

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D272/2006

CATCHWORDS

Work and labour done – whether agreement for payment – delay damages – evidence required – offset for damage to premises by Builder - evidence required

APPLICANT	R.M.H. Bricklayers Pty Ltd t/as R.M.H. Homes
RESPONDENT	David Henry
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Small Claim Hearing
DATE OF HEARING	23 June 2006
DATE OF ORDER	29 June 2006

R.M.H. Bricklayers Pty Ltd v D. Henry (Domestic Building) [2006] VCAT 1215

ORDER

1. Order the Respondent to pay to the Applicant the sum of \$5,323.
2. The counterclaim is dismissed.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr M. Harrison and Mr & Mrs R Harrison in person
For the Respondent	Mr D. Henry in person

REASONS FOR DECISION

The parties

1. The Applicant (“the Builder”) is a Builder. Its director, Mr Michael Harrison is a qualified bricklayer and has been for over 15 years. He is also a registered Builder. His fellow director is his father Mr Richard Harrison who is and has been a qualified bricklayer for over 40 years. He also carried on business in England as a Builder for 10 years. The Respondent, Mr Henry (“the Owner”), is the Owner of the dwelling house at 9 Michael Court, Forest Hill (“the House”).

The agreement

2. On 1 August 2005 the Builder entered into a contract to carry out alterations and additions to the House for a contract price of \$56,976.59. The work involved the construction of a new kitchen, laundry, toilet and bathroom, the removal of some walls and the construction of a covered outdoor veranda. The work was to be completed by 26 October 2005.
3. According to the Builder’s evidence, the last work to be done was the construction of the veranda which, according to an account received from the carpenters that built it, was completed on 23 October 2005.

The complaints

4. The Owner had many complaints about the work. There was a major complaint concerning a floating floor, as a result of which the parties agreed that the Builder would remove it and credit the Owner with the cost. There was also a complaint about the shower in that it did not have wheelchair access. Although the Builder disputed that this had been discussed and although it was not in the contract it agreed to modify the shower and it was some months before it was finally altered to the Owner’s satisfaction.
5. On 13 November 2005, while work was proceeding on the matters the Owners had complained about, he demanded the return of the keys. Thereafter any work could only be done after 7.00 p.m. during the week or on weekends.

6. On 27 February 2006 the Owner sent the Builder a cheque for \$10,531.72, being the final payment after deducting \$4,500.00 for liquidated damages (18 weeks @ \$250.00 per week) and \$500.00 to replace an allegedly damaged rug. It appears that all of the complaints have been attended to.

The proceeding

7. On 28 April 2006 the Builder commenced this proceeding to recover the \$5,000.00 withheld by the Owner plus interest to the date of issue calculated at \$392.20, and continuing. In addition to these claims, on 6 June 2006 the Builder wrote to the Registry and gave notice of 5 further claims as follows:

1. Brickwork to sills	\$658.00
2. Timber floor	\$2,746.50
3. Eight power points	\$384.00
4. Flue for the range hood through the roof	\$300.00
5. Filling up cracks and holes in existing brickwork	\$200.00

8. The Owner counterclaims for:

1. loss of rental income from a flat at the rear of the House	\$2,160.00
2. replacement of a damaged television cabinet	\$400.00
3. repair of mortar and brickwork which does not match the existing brickwork. (Estimate)	\$1,000.00.

The hearing

8. The matter came before me for a Small Claim Hearing with 2 hours allotted on 23 June 2006. I heard from Mr Michael Harrison, Mr Richard Harrison and Mrs Harrison for the Builder and from the Owner in person.
9. After ascertaining from the Owner that he had had no objection to the additional claims being included with the Owner's claims I said that I would deal with those as well.
10. It is clear that a great many of the areas of dispute between the parties have been resolved by agreement between them. For example, the delay in regard to the shower seems to have been due to the Builder agreeing to alter it at the Owner's

request although the Builder maintained and still maintains that it was already in accordance with the contract. I will deal first with the Builder's claims then with the Owner's claims.

The Builder's claims

9. The balance due under the Contract

It was not disputed that the amount of \$5,000.00 was withheld by the Owner on account of the claims with respect to liquidated damages and the damage to the rug. Liability for this sum depends upon the outcome of the Owner's claims.

10. Interest

The contract provides for interest on any unpaid progress payments of 15% per annum. The amount due for interest will depend upon the outcome of the Builder's claim.

11. Brickwork to sills

The evidence is that the Builder agreed to do this as a goodwill gesture. It cannot now claim payment for something it agreed to do for nothing.

12. Timber floor

The Owner complained about the floor and the Builder contended that it was in accordance with the contract. The dispute was resolved by the Builder agreeing to remove the floor and give a credit to the Owner, which was done. The parties having agreed to this resolution the Builder cannot now seek to reclaim the amount for the floor.

13. Power points

The specifications do not provide for power points. Mr Michael Harrison said that they were omitted by mistake. They were put in as part of the work and not charged for. It is not suggested that was considered an extra at the time. There was no agreement for any payment or any claim for a variation at the time, nor were the requirements of the Act concerning variations complied with.

14. The rangehood

The range hood was not vented through the roof. The Owner complained and the Builder agreed to vent it through the roof. That was a resolution of a dispute and there was no agreement for any payment nor any claim for a variation at the time. As with the power points, I think it is too late to claim this now.

15. Mending of cracks and holes in existing brickwork

This was something done that was quite extraneous to the contract. While the Builder was fitting a window the Owner asked if some problems with the mortar elsewhere in the house could be rectified. There was no charge made at the time but the Builder did not agree to do it for nothing. It was quite patently outside the scope of the contract. The work having been requested by the Owner in circumstances that do not indicate that it was to be done for nothing, he should pay a reasonable price for what was done. On the evidence as to the time taken and the hourly rate charged I accept the Builder's figure of \$200.00.

The Owner's claims

16. Loss of rental income from the flat

The claim for loss of rental income from the flat is for \$2,160.00. There is no evidence as to what the flat was rented for or when it was last rented. However the Owner said that it was his intention to rent the flat as soon as the renovations were completed. He complained that the floor in the flat was scratched when the Builder stored timber it but that dispute was resolved by agreement. The substantial reason given by the Owner for not having rented the flat was that he needed to use the shower due to delay in having the shower that had been built by the Builder in the house modified to the way he wanted it. There is insufficient evidence for me to find that the shower as originally constructed was not in accordance with the contract documents. There is an abundance of evidence that the Owner considered it unsatisfactory, bearing in mind the limited mobility of another occupant of the house. The dispute about the shower screen and base was settled by agreement. It is not suggested that there was any provision in that agreement for loss of use of either the house or the flat while the shower was modified to suit the Owner's requirements.

Liquidated damages

17. The alternate claim for liquidated damages. The Builder relied upon Clause 34 which limits the Owner's entitlement to liquidated damages from the end of the building period until the date the Owner takes possession of the land. I asked the Owner in what respect the works were incomplete rather than merely defective at the time the construction period was over and the instances he gave were of defective rather than incomplete work. In support of his contention that the work was finished late he produced to an account from the Builder with respect to the decking which was dated in February. However it transpires that that is the third version of that account, the original having been sent in November. The invoice from the carpenter for the decking supports the Builders evidence that it was built within time.

18. I am not satisfied that it has been proven that the work ran over time although it seems clear that the Owner had many complaints which were resolved by agreement whereby the Builder returned and did further work which extended into February. There was no evidence that it was a term of any of the agreements resolving these disputes that the Builder would pay a penalty or any damages to the Owner for loss of use of any part of the premises while the remedial work was being undertaken. The Owner was in occupation of the house throughout.

The television cabinet

19. The Owner complained of scratches in the top of the cabinet which he said were caused by the Builder. The cabinet was in a corner in which an air conditioner was replaced. From the photographs tendered I accept that it is likely that they were caused by something being pulled across the surface. Statutory declarations have been filed by the Builder from the various tradesmen who worked on the site all denying that they caused any damage to the TV cabinet or the rug. The Owner said in evidence that they had not been there before and the Builder's workman were in that area doing substantial work. The Owner has been questioned by me and the tradesmen who made the declarations have not appeared. The marks are obvious and would have been noticed if they had been there before the Builder started work. On balance, I think it is reasonable to infer that they caused the damage. The Owner claims \$400, being the value of the cabinet but that is

excessive. No quotation for the repair of the scratches was obtained but it seems likely from the photographs that the scratches could be sanded off and the surface recoated. In the absence of evidence as to the cost of this I will allow \$150.00.

The carpet

20. There is a large blue rug in the middle of the room made from some synthetic material. A small section of this about the size of a twenty cent piece appears to have been melted or partially dissolved. The Owner blames the Builder, saying that it had not been there previously but it is well away from the corner where the Builder's men were working and the room was used at the time by the Owner as well as the Builder. There is no explanation as to what caused the damage. I suggested that it might be a cigarette burn but the Owner said that it was bigger than that and the Builder's witnesses said that their workman were not permitted to smoke indoors. There is no evidence that this damage was caused by the Builder's workmen to contradict the Statutory declarations filed.

The mortar in the brickwork

21. The Owner complains that the mortar in the brickwork laid by the Builder does not match the mortar in the existing brickwork. From the photographs he produced it looks somewhat lighter. Both Mr Michael Harrison and Mr Richard Harrison said that colour in mortar is hard to match because it largely depends upon the colour of the sand used. They said they used the usual mix of six parts of normal bricklayer's sand to one part of lime and one part of cement and the mortar colour in the brickwork they laid was what one should expect. They said the original brickwork would have had a similar mix but the sand would not have come from the same source. Mr Richard Harrison said that perhaps the darker colour in the existing mortar was caused by pointing the beds and perpends when they were too dry. The hard photograph tendered shows some blue colouring on the surface of the original mortar which I think would not have been from the mortar itself.
22. There is no evidence from any qualified witness except for Mr Richard and Mr Michael Harrison and they both say the work was done in a proper and

workmanlike manner. The difference in colour is not so great as to entitle me to disregard this evidence so the claim is not established.

Interest

23. By clause 34.0 of the contract, if the Owner does not pay the final payment within 7 days the Builder is entitled to interest at the rate of 15% per annum. One of the invoices for the final payment tendered is dated 5 January at the top and 5 February at the bottom. The document says that payment can be made within 7 days. This is a re-issue of an earlier invoice and exactly why it was thought necessary to send a fresh invoice is unclear. (It was reissued again on 6 March when further adjustments were made to the figures but in the meantime the part payment had been made by the Owner). The Owner was given 7 days from 5 February 2006 to pay the invoice bearing that date and he only paid part of it. I have found that he should have paid it all, subject to an offset for the television cabinet of \$150. Interest should not be awarded on the \$200 awarded for the brickwork because this was outside the contract. Interest on \$4,850 from 12 February until 29 June 2006 is \$273.

Order to be made

24. The Builder is entitled to \$4,850 plus interest of \$273 and \$200 for the work on repairing the mortar. Since these figures take into account the counterclaim of the Owner there will be an order that the Owner pay to the Builder the sum of \$5,323. The counterclaim will be dismissed.

SENIOR MEMBER R. WALKER