VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. **D61/2012**

CATCHWORDS

Defective and incomplete works under a building contract and terms of settlement, interpretation of terms of settlement, delay costs, reimbursement of fees.

FIRST APPLICANT	Mohit Puri
SECOND APPLICANT	Nancy Devgan
RESPONDENT	Viss Group Pty Ltd (ACN 128 944 114)
WHERE HELD	Melbourne
BEFORE	Senior Member M Lothian
HEARING TYPE	Hearing
DATE OF HEARING	5 March 2014 and 16 July 2014
DATE OF ORDER	5 September 2014
CITATION	Puri v Viss Group Pty Ltd (Building and Property) [2014] VCAT 1104

ORDERS

1 The Respondent must pay the Applicants $38,147.43 forthwith.

2 Costs are reserved with liberty to apply by 6 October 2014. Any application for costs should be accompanied by a brief outline of facts and contentions. I direct the Principal Registrar to list any costs hearing before Senior Member Lothian with an estimated duration of 2 hours.

M Lothian
Senior Member

APPEARANCES:

For First Applicant	Mohit Puri, in person
For Second Applicant	Nancy Devgan, in person
For Respondent	Mr Greg Molloy, in person

REASONS

1 These orders and reasons bring this dispute to finality before the Tribunal. As described in the reasons of 2 May 2014, Mr Molloy, director of the Respondent - Builder, sought to have the hearing adjourned. I reserved my decision on the issue of adjournment and commenced to hear the substantive proceeding. Unfortunately, time available for the substantive proceeding was insufficient..

2 In the orders and reasons of 2 May 2014 I found that the Builder was not entitled to a further adjournment (which would have necessitated a re-constitution of the Tribunal before another member). The hearing of the substantive proceeding was concluded on 16 July 2014.

3 The Builder entered a contract to build a home for the Applicant-Owners in South Morang. It did not complete the home, and as I found on 2 May 2014 at paragraph 35:

> The Respondent has failed to complete the home when it promised to do so at least once, possibly twice and potentially on three occasions.

4 I am satisfied that the Builder has breached the building contract and also breached terms of settlement, the most recent of which was the Deed of Settlement and Release of 20 August 2013 ("Deed").

DEED OF SETTLEMENT OF 20 AUGUST 2013

5 The Deed is a five page document, and I reproduce a number of relevant provisions:

> **RECITALS**
>
> ...
>
> **B.** A dispute arose between the Parties in respect to the building contract and the Applicant filed proceedings in the Victorian Civil and Administrative Tribunal.
>
> **C.** Pursuant to that Application the proceedings were settled pursuant to Terms of Settlement on 28 March 2012.
>
> **D.** Those Terms of Settlement were defaulted by the Builder and fresh proceedings issued by the Applicant.
>
> **E.** The parties have acknowledged that the building surveyor has issued the Occupancy permit on this day with a list of works to be completed by the builder in order to satisfy the Occupancy Permit of a copy of which is attached.
>
> ...
>
> **2. TERMS OF SETTLEMENT**
>
> [There is no 2.1]

2.2 The parties agree to settle and release each other of any respective rights or obligations under the Initial Contract [this term is not defined] on the following basis:

(a) The Owner will:

(i) within twenty four (24) hours provide The Builder with proof of Building and Content Insurance for the premises ...; and

(b) on receipt of the above, The Builder will:

(i) within thirty (30) days thereafter complete the works identified in the Occupancy Permit and the works required under the Building Contract and agreed at mediation on 28 March 2012 including the installation of all appliances and carpet.

(ii) the Builder agrees not to install any appliances as required under the Building Contract more than two (2) working days before the handover.

In paragraphs 2.3 and 2.4 the Builder agreed to forgo $8,589.20 otherwise payable under the building contract and $1,500 otherwise payable under the terms of settlement of 28 March 2012.

In paragraph 2.5 the Builder agreed to make three payments of $3,000; the first 14 days after the Terms of Settlement were signed, the second 30 days after that and the final one 30 days after the second. The parties agree that only the first payment was made.

2.6 If the Builder fails to complete the works or fails to make any of the payments referred to in the last above paragraph by the due dates the Builder will pay liquidated damages of $500.00 per week until such failure or failures are remedied.

2.7 the Parties also agree that the Owner will engage the services of a Building Inspector to inspect the premises for defects. Upon receipt of that list (if any) the Owner and the Builder will attend the premises and mutually arrange for the Builder to rectify those defects (if any) within the time stipulated in the Contract. ["Contract" is not a defined term]

2.8 the Parties agree that it there are any defects the time to complete the defects is in accordance with the building contract and will not affect the thirty (30) day period in which the builder is required to complete the works referred to in the Occupancy Permit.

2.9 In accordance with this agreement if there are any works that are required to be completed by the builder beyond the thirty (30) day period the builder must notify the owner in writing what works are still needed to be completed and the length of time required to extend the thirty (30) day period to complete such works and the Owner will consent to such an extension provided that such extension does not exceed fourteen (14) days and is not an unreasonable request.

Clause 2.10 allowed for the proceeding to be adjourned, then withdrawn when the terms of settlement had been complied with. Instead, the proceeding was struck out with a right to apply for reinstatement.

3. MISCELLANEOUS

…

3.2 This Deed embodies the entire understanding between the parties as to the subject matter of the Deed.

3.3 Further Assurances Each party must:

(a) do or cause to be done all acts and things necessary or desirable to give effect to the provisions of this Deed including completion of all or any documentation and /or instrument that may be necessary for that purpose; and

(b) refrain from doing all acts and things that could hinder performance by any party of the provisions of this Deed.

…

3.8 Time is of the essence. [sic]

THE OWNERS' HEADS OF LOSS

6 The Owners' claims are for the following items:

i Compensation for dishwasher and oven stolen in a burglary, and the insurance excess;

ii Evaporative cooling system and heating system;

iii Delay damages;

iv Costs for the Owners' barrister on 25 July 2013

v Water bills incurred by the Builder and paid by the Owners

vi Electricity bills incurred by the Builder and paid by the Owners;

vii Carpet;

viii 22 meters of timber fence;

ix Remote controls for garage door;

x Painting

xi Fly screens to all openable windows; and

xii Gutters and valleys to be cleaned.

Compensation for dishwasher and oven allegedly stolen in a burglary

7 I accept Mr Puri's evidence that a burglary was reported to police on 16 November 2013. Mr Molloy claimed that both the dishwasher and the oven, which the Builder was obliged to supply under the building contract, were stolen. It is noted that in accordance with clause 2.2(a)(i) of the Deed, by

the date of the burglary there was a policy of Building and Content Insurance arranged by the Owners.

8 The Owners rely on items 3 and 4 of the AD Home Remodellers [sic] quotation, to the effect that the cost of a 900mm electric oven was $895 and the cost of a stainless steel dishwasher was $750.

9 Mr Molloy said he took the dishwasher and the hot water system to site, and the Owners' insurer should have paid because these items were stolen from them.

10 Mr Puri said the insurer paid for the hot water system and for damage to the walls and ceiling, but that the Owners recovered nothing for the dishwasher and oven. He said he was advised that Mr Molloy had told the police that the dishwasher and the oven had been installed. Mr Molloy said this was not so – these items were in boxes and the thieves stole the boxed items.

11 Mr Puri said that Mr Molloy did not assist with his claim to the insurer because he did not provide the make and model number of the dishwasher and the oven, together with a copy of the invoice. Mr Molloy claimed he gave these items to the investigating officer.

12 I note that there is no reference to details of the oven and dishwasher, other than make, in the insurer's documents and no reference to them at all in the Police report. The insurer's assessor report of 9 December 2013 was by Peter Di Biase for AAMI. It included:

> Mr Puri
>
> …
>
> - told me the point of entry was the laundry metal sliding door but that it had not been opened forcibly
> - was told by his builder that the dishwasher and stove were installed between the 11th and 15th of November
> - he has not seen the dishwasher or stove installed
> - that his neighbour witnessed individuals entering and exiting the risk premises but could not tell me what they were doing. Were they removing the dishwasher and stove?
>
> …
>
> **Issues/Concerns**
>
> Policy Exclusions
>
> > We do not cover Loss or Damage cause by someone (the builder) who entered the insured address with your consent (keys) or the consent of someone who had your authority (keys) to allow them access to the insured address.

13 I do not accept that these statements provide any level of proof that someone on behalf of the Builder was responsible for the damage or alleged removal of the oven and dishwasher. On 7 May 2014 Annie Dang, Client

Manager of the insurer sent an email to Mr Puri confirming the scope of works undertaken by it (including replacement of a damaged hot water system). The email concluded:

> Please also note as per our Assessors report, we were unable to accept the Dishwasher and the Stove unless further evidence or report was provided.

14 As quoted above, the Deed provided that the Builder would not install any of the appliances more than two working days before handover. Builders take this precaution to avoid the all too common theft of newly installed appliances. Leaving such appliances in an unprotected home overnight in their boxes is even more attractive to thieves than newly installed items.

15 I am satisfied that the Builder has failed to do "all such things necessary or desirable" to assist the Owners complete the works. Parties to building contracts make agreements about who will provide insurance because if there is substantial damage to the works, or theft, the parties might not have the resources to finish the job. I am satisfied that in circumstances where the Builder had information that would support the Owners' claim to the insurer, but the Owners did not, part of the assistance necessary for the Builder to provide to the Owners was to provide the necessary information to support the Owners' claim to their insurer for the oven and dishwasher.

16 In the alternative, the Builder did not act in accordance with the Deed by leaving the boxed appliances in the home. The Builder must pay the Owners $895 for the oven and $750 for the dishwasher, a total of $1,645.

17 Mr Puri also claimed the insurance excess of $1,100. As the Deed provided for the insurance to be arranged by the Owners, I am not satisfied that the Owners have proven a basis upon which the insurance excess should be born by the Builder rather than themselves. I make no allowance for it.

Evaporative cooling system and heating system

18 I accept Mr Puri's evidence that the quotation he received for air-conditioning in accordance with the contract is $3,480 plus $2,800 for heating; a total of $6,280. I note Mr Molloy's evidence that he "could have" supplied and installed the evaporative cooling system and heating for about $4,500. However, the Builder did not do that. Further, the Builder has not provided any other evidence about the cost to the Owners of obtaining and installing the system.

19 I allow $6,280 for this item.

Delay damages

20 The context of the claim for delay is that the contract was dated 15 September 2009 with a construction period of 272 calendar days. Without any contractual extensions of time, but subject to determination of the commencement date, the Builder should have finished the home around

July or August 2010. When the Owners commenced proceedings on 27 January 2012 their "grounds for complaint" commenced:

> Our Builder ... has taken more than 843 to complete our 20 square single storey house in a given time frame of 272 days ... and we are requesting VCAT to be involved in this matter and get the builder to finish off the house ASAP...

21 On 19 August 2013 Mr Arron McDermott of Amalgamated Building Approvals issued a somewhat contradictory occupancy permit to the Owners. It stated both:

> **Suitability for occupation**
>
> The building or part of the building to which this certificate applies is suitable for occupation.

and

> **Conditions of Occupancy Permit**
>
> **Whilst the dwelling is fit for Occupancy there are some items that need attention prior to the works *being finalised and physical occupation occurs.*** [Italics added]
>
> **A list of these items are in the attached 'Direction as to work' dated 9.08/2013**
>
> **These items are to be addressed and this office engaged to carry out a final inspection.** [sic]

22 Having regard to the first passage quoted, there appeared to be no part of the home that was suitable for occupation at the date of the occupancy permit.

23 Mr McDermott's "Direction as to work" listed seven items. The first was for repair to the WC. Both parties agree that the Builder finished this work, but Mr Puri said it was completed on 28 October 2013, whereas Mr Molloy said it was completed on 12 October 2013.

24 Item 2 concerned mortar missing from perpends. Mr Puri said he had it done by others and was not claiming the cost.

25 Item 3 concerned a penetration through brickwork that could allow access for vermin. Mr Puri said it was incomplete. Mr Molloy said it was complete, but as the Owners abandoned their claim for this item, it was unnecessary for me to consider it further.

26 The parties agreed items 4 and 5 had been completed by the Builder.

27 Item 6 was:

> The last photo shows a thin orange electrical cable that travels from ground level up into the roof. Is this the correct way for this to be installed. [sic]

28 Mr Puri said that the cable was "still like that". Mr Molloy said that the cable was suitable for the installation of a solar unit and complies with

plumbing requirements. Neither party provided further evidence concerning the cable, and I note that it does not appear to be a separate item in the quotation dated 27 November 2013 provided by AD Home Remodellers to Mr Puri. Nevertheless, the quotation does refer to "defects listed in the inspection report by SPI Property Inspections". At page 11 of that report, Mr Zablocki of SPI states:

> The wire from the solar panels to the hot water service unit has been run over the gutter and has been secured to the down pipe with cable ties however, the manufacturers requirements are that the cable is to be concealed and protected from the weather.

29 I prefer the evidence of Mr Puri that this item remained incomplete, and I consider it further below.

30 Item 7 concerned the need for permanent cooking facilities:

> Whilst the dwelling is capable of having temporary cooking facilities installed, in accordance with the [Builder's] representations, a permanent cooking facility needs to be installed with the correct ventilation. Due to the possibility of theft of kitchen items, the cooking facility will be installed prior to physical occupation.

31 There are a number of items claimed by the Owners for delay in their "List of Damages" sent to the Tribunal and the Builder's former solicitors on 30 January 2014. They are as follows:

1. $310 p/w as per mediation orders from 14th May 2012 up to 20th August 2013 =$23,250

...

3. $6,000 as per new settlement terms signed on 20th August 2013 as per clause 2.5 (Not paid till date) =$6,000
4. @$500 p/w for 1 week delay of first instalment mentioned in the New settlement terms sign on 20th august 2013. As per clause 2.6 =$500
5. @$500 per week for 16 weeks starting from 12th October for not completing the house till date as per clause 2.6 in new settlement terms dated 20th august 2013. =$8,000
6. @ $500 p/w for 17 weeks for the unpaid second instalment starting from 3rd Oct 2013 till date as per new settlement terms signed on 20th August as per clause 2.6 =$8,500
7. @ $500 p/w for 12 weeks Starting from 3rd November 2013 for not paying the final payment till date as per clause 2.6 in the new settlement terms =$6,000

Claim 1 - $310 per week under the mediation agreement of 14 May 2012

32 As the parties' agreements under the Deed about money payable include an amount that would otherwise have been payable by the Owners to the

Builder under the mediation agreement, I find that the agreement to pay $310 was merged in the Deed. I make no allowance for this claim.

Claim 3 - $6,000 under the Deed

33 The parties both agree that these two sums totalling $6,000 were not paid on the days they were due, which in accordance with clause 2.5 was 3 October 2013 and 2 November 2013. On 5 March 2014 Mr Molloy said that he wanted to pay the remaining $6,000 when the work was completed, but gave no reason why such an arrangement was consistent with the Deed. I note further that such an arrangement would not be reasonable where the Builder had control over both the date of completion of the works and the date of payment – one aspect of its obligations was not dependent upon the other.

34 On 16 July 2014 Mr Molloy agreed this sum was outstanding.

35 The Builder must pay the Applicant $6,000 forthwith.

Claims 4, 5, 6 and 7 under clause 2.6

36 The Owners claim $500 per week for each instance of a breach by the Builder so that, taking the example of the week starting 3 November 2013, their claim is for $1,500, being $500 for each of claims 5, 6 and 7.

37 As the clause concludes:

> … the Builder will pay liquidated damages of $500.00 per week until such failure or failures are remedied. [Underlining added]

I interpret this clause to mean that the liquidated damages or damages for late payment are $500 per week, regardless of how many breaches there are.

38 I find that the Owners were entitled to $500 for the week stating 3 November 2013, then $500 in total from 3 October 2013 (the date the second payment was not made) until the date of these orders and reasons, being 5 September 2014. This is a total of 49 weeks and one day, which equals a sum of $24,571.43.

39 I have found that the Owners are entitled to $500 per week for one or more breaches, and I have found that the Builder breached its obligation to pay for a period longer than the period in which the Builder was to complete the works. It is therefore not necessary for me to consider the extensive argument between the parties about whether the Builder was entitled to an extension of time to complete. However, I note that the meaning of clause 2.9 of the Deed is unclear and none of the evidence given by Mr Molloy gave a reason for the Builder's delay that would have supported a "not unreasonable request".

Conclusion regarding delay and related damages

40 The Builder must pay the Owners $6,000 under claim 3 and $24,571.43 under claims 4, 5, 6, and 7 – a total of $30,571.43.

Costs for the Owners' barrister on 25 July 2013

41 The Owners claim the fees charged by their barrister of $2,200 "due to the respondent's lawyer not [p]resent on hearing for determination on 25th July 2013".

42 Order 2 of that day was:

> The Applicants' application for costs of this day will be heard on 20 August 2013.

On 20 August 2013 Member Eggleston ordered in chambers that the proceeding was adjourned to be heard by him on 22 October 2013, and on that day Member Eggleston struck out the proceeding with a right of reinstatement. It was the same day that the Deed was executed.

43 The Deed provided:

> 3.7 The Parties shall bear their own legal costs in these proceedings.

I am satisfied that the Deed included any costs incurred before it was executed. I therefore make no order as to the costs of 25 July 2013.

Water bills incurred by the Builder and paid by the Owners

44 The Owners claim $1,091.03 for this item. At the hearing on 16 July 2014 Mr Puri admitted that this was for amounts billed before the Deed was executed. Under clause 3.2 of the Deed I am not satisfied that the Owners are still entitled to claim for this amount.

Electricity bills incurred by the Builder and paid by the Owners

45 The Owners claim $961.70 for this item. Mr Puri admitted that this was also for amounts billed before the Deed was executed. For the same reason as for the water bills, I am not satisfied that the Owners are still entitled to claim this amount.

Carpet

46 The Owners claim $1,800 for "Quotation for carpet as requested by Builder." Mr Molloy said the carpet chosen by the Owners was more expensive than the carpet allowed for under the contract, which was to the value of $1,386. However, I accept Mr Puri's evidence that he brought to the Builder's attention that the specified carpet was no longer available, and note Mr Molloy's response by email of 23 October 2013 was "Thank you for your selection which has been noted."

47 I find the cost to the Owners of obtaining carpet in general accordance with the Builder's obligations under the building contract is $1,800, which the Builder must pay the Owners.

22 metres of timber fence

48 The parties agree that the Builder did not undertake the fencing. Mr Molloy said the fencing was deleted from the contract, but Mr Puri denied that there was any change to the contract concerning fencing. Given that there have been two written settlements, in the absence of any written evidence of change to the fencing obligation I find that it is unchanged.

49 The Builder must pay the Owners $860 for fencing in accordance with Mr Puri's estimate of the cost.

Remote controls for garage door

50 The parties agree that remote controls were not provided. As Mr Molloy conceded the sum of $180 paid for two remote controls, the Builder must pay that sum.

Painting

51 This item was withdrawn by Mr Puri on 16 July 2014, as painting had been undertaken by the Insurer.

Fly screens to all openable windows

52 I accept Mr Puri's evidence that fly screens to openable windows were part of the Builder's contractual obligations, they have not been provided and the cost to have them supplied and installed now is $2,240. The Builder must pay the Owners this sum.

Gutters and valleys to be cleaned

53 Although the AD Remodellers quotation includes $525 for this item, it does not identify whether it is for the Builder's failure to keep the gutters clean, or whether it is a maintenance item. I accept Mr Molloy's evidence that there are tall trees nearby and note that Mr Puri could not say more about why the gutters need to be cleaned. I make no allowance for this item.

Solar wire to hot water system

54 As mentioned above, I prefer Mr Puri's evidence that the cable has not been rectified. However I am not greatly assisted in making a separate allowance for this item because the items specifically listed by AD Home Remodellers total $18,474.50, whereas the final sentence of the quotation is:

> Please Note total cost to complete the above items and to rectify all the defects mentioned in the Building Inspector's report including GST is $27868.40.

55 There is no indication of how the difference between those two sums, of $9,393.90, is calculated. In the absence of better evidence I allow 2 hours of electrician's time at $80 per hour, plus some travel time, a total of $200, which the Builder must pay.

FEES PAID BY THE OWNERS

56 Division 8A of the *Victorian Civil and Administrative Tribunal Act* 1998 came into operation on 2 June 2014. It provides at s115B that the Tribunal may order a party to reimburse another for fees paid. Section 115C provides further that there is a presumption that a party who has substantially succeeded against another will have their fees reimbursed by the other party for, among other things, a proceeding under the *Domestic Building Contracts Act* 1995.

57 I find that the Owners have been substantially successful and I accept Mr Puri's evidence that he paid Tribunal fees of $651 for the hearing on 16 July 2014, which I order the Builder to reimburse forthwith.

SUMMARY

58 The Builder must pay the Owners the following sums for the items named:

Dishwasher and oven	$1,645.00
Delay damages	$30,571.43
Carpet	$1,800.00
Fencing	$860.00
Remote controls for garage	$180.00
Fly screens	$2,240.00
Solar wire	$200.00
Reimbursement of Tribunal fees	$651.00
	$38,147.43

COSTS

59 Costs are reserved with liberty to apply by 6 October 2014. Any application for costs should be accompanied by a brief outline of facts and contentions. I direct the Principal Registrar to list any costs hearing before Senior Member Lothian with an estimated duration of 2 hours.

M Lothian
Senior Member