

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### Catchwords

Domestic Building List – settlement of claim by owner against builder for rectification of defects. Repudiation of settlement agreement. Claim by builder for damages. Counter claim by owner for rectification and delay. Estoppel of counter claim.

### DOMESTIC BUILDING LIST

**VCAT Reference: D672/2009**

**APPLICANT** Sayed Rustom T/A Snab Home Improvements

**RESPONDENTS** Ahmed Souleiman and Nada Souleiman

**WHERE HELD:** Melbourne

**BEFORE:** Member D O'Halloran

**HEARING TYPE:** Hearing

**DATES OF HEARING:** 08 and 09 April 2010

**DATE OF ORDER:** 28 April 2010

**DATE OF REASONS:** 28 April 2010

**CITATION:** Rustom trading as Snab Home Improvements v Souleiman (Domestic Building) [2010] VCAT 510

### ORDER

- 1. The respondents pay the applicant the sum of \$36,887.37.**
- 2. Costs and interest reserved – liberty to apply.**

### MEMBER D O'HALLORAN

#### APPEARANCES:

For Applicants: Mr A. Ritchie of Counsel, instructed by Graham Legal, Barristers and Solicitors

For Respondent: Mr B Carew of Counsel, instructed by Kalus Kenny, Lawyers

## REASONS FOR DECISION

### Background

- 1 The applicant carries on business as a domestic builder.
- 2 The respondents are the owners of a home and land at Lot 4 Murray Road West Preston, Victoria (the premises).
- 3 Pursuant to a contract between the parties, the applicant performed building work at the premises between January 2007 and February 2009. The building work consisted of an upper story renovation and extension of the premises. The date of the contract and the scope of the work are very much in dispute.
- 4 In February 2009, a dispute arose between the parties.
- 5 The respondents made separate application to the Tribunal, seeking;  
That the Builder complete all incomplete works in accordance with the Building Contract, plans and specifications. That the builder rectify all defective items. Alternatively that the builder pay the costs of completion and rectification. Compensation for loss and damage on the following grounds – The Builder has failed to complete works in accordance with the Building Contract, plans and specifications. (See attached inspection reports).
- 6 The amount claimed for the cost of completion and rectification was not detailed.
- 7 The parties attended mediation at the Tribunal on 02 April 2009. The first named respondent attended in person, with his solicitor, at the time. The applicant attended in person with his wife. A Tribunal Member mediated.
- 8 At the mediation, the parties signed handwritten terms of settlement.
- 9 The settlement required the builder to attend to 16 specified items requiring completion or rectification, to confirm he had attended to those items and to provide the owners with the opportunity to inspect the work. The owners were then required to obtain an Occupancy Permit. On receipt of the Occupancy Permit, the builder was required to hand over possession of the premises and contemporaneously the owners were required to provide the builder with a bank cheque in the sum of \$50,000.00. Within six months of the date of this payment, the owners were required to pay the builder the further sum of \$5,000.00.
- 10 The parties agree that no further work has taken place and there has been no payment of any further amounts.
- 11 The applicant initiates the current proceedings and they relate to the settlement of the respondent's earlier application to the Tribunal.
- 12 In addition to the evidence and submissions made during the course of the hearing, both parties filed written submissions. I have considered those submissions in the preparation of the order and these reasons.

- 13 The applicant filed further submissions in response to the respondents' submissions. Those further submissions were filed without leave and have not been considered in the preparation of the order and these reasons.

### **The Applicant's Claim**

- 14 By email dated 28 April 2009, the applicant advised his availability to commence the works, the subject of the abovementioned settlement agreement, on 04 May 2009.
- 15 By email attachment of 30 April 2009 the respondents advised that they had been unable to secure funds in the amount of \$50,000.00 and that they were in a position to pay the sum of \$25,000.00 within the settlement time frame and a further \$1,000.00 each month.
- 16 By email, dated 03 May 2009 the applicant rejected the respondent's proposal. The applicant requested proof that funds were available prior to commencing any work.
- 17 The applicant has never received advice that the respondents could or would make payment in accordance with the settlement agreement. Additionally the applicant accepts he has not performed the work detailed within the settlement agreement.
- 18 By email of 29 June 2009, the applicant advised the respondents that suppliers were seeking monies owed and would remove the kitchen cupboards and cooling system from the premises in the event of non-payment. The applicant confirmed that in the absence of payment the applicant would give the suppliers access to the premises to remove these items.
- 19 The parties agree that on 03 July 2009 they had a heated and intense telephone conversation.
- 20 The applicant says that the first named respondent advised him that he had changed the locks to the premises, as he did not want the applicant to return to the premises.
- 21 The applicant says that he had completed the building works in August 2008. He says that a final inspection took place on or about 08 August 2008. He says that a building surveyor, Mr J T De Jong of Nanjey & Partners attended, at this inspection. Mr De Jong has provided a letter dated 10 August 2008. The parties agree the letter is incorrectly dated and should carry the date 08 October 2008.
- 22 The letter from Mr De Jong refers to the fact he attended the premises for a final inspection and that there are 29 listed items requiring rectification. Mr De Jong did not give evidence.
- 23 The applicant maintains that the building works were completed and the list from Mr De Jong relates to rectification, not completion. This is consistent with the letter from Mr De Jong.

- 24 The applicant submits that he was ready willing and able to carry out the rectification work detailed within the settlement agreement. The applicant further submits that the respondents repudiated that agreement by virtue of the email of 30 April 2009 and/or the telephone conversation of 03 July 2009 and the fact the respondents changed the locks to the premises, thus denying the applicant access to the premises.
- 25 By letter dated 10 July 2009 from the representatives of the applicant to the representatives of the respondents the applicant says that he accepted the respondents' repudiation of the settlement agreement and demanded payment pursuant to that agreement.
- 26 The applicant says that the works under the contract are completed and he is therefore entitled to the balance payable under the contract, that is, \$55,000.00, less what it would have cost him to complete the rectification work detailed in the settlement agreement.

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

- 27 The respondent maintains that as of February 2009 the works, the subject of the building contract, were not completed. The respondent further maintains that the settlement agreement contemplated a completion of the applicant's obligations under the building contract.
- 28 The respondents maintain that all rights and obligations under the settlement agreement are extinguished because the actions of the applicant resulted in the termination of the settlement agreement. The respondents say that in those circumstances the party's rights and obligations revert to those applicable to the building contract itself.
- 29 The respondents submit that in these circumstances the applicant has no right to the payment, the subject of the settlement agreement, as he has not performed the works, the subject of the settlement agreement.
- 30 In addition, the respondents' position is that the contract provided for completion within 330 days, after commencement of works. The parties agree that work commenced in or about February 2007 and therefore, in accordance with the contract, were due for completion, in or about December 2007.
- 31 The parties agree that the contract provides for the payment of liquidated damages for late completion at the rate of \$250.00 per week.
- 32 The respondent claims \$19,750.00 for late completion.
- 33 The respondent says that the settlement agreement provides that the applicant complete and/or rectify specified items. The respondents say their expert has costed the completion and/or repairs at \$27,324.00. The respondents claim this amount from the applicant.
- 34 The respondent says that the letter from Mr De Jong details other defects that the applicant must rectify. The respondents say that their expert has

costed rectification at \$17,219.00. The respondents claim this amount from the applicant.

- 35 The first respondent says that he did not tell the applicant he had changed the locks but rather that he wanted to change the locks. He also denies telling the applicant he would not let him finish the work.
- 36 The first respondent maintains that he did not repudiate the settlement agreement and that by letter dated 17 July 2009 from his representatives, he advised the representatives of the applicant that he was willing to comply with the terms of the settlement agreement.
- 37 By letter dated 10 August 2009, the representatives of the respondents advised that they were of the view that the applicant had repudiated the settlement agreement and on behalf of the respondents, they accepted that repudiation.

### **Evidence and Findings of Experts**

- 38 The applicant has provided a report from Mr Roy Harding & Associates. The respondent has provided a report from Mr Tony Croucher of Buildspect Building Consultants.
- 39 The report from Mr Harding relates to the matters detailed in the settlement agreement. The report costs the rectification work at the rate applicable to another builder performing the work and at the rate applicable to Mr Rustom performing the work.
- 40 The report from Mr Croucher confines the costing to the rate applicable to another builder performing the work but also includes the cost of the rectification work detailed in the letter of Mr De Jong, referred to above.
- 41 Mrs Rustom, the bookkeeper for the applicant, confirmed that the applicant's charge out rate is \$350.00 per day.
- 42 In the costing applicable to the applicant performing the work, Mr Harding has allowed \$45.00 per hour, being the applicant's charge out rate, except where an expert or specialist is required and then the rate applicable to the expert or specialist is applied.
- 43 Mr Croucher has applied the rate chargeable by the relevant expert or specialist.
- 44 Mr Croucher has allowed 10% for contingencies and 30% margin for all items. Mr Harding has allowed 25% for overheads and profit for all items and has factored into individual items, contingencies where there is an uncertainty.
- 45 The experts gave evidence together and were cross-examined by Counsel for both the applicant and respondent.
- 46 Mr Harding challenged the 10% contingency allowance that Mr Croucher applied in all cases. Mr Croucher submitted that you could never be sure of what lay ahead. I note that in some items, Mr Croucher has allowed not

only the 10% contingency, but also extra time to account for unforeseen difficulties. I am not satisfied that this practice can be defended as a general rule.

- 47 Mr Croucher's costing for the De Jong items is at the rate for a builder other than the applicant and includes an allowance of 10% for contingencies and 30% for profit margin. Mr Croucher presented no evidence of the applicable contingencies and I am not satisfied that in the absence of a demonstrated unknown or doubt, I should allow that inclusion.

### **Evidence of delay**

- 48 There is a significant dispute between the parties concerning the plumbing works, the laying of tiles and the supply and fixing of new kitchen cupboards. Did the contract provide for completion of these items by the builder or the owner?
- 49 The applicant says that a significant element of any alleged delay relates to the respondent's failure to complete the kitchen works.
- 50 The respondents say that any delay is the fault of the applicant and the documentation relating to alleged extensions of time does not satisfy the contract's requirements and does not excuse the applicant for the delay.
- 51 As will be apparent, it is not necessary for me to make findings as to the issue of delay.

### **Findings**

- 52 In their letter of 30 April 2009, the representatives of the respondents advise that the respondents are unable to secure the funds the subject of the settlement agreement. The respondents propose an alternative method of payment.
- 53 The applicants say that this amounts to an anticipatory breach of the settlement agreement.
- 54 I am satisfied that at this time the applicant was ready willing and able to perform the contract<sup>1</sup>.
- 55 The content of the telephone conversation between the parties of 03 July 2009 is in dispute. I prefer the version provided by the applicant. It is consistent with the events leading up to that conversation. I am satisfied that the first named respondent rang the applicant in response to the applicant's letter of 29 June 2009 and the advice that suppliers may seek to remove items from the property. I am satisfied that the first named respondent saying he had changed the locks is more consistent with this turn of events.
- 56 I am satisfied that at the time of this conversation the applicant was ready willing and able to perform the contract.
- 57 Consequently, I am satisfied that by their actions, being the letter of 30 April 2009 and/or the telephone conversation of 03 July 2009 the respondents repudiated the settlement agreement and the applicant accepted that repudiation.

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<sup>1</sup> *Foran v Wight* (1989) 168 CLR 385 at 422.

- 58 The parties agree the builder has not completed the work contemplated by the agreement and the owner has not paid monies contemplated by the agreement. I do not accept the respondent's submission that in those circumstances the party's rights revert to the building contract itself.
- 59 I am satisfied that there was substantial completion of the building work in accordance with the contract, as of the date of the final inspection with the building surveyor, Mr De Jong, in August 2008.
- 60 The detailed list of rectification items prepared by Mr De Jong and the list of rectification items being the subject of the settlement agreement is support for this finding. These are items of defects requiring rectification, not items requiring completion.
- 61 As such, I am satisfied that the parties chose to crystallise or finalise their dealings by way of the settlement agreement. The respondents had the benefit of legal representation at the time of the settlement agreement.
- 62 Repudiation of the agreement by the respondents therefore entitles the applicant to seek damages being the loss arising from the settlement agreement and not the contract itself.
- 63 I am satisfied that the loss suffered by the applicant is the \$55,000.00 less the cost of rectification. The issue for the Tribunal is to determine the cost of rectification.
- 64 At the time of the settlement agreement, the respondents had full details of the defects within the De Jong letter. The full details of the liquidated/delay damages were also known to the respondents on that occasion.
- 65 Neither the defects within the De Jong letter, nor liquidated/delay damages form part of the settlement agreement.
- 66 The applicant argued that the respondents are estopped from claiming the De Jong items and/or liquidated damages as these are items that were known to the respondents at the time of the settlement agreement, but are not included as part of that agreement.
- 67 The often-quoted decision of *Port of Melbourne Authority v Anshun Pty Ltd*<sup>2</sup> provides support for the position that estoppel will only arise where a party, in subsequent legal proceedings, seeks to expand the matters that were the subject of an earlier judgement or adjudication, arising from the same cause of action.
- 68 There was no judgement or adjudication in this matter.
- 69 However, the decisions of *Wells v D'Amico*<sup>3</sup> (a decision of the Supreme Court of Victoria) and *Prestwich v Hirschfeld*<sup>4</sup> (a decision of Deputy President McNamara of this Tribunal) make it clear that estoppel may apply equally to a settlement as to a judgement, where the cause of action is the same.

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<sup>2</sup> (1981) 147 CLR 589.

<sup>3</sup> [1961] VR 627.

<sup>4</sup> [2001] VCAT 2416.

- 70 The cause of action in this matter arises from the work performed by the builder, for the owner, under a building contract signed by both parties. The allegations relate to the work performed by the builder and to payment by the owner. I am satisfied that in this case the cause of action resulting in the settlement agreement is the same as the cause of action, the subject of these proceedings.
- 71 In other words, I am satisfied that in their counter claim to the applicant's present proceedings, the respondents are seeking to re-agitate the same cause of action that was the subject of their earlier proceedings and the settlement agreement.
- 72 At the mediation in April 2009, the respondents compromised their rights, as did the applicant. By virtue of the compromise or settlement, the respondents are estopped from seeking to expand their rights beyond the details of the settlement agreement.
- 73 I am satisfied that the cost of rectification is the cost of the applicant completing the rectification of the items contained within the settlement agreement and not the items referred to within the De Jong letter. The settlement agreement contemplates the applicant performing the rectification work, not another builder.
- 74 The costing from Mr Croucher is on the basis that another builder carries out the work. The report is nevertheless useful as his comments and calculations relating to time and work are certainly helpful in the calculation of the cost to the applicant of the rectification.
- 75 Concerning Mr Croucher's report for the settlement agreement items, as previously stated, I would immediately reduce that costing by 10%, as there is no evidence of the uncertainties or contingencies allowed.
- 76 Mr Croucher has also allowed an additional 30% for the margin. The margin is to cover preliminaries, permit fees, warranties, overheads, supervision and profit.
- 77 Mr Harding has an overhead allowance of 10%. This includes the allowance for the site clean and removal of debris (except that debris related to the footpath repairs). The allowance does not include costs associated with supervision and/or administration of the works by the builder, the applicant.
- 78 Profit should not be a part of the margin/allowance as the profit figure is already part of the contract price. I consider that an allowance of 20% is appropriate for overheads, including the remaining items referred to in Mr Croucher's margin.
- 79 Both experts have included GST at 10%. This should not be included as it is not a cost to the builder. The builder is entitled to a GST rebate back from the federal government.
- 80 Doors; Mr Harding conceded he made no allowance for the possibility that doors would be out of alignment. In those circumstances, I consider Mr Croucher's estimate of 14 hours as a more reasonable estimate. Mr Croucher has allowed \$65.00 per hour, that being the reasonable cost of a carpenter. Mr Harding allowed \$45.00, being the applicant's charge out rate. I am satisfied that the applicant would perform the work himself. I allow 14 hours at \$45.00, \$630.00 plus \$120.00 for materials, a total of \$750.00.

- 81 Balcony drainage; Mr Croucher simply accepted Mr Harding's estimate, which, like Mr Croucher allows the rate for a plumber completing the work. Including materials, I allow \$247.50.
- 82 Garage kitchen ceiling; there was a difference between the experts as to whether the ceiling needed removal prior to refixing or whether it could just be refixed. Neither expert could identify the cause of the defect without further examination. The question for the Tribunal is whether it is reasonable to go to the extra lengths recommended by Mr Croucher. I am satisfied that Mr Harding has proceeded on a best case scenario and Mr Croucher a worst case scenario. I am also satisfied that given the size of the ceiling it is unlikely simple refixing can repair it. Mr Harding also argued that there should be a level of tolerance even when the ceiling was not level. He said that this level would depend upon how the ceiling appeared visually. I allow 16 hours as a compromise of the opposing arguments. I am satisfied that the applicant would perform this work and the charge out rate should be \$45.00 per hour. I allow \$400.00 for materials making a total of \$1,120.00 for this item.
- 83 Sub floor access; Mr Harding relied upon an invoice for the door that Mr Croucher assumed was on site. Mr Croucher therefore accepted Mr Harding's estimate of four hours. I agree save that, I allow the rate per hour of \$55.00 for a carpenter. Including materials I allow \$966.36.
- 84 External plumbing outlets; there is an allowance from Mr Croucher for additional pipes. This is on top of his 10% allowance for contingencies. This is excessive. I allow 4 hours at a plumber's rate of \$70.00 per hour, plus materials of \$55.00, a total of \$335.00.
- 85 Upstairs kitchen, Mr Croucher suggests alternative ways of resolving the defect. Mr Harding accepts that cabinetmakers will not attend on site for short periods and there are several items requiring attention. Mr Croucher accepts that Mr Harding's kick board solution may be viable but that even that solution would exceed three hours. I am satisfied that five hours at cabinetmaker's rates of \$70.00 per hour is appropriate for this item. With materials of \$150.00, I allow \$500.00.
- 86 Downstairs kitchen cornice; Mr Harding says it is simply a matter of refixing. Mr Croucher provided a photograph and gave a detailed description of the work required. This work included removal from the bulkhead and it is a sizeable item. I accept Mr Croucher's estimate of six hours in this regard. I am satisfied that the applicant would perform this work. With materials, the total for the item is \$360.00.
- 87 External bolts; both experts agree it is a two-hour job. I am satisfied that the applicant could perform the work. I allow \$110.00, which includes materials.
- 88 External outlets, two hours at plumbing rates of \$70.00 per hour is appropriate. With materials, the total for this item is \$215.00.
- 89 Stairwell wall, the difference between the experts was the need for preparation. Mr Croucher had a recollection of nail pops and a patching. His recollection was

clear. Mr Harding had no such recollection. I accept the estimate of four hours at \$45.00 per hour, plus materials of \$45.00, a total of \$225.00.

- 90 Patch external render and filler to bedroom 1 window; Mr Harding confirmed that he had not observed any need for external repair. Mr Croucher confirmed the first named respondent took him to the site of the defect and he was satisfied that the site was consistent with the terms of the settlement agreement. In the circumstances, I accept the costing of Mr Croucher and allow ten hours. I am satisfied that the applicant would perform this work and I allow \$45.00 for each of the ten hours, plus materials of \$90.00, a total of \$560.00.
- 91 Power to tool shed; Mr Croucher said that the power lines had to lie underground and the electrical safety commission would not allow overhead lines. Mr Croucher was unable to provide documentation confirming his evidence. He described it as his understanding of the requirement of the electrical safety commission. There is a significant cost difference between the two approaches. Given the cost difference I am satisfied that it is appropriate that Mr Croucher provide support for his position. I am not satisfied that he has done so. On the other hand, Mr Harding conceded that he had not made full allowances in his costing for this item. In particular, new wires would need to run back to the switchboard and there would need to be an extension at the tool shed to keep the overhead wires at sufficient height. Considering all matters, including materials, I allow \$1,000.00 for this item.
- 92 Connect external tap head; Mr Croucher confirmed he could not locate this item and he accepted Mr Harding's costing of \$105.00 which includes materials.
- 93 Rectify footpath; the experts presented two different costing methods. Mr Harding costed the rectification based on \$70.00 per square meter. He said he obtained this rate by ringing a concreting contractor. Mr Croucher calculated the cost at the rate of \$200.00 per 1.5-meter square slab. Mr Croucher based his rate on 10 years experience with building companies. Mr Harding calculated 28 square meters needing repair and Mr Croucher 23 slabs needing repair. For this item, I prefer the evidence of Mr Croucher and I allow the amount of \$4,600.00.
- 94 Supply and install windows; Mr Harding confirmed that he had measured three windows ordered by the applicant and they were the correct size. The invoice for the windows is for \$909.10. Mr Croucher had allowed \$1,500.00 for the windows but ultimately accepted the evidence of Mr Harding concerning the invoice. The Mr Harding based his costing on one person. He agreed that it was a job for two people. In addition, Mr Harding's costing makes no allowance for architraves. I am, however, satisfied that the applicant would have performed this work and the charge out rate should be \$45.00 hour. I am satisfied that \$4,000.00 is an appropriate allowance for this item, which includes, two people performing the work, the windows and other materials.

**Rectification totals**

Doors	\$ 750.00
Balcony drainage	247.50

Garage kitchen ceiling	1,120.00
Sub floor access	966.36
External plumbing outlets	335.00
Upstairs kitchen	500.00
Downstairs kitchen cornice	360.00
External bolts	110.00
External outlets	215.00
Stairwell wall	225.00
Patch external render	560.00
Power to tool shed	1,000.00
Connect external tap head	105.00
Rectify footpath	4,600.00
Supply and install windows	4,000.00
<b>Total</b>	<b>15,093.86</b>

- 95 The total for the rectification items is \$15,093.86. As previously advised it is appropriate to add 20% for overheads and therefore the total cost of rectification is allowed at \$18,112.63.

#### **Summary of Claim**

Balance payable to builder under contract	\$55,000.00
Cost of rectification	15,093.86
Allowance for overheads	3,018.77
Total	18,112.63
Amount payable by owner to builder	36,887.37

- 96 Order that the respondents pay the applicant \$36,887.37, being the difference between \$55,000.00 and the cost of rectification.
- 97 Costs and interest are reserved and there is liberty to apply. The party's attention is directed to section 109 of the *Victorian Civil and Administrative Tribunal Act* 1998.

**MEMBER D O'HALLORAN**

28 April 2010