 The applicant's photographs were taken on 14 February 2009. The respondent's photographs were taken on 19 January 2009. The independent report obtained by the homeowner is dated 19 February 2009. The email from the homeowner which details the defects referred to above is dated 19 March 2009. The homeowner was not called to give evidence.
- 24 The bulk of the work performed by the applicant involved the use of metal materials. However, the respondent says that any roof plumbing rectification work performed by the applicant or others also required other carpentry and building work. The applicant disputed this claim and alleged that any alteration to flashing took place with the timber and other work in place.
- 25 The respondent called their site supervisor, Mr Dwayne Doig, a qualified carpenter, who gave evidence that adjustments to flashing would require repair and/or replacement and/or painting of architraves and weatherboards. The applicant gave evidence that there should not have been any damage. Mr Doig gave evidence that there was damage and the damage needed repair. The damage comprised marks and scratches to the woodwork. I accept Mr Doig's evidence in this regard, including the fact that the damage was caused by the applicant, during the course of his rectification work.

## **Delay**

### **(i) Heating and Cooling Account**

- 26 The respondent has included a claim that relates to the heating and cooling contractor (Hallidays) attending the property on three occasions (03/10/08, 10/10/08 and 16/10/08) and not being able to carry out their work as the roof was not ready. The account was for \$250.00 for each occasion, plus \$75.00 GST, a total of \$825.00.
- 27 The parties agree that Hallidays attended following instruction from Dwayne Doig, the site supervisor, employed by the respondent. However, the respondent says that they relied upon the advice of the applicant and/or the sub-sub-contractor to the applicant that the roof was ready. The applicant says that he would not have advised the respondent the roof was ready unless it was.

- 28 It is interesting to note that Hallidays has provided the applicant with an account for two attendances (30/09/08 and 03/10/08) where the roof was not ready and the applicant has paid that account. Hallidays would appear to have billed both parties with regard to 03/10/2008. I was not given an explanation as to why there were two accounts in respect of 03/10/08.
- 29 The respondent alleged that the applicant did not attend the site in 2008. The applicant did not challenge this allegation. I accept the allegation as accurate. As such, if any direction that the roof was ready had come from the applicant it must have originated with the sub-sub-contractor to the applicant. The sub-sub-contractor was not called to give evidence. I presume that the evidence of the applicant's sub-sub-contractor would not have assisted the applicant<sup>1</sup>. The applicant is not able to say what instructions the sub-sub-contractor gave to Mr Doig. I accept the evidence of Mr Doig that he was told the roof was ready when it was not.
- 30 On the other hand, it is clearly the role of the supervisor to ensure the smooth progression of the project. Attendance by the supervisor at the site would have overcome any doubt as to whether the site was ready. Mr Doig attended the site during 2008 and 2009 but, rather than attend the site at the relevant times, he relied upon the instructions of the sub-sub-contractor.
- 31 The respondent alleges that the applicant did not attend the site, as the distance from his primary work place was too great – potentially three hours or more. However, I am satisfied Mr Doig relied upon the advice of the sub-sub-contractor, rather than attend the site himself, for the same reason.
- 32 As site supervisor, I am not satisfied that Mr Doig was entitled to rely upon the advice of others, without ensuring the accuracy of the information he received. After all, that is his position, site supervisor.
- 33 The applicant has paid two of Hallidays' non-delivery accounts. I can only assume that he satisfied himself that for whatever reason, he was obliged to do so. The applicant made no claim for reimbursement of these accounts.
- 34 It is not clear to me as to why there are two accounts for 03/10/08. I can only presume that Hallidays made two delivery attempts on that day. The only other reasonable explanation is that they have issued two accounts for the one item. If so, the respondent would be entitled to say that it has already been paid by the applicant.
- 35 As to Hallidays' accounts for 10/10/08 and 16/10/08, I am satisfied that these accounts relate to the failure of the site supervisor to properly supervise the site and work progress at the site. I propose to dismiss that aspect of the respondent's claim.

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<sup>1</sup> *Jones v Dunkel* [1959] HCA 8.

**(ii) Delay damage**

- 36 The respondent has claimed the amount of \$1,750.00 being what it says is damages for late completion of the project. The claim is supported by a Variation – Tax Invoice wherein the respondent has reduced the contract price of the house to the owner at the rate of \$250.00 per week for seven weeks. This is the rate for liquidated damages specified in Item 9 of Schedule 1 of the contract between the builder and the homeowner.
- 37 The respondent contends that the delay has been caused by the applicant and the expense arises directly from that delay and should be met by the applicant. There is no written or verbal arrangement between the respondent and the applicant in so far as delay is concerned. However, the applicant is a long term practitioner in the industry and I am satisfied that he would be aware that delay could lead to compensation having to be paid and that building contracts would generally provide for that event.
- 38 The history of the dispute between the parties is not one of delay caused simply by the defect itself. The respondent says that the delay arises because of the failure on the part of the applicant to attend the site to rectify the defect – the site being some several hours from the applicant’s work premises. The applicant says he would not attend because he was owed a considerable sum of money by the respondent. The respondent replies that it could not bill for substantial sums owing to it until the applicant rectified the defects and completed work.
- 39 I am satisfied that this dispute is many faceted and that both parties played a role in its explosion beyond a simple question of rectifying a defect. Unfortunately, neither party has undertaken a critical path analysis, which would have assisted in assessing any period of actual delay. Delay in completion of work because of defects may not equate to an overall delay in the project. There is no evidence that the applicant or his sub-sub-contractor performed his work independently of the other contractors or that he was the sole contractor on site at any given time. A critical path analysis would have assisted in identifying the impact, if any, of the applicant’s delay, if any, to the overall completion date. In the absence of such an analysis, it is difficult to determine/allocate responsibility for the delay.<sup>2</sup>
- 40 The respondent bears the onus of proving all aspects of its claim. I am not satisfied that the respondent has demonstrated that the applicant is responsible for the delay. This aspect of the respondent’s claim is dismissed.

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<sup>2</sup> *MX Projects Pty Ltd (CAN 105196263) v Hyber Pty Ltd (Domestic Building)* [2007] VCAT 271 at 88.

### **Evidence and finding in respect of Caspian Chasse**

- 41 The respondent also makes a claim in respect to the property at Lot 115 Caspian Chasse, Pakenham. The claim relates to two items, both flashing defects and the need for rectification by a roofing plumber.
- 42 No photographs have been presented, however, the respondent has provided an email from the owner of the property. The email is dated 4 June 2009. The applicant claims to have attended to these defects. The applicant's apprentice has provided a statutory declaration that the work was completed when he attended the premises on 19 June 2009.
- 43 The respondent bears the onus of proving its claim. I am not satisfied that the work at Caspian Chasse has not been completed in a satisfactory manner. In the absence of further evidence in support of this aspect of the claim, it is dismissed.

### **Findings**

- 44 When considering the evidence as a whole, including the photographs, the report submitted by the homeowner and the email from the homeowner, I am satisfied that the applicant has failed to complete the work as required and the respondent has and will incur expense in rectifying the defects, in respect of the Molesworth Drive site. In this regard, I note that the homeowner's report and email postdates the photographs taken by the applicant.
- 45 Consequently, I accept the respondent's claims of carpentry for \$200.00, painting for \$55.00 and lift hire for \$485.50, a total of \$740.50.
- 46 The respondent also makes a claim of \$1,231.50 for the rectification of the roof plumbing work. The claim is evidenced by three invoices from Walker Plumbing. On close inspection, two of the invoices, Numbered 4751 and 4810, relate to the work performed at 1021 Hector Drive, Cranbourne and 118 Caspian Chasse, Pakenham, respectively. Neither invoice makes any reference the Molesworth Drive site. The rectification work clearly relates to work performed by Walker Plumbing at the Cranbourne and Pakenham sites.
- 47 The respondent did not lead any evidence in respect to defects at the Cranbourne site. In respect to the Pakenham site, reference is made to my earlier finding that the respondent's claim with regard to defects at that site, is dismissed. The respondent bears the onus of proving its claim. The claim evidenced by the invoices for those sites will be dismissed. Invoice 4798 relates to defects at the Molesworth Drive site and the claim will be allowed in the amount of \$720.00.
- 48 The respondent has made a claim for \$495.00 for a redelivery charge received from Lafarge PlastaMasta, Hallam, as the site was not ready for the plaster on the first delivery occasion. The respondent alleges

that either the applicant or his sub-sub-contractor, incorrectly advised the respondent that the site was ready.

- 49 The invoice from Lafarge PlastaMasta refers to an item for ‘cartage’ in the sum of \$700.13. There is no separate item for \$495.00. Mr Onley and Mr Bartles gave evidence that \$495.00 was the relevant amount. The invoice bears a handwritten note, “Includes Re Delivery Fee” with the initials B.M. Lafarge PlastaMasta did not attend to give evidence.<sup>3</sup>
- 50 The evidence of the two representatives of the respondent is conflicting. Mr Onley gave evidence that the accounts have no separate item for cartage when delivery of the plaster is completed. He went on to say that as delivery was not completed on the first occasion the account includes an amount for cartage. Mr Bartels gave evidence that there are separate accounts for cartage and that he had these accounts in his office. These accounts were not presented to me.
- 51 The respondent bears the onus of proving each item of their counter claim. Given the difference in amounts claimed and the conflicting evidence, I am not satisfied that the respondent is entitled to claim this amount. The claim in respect the cartage and/or redelivery from Lafarge PlastaMasta will be dismissed.
- 52 The balance of the respondents claim as it relates to defects at Molesworth Drive relates to work yet to be completed. On the basis of the evidence referred to above I accept the respondent’s claim and find the applicant responsible in the amount of \$3,220.00.

### **The Claim for Legal Costs**

- 53 The respondent seeks legal costs for \$1,375.00. The respondent says that these are the legal costs it incurred when it sought advice concerning the applicant’s claim.
- 54 The question of legal costs is subject to the Tribunal’s discretion in accordance with section 109 of the *Victorian Civil and Administrative Tribunal Act 1998*. It is clear to me that relations between the parties have deteriorated to a very bitter level. That much was made clear by the conduct of Mr Onley, who at times could not help himself and resorted to snide and gratuitous comments concerning the applicant.
- 55 I am satisfied that there is at least some merit on both sides and that the applicant was indeed entitled to institute proceedings to recover amounts owed; amounts which the respondent agrees it must pay.

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<sup>3</sup> Op cit. *Jones v Dunkel*.

- 56 In all of the circumstances and having heard the parties argue the question of legal costs, I decline to exercise my discretion in regard to costs and that aspect of the respondent's counter claim will be dismissed.

**The Invoices relating to Stanhope Avenue, Molesworth Drive and Amanda Close**

- 57 The respondent contends that it should not be required to pay the invoices relating to work at Stanhope Avenue or Amanda Close. The only evidence of defects presented by the respondent is in relation to Molesworth Drive. There is no evidence of defects in relation to Stanhope Avenue or Amanda Close. However, the respondent contends that the applicant did not complete these two jobs. The applicant did not dispute this contention. It would appear that because of the general dispute regarding payments between the parties, the applicant walked away from these two jobs prior to their completion.
- 58 The respondent contends that the parties had a contract and the applicant has failed to complete the contract and therefore should not be paid. The applicant contends that he supplied materials and performed good work but did not complete the work as the respondent made his position untenable by not making payments in respect of these and other works performed by the applicant.
- 59 In the circumstances where the evidence of the applicant that he supplied materials and performed good work is not challenged and in the absence of evidence that the work has to be redone, I am satisfied that it is appropriate that the respondent make payment in regard to the invoices relating to Stanhope Avenue and Amanda Close.
- 60 The invoice in relation to the work at Molesworth Drive is on a different footing. The evidence presented by the respondent details numerous defects. I have accepted that evidence. The evidence also details much rectification work that has been and is to be performed. I have accepted that evidence and I have made orders requiring payment by the applicant. In all of the circumstances, I am not satisfied that the Molesworth Drive invoice represents an invoice for work performed in a satisfactory manner.
- 61 However, there will be an inequitable result if the applicant is not paid for the work he performed at Molesworth Drive **AND** he is required to pay the rectification work the respondent has had to complete. The result is that the respondent has had that work completed, at no expense to itself, and the homeowner presumably, as part of the building contract, has paid the respondent an amount for that work.
- 62 In order to overcome this inequitable result, first, I propose to disallow the work the applicant claims to have completed at

Molesworth Drive, as evidenced by invoice number 301D, in the amount of \$1,908.50. Second, I propose to offset the respondent's claim for rectification by the same amount.

- 63 Finally, I accept the applicant's claim for \$5,088.40. This amount represents five of the six invoices that make up the applicant's claim. The invoice excluded is the invoice with regard to Molesworth Drive, for \$1,908.50.

**Reconciliation**

Credits to Applicant

Outstanding invoices \$5,088.40

Credits to Respondent

Rectification of defects \$1,460.50  
Future rectification of defects 3,220.00  
\$4,680.50

Less offset of Molesworth Drive

Invoice \$1,908.50

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\$5,088.40 \$2,772.00

- 64 Therefore I will order that the respondent pay the applicant \$2,316.40.

**MEMBER D. O'HALLORAN**