

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT Reference: D421/2008

CATCHWORDS

Domestic building – subcontract carpentry work – work incomplete and defective – proven cost of completing and rectifying work set off against contract sum – order for balance

APPLICANT: MRP Carpenters & Builders Pty Ltd (ACN 098 145 772)

RESPONDENT: C & N Constructions (Australia) Pty Ltd (ACN 080 399 677)

WHERE HELD: Melbourne

BEFORE: Senior Member R.Walker

HEARING TYPE: Small Claim Hearing

DATE OF HEARING: 16 October 2008

DATE OF ORDER: 29 October 2008

CITATION: MRP Carpenters & Builders Pty Ltd v C & N Constructions (Australia) Pty Ltd (Domestic Building) [2008] VCAT 2587

ORDERS

1. Order the Respondent to pay to the Applicant the sum of \$3,817.42.
2. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant: Mr J Bediaga, Solicitor

For the Respondent: Mr P Little of Counsel

REASONS

Background

1. The applicant is a company controlled by Mr Perera, a Carpenter of eight years experience. The respondent carries on business as a builder. Its director, Mr Nestora Loizides, is a registered builder.
2. On 16 January 2007 the applicant provided a quotation to carry out carpentry work for the respondent at a site in Viney Street, Clarinda. Five units were being constructed by the Builder at the site and the quotation was to do the carpentry work for four of those units. The carpentry work for the fifth unit was to be done by another carpenter.
3. The quotation specified separate figures for the sub-floor, frame, lockup and fixing stages for each of the four units. The quotation is described as a “proposed estimated quote” but the parties thereafter treated it as being a quotation and so shall I.
4. The quotation said that the applicant would be sending an invoice on Fridays with the details of work carried out during the week. After the figures for the various stages are set out, the quotation continues as follows:

“MRP will be faxing an invoice of \$2,500.00 to \$3,000.00 per week depending on work carried out. Upon completion of the Stage, the balance due must be pay in full once inspection has passed (sic).”
5. Work commenced on 22 January 2007 and invoices were at first rendered and paid weekly. From March, the invoices became less frequent and a dispute then arose between the parties as to payment.

The dispute

6. There is a dispute on the evidence as to how the contract came to an end. According to Mr Perera, Mr Loizides told him that he had no money and that the applicant would have to finish the various stages before it would be entitled to any further payments. Mr Perera said that he and his workmen then left the site because he was afraid that nothing more would be paid. The applicant now claims the whole of the quoted price for sub-floor and frame for each of the four units plus the quoted price for lockup and fixing for Unit 5 which Mr Perera says was substantially completed.
7. Mr Loizides denies that he said that he had no money and claims that he told Mr Perera that he would have to rectify numerous defects and finish the various stages he was claiming for before becoming entitled to payment. He said that Mr Perera then walked off the job and after trying unsuccessfully to get him back he engaged other carpenters to finish the work. This included, he said, rectifying the defective workmanship of the applicant. He denies that the frame stage was

completed on any of the units and says that lockup and fixing on Unit 5 was only about half done.

The hearing

8. The matter came before me for a Small Claim Hearing on 25 September 2008 and then was adjourned part heard to be completed on 25 September 2008.
9. On behalf of the applicant I heard evidence from Mr Perera and on behalf of the respondent I heard evidence from Mr Loizides, from his son and from Mr Nikitakos, a carpenter who had carried out some rectification work on Units 2 and 3.
10. The applicant was represented by its solicitor, Mr Bediaga and the respondent was represented by Mr Little of counsel.
11. The quotation and various invoices and some correspondence were tendered on behalf of the applicant. Various accounts for rectification work were tendered on behalf of the respondent.
12. I was less than happy with Mr Loizides as a witness. I thought that he was somewhat careless in his evidence and some of what he said is difficult to believe. For instance, I do not believe that he incurred \$1,000.00 in purchasing material for the rectification work considering the scope of that work. His evidence as to the reason some windows were replaced (this was not part of his defence but part of his criticism of the work) was quite unconvincing. A number of the complaints that he made were unsubstantiated.
13. I did not form an unfavourable impression of any of the witnesses. Mr Perera was quite a good witness and conceded that some of the criticisms of his work were justified. Mr Loizides' son was not as involved as his father and although he has some building qualification his evidence as to the installation of windows indicates that this is far from perfect.
14. The most impressive witness was Mr Nikitakos who gave evidence in a clear and factual way without any apparent embellishments.

The evidence

15. The total contract price for sub-floor and frame for the four units was \$33,540.32. In addition, the figure for lockup to Unit 5 was \$2,283.60 and for fixing, \$2,854.50. That makes the total price of \$38,678.42 for the Stages Mr Perera claims the applicant did. The respondent has paid the applicant \$30,327.00 and the applicant claims the balance of \$8,351.42, although I note that the amount in the application is slightly more than that.
16. The evidence focused almost entirely on the alleged deficiencies in the work. The absence of any written complaint by the respondent during the work means that

all of the evidence relating to these matters was oral apart from some documents establishing the cost of rectification.

17. The respondent claims to have incurred the following costs in rectifying and completing the work to the stages claimed, namely:

Mr Nikitakos – Units 2 and 3	\$3,340.00
Mr Matarozzo to bring Unit 1 to frame stage	\$1,210.00
Mr Matarozzo to bring Unit 5 to lockup and fixing	\$1,584.00.

18. In addition, the respondent claims \$2,794.00 for plaster repairs caused by defective framing. The total of all these claims is \$8,928.00, which exceeds the amount claimed from the applicant. The respondent therefore contends that nothing is due.

Findings

19. Fortunately, I am able to fully assess the work done by Mr Nikitakos because he was available for cross-examination. He has also helpfully set out in great detail what he did. From his description, I am satisfied that all of his work related to bringing Units, 2 and 3 to frame stage save for three items. The first is de-nailing the tops of the cupboard headers and bringing them straight. That is frame straightening and belongs to lockup which has not been charged. The second relates to re-fixing the windows. The problem here was that Mr Perera had supported them on chipboard; the chipboard had been exposed to the weather and become swollen which deformed the frame. When asked why he used chipboard Mr Perera said that that was the material Mr Loizides had given him. The contract was for the respondent to provide all materials. I find that this is a defect caused by faulty material and not by faulty workmanship and is not something for which Mr Perera is responsible. I therefore disallow that part of Mr Nikitakos' charge that relates to the windows. I also disallow the two hours that he spent in the bathroom because I am not satisfied that that is attributable to any fault of the applicant.
20. Doing the best I can on the limited evidence available, I attribute \$1,000 of his charge to these three items. I will allow the balance of \$2,340.00 against the amount claimed by the applicant.
21. The work done by Mr Matarozzo on Units 1 and 5 is much less detailed. I am not satisfied that building the bulk head was part of the scope of works quoted nor am I satisfied as to the re-sheeting of the ensuite wall in Unit 5. Doing the best I can I will deduct \$600.00 for these items and allow the balance of \$2,194.00 against the contract sum.
22. As to the plastering, if I were to accept the evidence as to the need to rectify the right hand side garage I would also have to find that it should not have been

plastered in that state. I think the walls should have been straightened first so I disallow that claim. I am also not satisfied as to the other two claims.

Conclusion

23. The deduction to be made from the balance of the contract sum for the four units is therefore the total of these sums which is \$4,534.00. That leaves a balance due to the applicant of \$3,817.42.
24. There will be an order for this sum. Costs will be reserved, but only because I have heard no submissions as to costs. The parties should be aware that it is not usual to make orders for costs on a small claim.

SENIOR MEMBER R. WALKER