

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1621/2016

CATCHWORDS

Domestic building – contract partly oral - terms – rectification cost – assessment – additional work done voluntarily –no contractual obligation to confer a greater benefit than that conferred – no provision for liquidated damages for delay – open to owner to prove actual loss - assessment of damages

APPLICANT	Olympia Sarrinikolaou
RESPONDENT	Gazoza Pty Ltd (ACN 100 861 961)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	25 – 26 September 2017
DATE OF ORDER	2 October 2017
CITATION	Sarrinikolaou v Gazoza Pty Ltd (Building and Property [2017] VCAT 1596

ORDERS

1. Order the Respondent to pay to the Applicant \$10,647.75.
2. Further order that the Respondent pay to the Applicant the cost of the expert's report of \$2,700.00 and the issuing fee of \$485.60, making together the sum of \$3,185.60.
3. Costs are otherwise reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant:

In person

For the Respondents:

Mr G. Risteski, Director

REASONS

Background

1. The applicant (“the Owner”) is the Owner of a single fronted single-storey Victorian weatherboard House in Footscray (“the House”) which she occupies with her mother.
2. The respondent is a Builder. Its director is Mr Risteski who is a registered Builder. He and the Owner were introduced by his wife, who is employed at the same workplace.
3. Between 26 June 2015 and September 2016 the Builder carried out renovation work on the House, comprising a small addition at the rear, repairs to the old part of the House and some landscaping work, for a contract price of \$162,000.00 inclusive of GST.
4. The Owner claims that the work was done defectively and took too long and she seeks damages for poor workmanship and various other sums. The Builder claims that it has not been paid for certain of the work, including the final payment which the Owner has withheld.

The hearing

5. The proceeding came before me hearing on 25 September 2017. The Owner appeared in person and the Builder was represented by its director, Mr Risteski. Each party called an expert building witness. The witness called for the Owner was Mr Lindberg the expert called on behalf the Builder was Mr Beck.
6. Evidence of the two experts was given currently and was completed on the morning of the first day. There was little disagreement between the experts as to either the defects or the cost of rectification.
7. Following their concurrent evidence, the experts were excused and I heard the evidence of the Owner and Mr Risteski. The evidence concluded on the morning of the second day. There was a great deal of written material relied upon and so I informed the parties that I would provide a short written decision after I had read it.

The agreement

8. The form of contract entered into between the parties was a Master Builders Association home improvement contract. It was signed by the parties on 4 March 2015.
9. The plans for the work comprised a single sheet prepared by a designer engaged by the Owner and three pages of engineering drawings, including a design for a raft slab that was not ultimately used, which was prepared by an engineer, also engaged by the Owner.
10. Before signing the contract the Owner and Mr Risteski walked through the House and the Owner explained to Mr Risteski what it was that she wanted. During the course of the conversation, which appears to have been amicable, Mr Risteski asked the Owner what her budget was and she said

that it was \$150,000.00. Mr Risteski told her that he would see what he could do.

11. Mr Risteski prepared a document headed “Pella Homes – Inclusions and Specifications” setting out what was included and specifying a price of \$162,000.00, inclusive of GST. Upon reading this document, which was later incorporated into and forms part of the contract, the Owner noted that there were a number of things that she had discussed with Mr Risteski that were not listed and she spoke to him by telephone to confirm that they were to be included. She said that he agreed that they would be. Mr Risteski agreed in evidence that some further matters were included but denied others.
12. The contract was subsequently signed. It provided for a construction period of 165 calendar days but no provision was made for liquidated damages. The form of contract used provided that, in those circumstances, no liquidated damages applied.
13. The Owner and her mother moved out of the House for most of the period of construction and lived in an apartment belonging to a relative at a modest rent of \$1,000.00 a month.
14. During the course of construction some additional work was done by the Builder at the Owner’s request. This included painting the old part of the House which was not included in the contract price and for which the Builder made no charge. The Builder also sanded and sealed the timber floor in the old part of the House at cost.
15. The Owner became dissatisfied with the progress of the work and complained about the quality of the workmanship. She said that the fixing payment was claimed prematurely by the Builder but that she paid all of the instalments of the contract price, save for the final payment of \$8,100.00.
16. The Owner and her mother moved back into the House in mid-April 2016. The precise date is unclear. Work continued on the outside of the House and some inside work was done but the Owner said that it was intermittent.

The scope of works

17. It was agreed by Mr Risteski that the contract documents and the inclusions list do not contain all of the work that was to be done for the contract price. I make the following findings as to the additional work that was included.

- (a) The pergola

During the course of discussions prior to entering into the contract, the Owner gave the Builder a written sketch of a pergola and decking at the rear of the House. In the inclusion list there is reference to “sitting benches and cover as per client’s request” but the word “pergola” was not used. There were two alternative designs and the Owner said that the larger design was the one that was agreed upon. Mr Risteski agreed that was the case.

- (b) Air-conditioning

No air-conditioning is included in the contract documents or in the four-page inclusion sheet but Mr Risteski agreed that as part of the job the old air conditioner in the kitchen was to be replaced. He said that the supply and installation of the air-conditioners in the two bedrooms were an afterthought by the Owner. The Owner claims that they were always to be included but I thought her evidence was somewhat vague on this point. The invoices from the Builder's subcontractor indicate that the air conditioners in the kitchen and in the first bedroom were supplied at the same time whereas the air-conditioner in the second bedroom was invoiced six weeks later. This supports the Builder's contention that the latter air-conditioner was that an afterthought. I find that the additional air-conditioner in the second bedroom was an extra that was requested by the Owner for which the Builder is entitled to payment. I find that the other two air-conditioners were included in the scope of works.

(c) Painting the old section of the House

This was not included but Mr Risteski said that he did it at no cost to the Owner. The Owner acknowledged that she did not pay for the painting of the old section of the House but she nevertheless complained about the quality of the work and what she said was the absence of preparation.

(d) Fly screens

There is no mention of fly screens in the contract documents but Mr Risteski acknowledged that they were to be supplied.

(e) Sliding security door

The rear extension included a double sliding door. The Owner said that there was to be a sliding security door supplied as well. There is no mention of that in the contract documents. Mr Risteski agreed that a sliding fly wire door was to be provided but not a security door, which is more expensive. In the absence of any documentary evidence I not satisfied that a security door was to be supplied.

(f) Other items that were supplied although not in the contract documents were a sensor light and doorbell and a side gate. The Builder also removed some old plastic cladding from the weatherboards of the House and replaced the degraded weatherboards underneath at no charge.

The Owners claim for defects

18. The expert evidence establishes the following items of defective and incomplete work. The rectification costs are gross costs for labour and materials, before addition of GST or any Builder's margin.

(a) Front footpath \$1,250.00

In the course of replacing the old wall in front of the property with a new picket fence, the concrete pavement was broken up adjacent to

the fence and has to be reinstated. Mr Lindberg assessed a cost of \$1,770.00. Mr Beck assessed a cost of \$695.00. Looking at the photographs there does not appear to be a great deal to be done. One expert is as likely to be as right as the other and so I will allow \$1,250.00.

(b) West elevation pathway \$3,200.00

The works included taking up an old concrete path up the side of the House and replacing it with pavers. Mr Risteski suggested that there was a danger that underlying pipework might be damaged if the old concrete work was lifted and that it would be better to lay a fresh concrete path over the old path. The Owner agreed but the work was never done. Mr Risteski said that he was delayed until the end of the job and was then prevented from laying the concrete, first by bad weather and then by the Owner refusing access. The work had not been done by September and the Owner is entitled to the cost of having it done by someone else. Mr Lindberg has assessed a cost of \$4,960.00 whereas Mr Beck has assessed a cost of \$2,704.75. Neither expert has costed the agreed scope of works, that is, providing a new path over the old. Removing the demolition costs from Mr Lindberg's figures that reduces his assessment to \$3,640.00. Taking into account that there will be less concrete used, I will allow figure of \$3,200.00.

(c) Painting \$1,927.50

Mr Lindberg allowed \$2,750.00 to rectify various deficiencies in the painting both inside and outside the House. Mr Beck allowed \$1,727.50 but he conceded during his evidence that he should have allowed an extra \$200.00 for materials. Much of Mr Lindberg's allowance relates to the area in the old part of the House that was painted by the Builder without charge. The Owner complained that there was insufficient preparation for this part of the work. Mr Risteski said that it was done as a favour to the Owner so that the colours of the old part of the House would match the colours in the new part of the House. It was not suggested that the internal surfaces of the House were made worse by this work that the Builder did for nothing. The complaint appears to be that it was not done to a better standard. If something is done as a favour to the Owner then the benefit is what she receives. She cannot complain that she should have been given a greater benefit than she was for nothing. I am not satisfied that she is entitled to ask for any more than she received. Consequently, I will allow Mr Beck's adjusted figure which does not take account of these areas.

(d) Downpipes \$291.25

Two downpipes on the west side of the veranda required connection to the stormwater system. Mr Lindberg allowed \$287.50 Mr Beck allowed \$295.00. I will take a midpoint and allow \$291.25.

- (e) Timber gate \$112.50
The gate installed by the Builder requires repair, having been broken by the Builder's workmen, also adjustment so that it opens and closes easily. Mr Lindberg has assessed a cost of \$112.50 which will be allowed.
- (f) Window flashing \$500.00
The flashings above the windows and doors on the west and north side of the House have not been properly fitted. Mr Lindberg has assessed cost of \$140 whereas Mr Beck's figure was much higher, at \$695.50. During the course of the concurrent evidence, there was discussion as to the scope of works required and it appears the cost will be likely to be approximately \$500.00. That figure will be allowed.
- (g) Air conditioning ducts \$350.00
The Owner and her fiance complained that the drainage pipes from the internal air conditioning units were not roughed in to the wall frame. Instead they were passed through the wall in each case to the external face of the weatherboard wall and are then directed through a special conduit to a downpipe. After hearing the evidence of Mr Lindberg and Mr Beck in this regard, I am satisfied that what the Builder did is appropriate whereas the alternative, namely drilling holes in the studs of the old wall sufficiently large to accommodate the drainpipes was, according to Mr Beck, problematic. I cannot find on the balance of probabilities that what the Builder has done is defective except that, where the internal pipe emerges from the conduit, it slopes up to the hole in the downpipe. It was agreed in the course of evidence that the downpipe has to be replaced so that the pipe can flow downwards into it. The cost of doing that is \$350.00 and that sum will be allowed.
- (h) Rattling Builder's wrap \$365.00
The Builder's wrap installed under the weatherboards is exposed in parts and needs to be covered by quad in order to prevent it from rattling in the wind. Mr Lindberg assessed the cost at \$255 whereas Mr Beck assessed it at \$467.50. One is as likely to be right as the other so I will take a mid-point of \$365.00.
- (i) Rear courtyard \$970.00
The paving in the rear courtyard slopes towards the House stop it needs to be aligned so that water is directed away from the House stop since I accept the methodology of Mr Lindberg accept those costing of \$970.00.
- (j) Roofing the pergola \$2,500.00
The pergola needs to be roofed and to have guttering and a downpipe attached. Mr Risteski said that the work was delayed while Fiona made up her mind about possible roofing material she wanted. Whatever the reason, the work needs to be done and the Owner is

entitled to the reasonable cost of having someone else do it. Mr Lindberg has assessed the cost of \$3,860.00 whereas Mr Beck has assessed a cost of only \$810.00. The difference appears to depend upon how elaborate the structure is to be and there are no detailed plans or specifications of what was contemplated. Mr Risteski said that his carpenters had constructed the pergola to receive a roof that would slope into a box gutter. And that is ready to receive the roofing material which, he said was intended to be a transparent laserlite. Doing the best I can on the inadequate evidence I will allow \$2,500.00.

- (k) Scratch on the floor \$380.00
There is a scratch on part of the floor of the old part of the House apparently occurred while the Builders work were assisting the Owner to move her furniture. I will allow Mr Lindberg's figure of \$380.00 to re-seal and re-sand the floor, which compares favourably with what it cost to sand and seal it in the first place.
- (l) Caulking in wet areas \$230.00
The caulking is deficient in part of the basin and in the shower screen. This is agreed and I will allow a figure of \$230.00, being a midpoint between the assessments of the two experts.
- (m) Joinery \$421.25
There are a number of items of joinery shown in the photographs that require adjustment or minor repair. I will allow \$421.25, being the midpoint between the assessments of the two experts.
- (n) Laundry door \$365.00
A sheet of glass internal laundry draw scratch requires replacement. I accept Mr Lindberg's assessment of \$365.00.
- (o) Laundry floor transition \$50.00
There is a slight trip hazard at the entrance to the laundry due to a difference in finished floor height. I accept Mr Lindberg's assessment of \$50.00 to install a piece of quad at the entrance door
- (p) Meals area ceiling \$2,265.00
The ceiling is not level requires removal and packing of the underside of the trusses. There is a substantial difference in the costing of this item, with Mr Beck's costing being more than that of Mr Lindberg. After listening to the experts I think that Mr Beck's costing of \$2,265.00 is more likely to reflect what the Owner will need to spend to get the problem addressed.
- (q) Toilet door latch \$32.50
The latch does not work and requires adjustment. Allow Mr Beck's figure of \$32.50.

The quotations

19. Both sides produced quotations, showing a great divergence in what it is claimed it will actually cost the Owner to rectify the defects complained of. The authors of these quotations were not called.
20. Although it might be argued that quotations may reflect the actual cost, as I pointed out during the hearing, a quotation is a statement of what the author of the document wants to do the work. It does not purport to be an assessment of the fair and reasonable cost, which is what I must allow.

Builder's margin

21. The experts differed in their approach to a Builder's margin on the base cost of rectification, in that, whereas Mr Beck added a Builder's margin of 25%, Mr Lindberg simply added an amount of \$6,150.00 for the cost of a supervisor. The difficulty of adopting Mr Lindberg's approach is that the amount that he has assessed is the cost of supervising all of the items he listed and I have not allowed them all. I do not know how to adjust his figure to suit the findings that I have made. Mr Beck's approach is that more commonly adopted in this Tribunal and has the advantage of taking into account a margin on the actual work that is allowed for.
22. The total of all of the defects assessed as above is \$15,210.00. Adding Builder's margin of 25% brings the figure to \$19,012.50 and with GST it becomes \$20,913.75.

Other claims

23. The Owner makes the following further claims:

- (a) Alternate accommodation \$1,000.00

Rental of alternative accommodation is claimed for the months of March and April \$1000.00. The rental was in an apartment owned by a relative of the Owner and the rate claimed of \$1,000.00 a month seems modest. It was known and acknowledged by the Builder that the Owner of the mother had to be accommodated elsewhere upon the work was carried out. Since the evidence is that work commenced on 20 June 2015, the building period permitted by the contract of 165 days expired, on my calculation, on 1 December 2015. Defence of this claim the Builder pointed out that there was no provision in the contract for payment of liquidated damages. That is so, but that does not mean that the Builder is not answerable in damages if it does not meet its contractual obligation to complete the work here. It simply means that the Owner must prove the amount of any damages. The amount claimed will be allowed.

- (b) Cost of inspection report

The Owner obtained the services of a property inspection company to conduct the inspection on 9 June 2016 at a cost of \$440.00. The author of this report was not called to give evidence. Although it may have

been considered by the Owner prudent to obtain this report it was not something that was I do not regard this as being a loss arising from the breach by the Builder of the contract. Had the author of the report been called, this might have been part of a claim for costs.

(c) Report by Mr Lindberg

The Owner was charged \$2,700.00 for Mr Lindberg's report. Since he appeared and gave evidence, that sum will be dealt with in the order for costs.

(d) Sliding door lock \$154.00

I accept the Owner's evidence that the lock will not operate properly and that she had to engage a locksmith at the cost of \$154.00 to fix the problem. According to a notation on the locksmith's account, the lock had been incorrectly installed. Stop no

(e) Rear security sliding door \$315.00

The Owner seeks an amount of \$715, being the cost that she says she will incur in order to install a rear security sliding door on the extension. I find that it was not part of the contract that the Builder would provide this but Mr Risteski acknowledged that the sliding door that the Builder was to provide would cost \$400.00 less than that sum. Accordingly, an amount of \$315.00 will be allowed.

(f) Fly screens \$308.00

The Owner has obtained a quotation for \$308 to purchase price fly screens for the windows. Mr Risteski acknowledged that fly screens were to be provided and so the claim of \$308.00 will be allowed.

(g) Existing kitchen

The Owner said that the Builder was to disassemble and reassembling the existing kitchen so that it would not be damaged during the course of the work. He suggested that it would cost the Builder \$3,000.00 to that and that it was not done. This was discussed in connection with the re-leveling of the kitchen floor and Mr Risteski said that they were able to do that without moving the kitchen. It is up to the Builder how it carries out the work. The Owner is not entitled to any credit for the fact that the kitchen was allowed to remain.

(h) Non-pecuniary damages

The Owner claims amount of \$34,000 for "...delayed completion with loss of enjoyment of property and lost time and disadvantage associated with having to secure individual trades to complete the works." Any entitlement to damages is according to the law of contract and in general, contractual damages are pecuniary (see for example *Sunley v. Cunard White Star* [1939] 2 KB 791 at 799). There are certain recognised exceptions where non-pecuniary damages may be awarded such as, for substantial physical inconvenience or

discomfort, pain and suffering, mental distress or where the purpose of the contract was to provide entertainment or pleasure but none of those exceptions applies to the present case.

Summary of the Owner's claim

24. The total of the Owner's claim is \$22,690.75, as follows:

Rectification of defects	\$20,913.75
Alternate accommodation	\$ 1,000.00
Sliding door lock	\$ 154.00
Rear sliding door	\$ 315.00
Flyscreens	<u>\$ 308.00</u>
Total	<u>\$22,690.75</u>

The Builder's counterclaim.

25. On the counterclaim, the following items are established

(a) Air conditioning \$2,200.00

The Builder claims \$5,070.00 for air-conditioning the two bedrooms. I am satisfied that it is entitled to be paid for air-conditioning second bedroom, which is \$2,200.00.

(b) Sanding and polishing the old floorboards \$693.00

The Builder claimed \$2,683.00. Mr Risteski said that he agreed with the Owner to polish the floorboards in the old part of House at cost. An invoice from the floor polisher shows that the cost to the Builder doing that was \$693.00 and that amount will be allowed.

(c) Landscape variation \$1,050.00

The contract included landscaping but no claim was shown. The Builder brought in topsoil and pavers and planted roses. Mr Risteski said that the Owner then changed her mind about what she wanted and asked for the garden to be laid out using pebbles instead. He said that he and his workman spent a full day removing the topsoil and laying the pebbles for which the Builder has charged \$1,050.00. The Owner denied that she changed her mind but on this issue I prefer the evidence of Mr Risteski. The amount claimed will be allowed.

(d) Painting touch-up

Mr Risteski said that he had rejected the original painters back to rectify deficiencies in their work and that he had to bring in replacement painters who charged for the work, whereas the earlier pages would have been required to do it for nothing. This claim is misconceived. The Builder cannot claim the cost of rectifying defective work from the Owner.

(e) Final stage \$8,100.00

The Builder claims the final payment of the contract of \$8,100.00. Since I am allowing the Owners claims insofar as they established, the Builder is entitled to this payment.

(f) Interest on the final stage payment

The contract provided that the Owner was to pay interest of 10% per annum on any overdue payment. However, since the work was not complete the final payment was never due and so no interest was payable.

(g) Cost of expert reports

The cost of obtaining experts reports is a cost rather than part of the principal claim. Since the expert reports were only required because the work was defective or incomplete, the Builder's cost of obtaining reports should not be allowed.

26. The total of the above figures is \$12,043.00.

Orders to be made

27. The two amounts will be set off and there will be an order that the Respondent pay to the Applicant the difference of \$10,647.75.
28. Since items of costs were included in the claims of both parties I will also deal with that now.
29. There will be a further order that the Builder pay to the Owner the cost of her expert's report of \$2,700.00 and the issuing fee of \$485.60 because I think that it is fair in the circumstances that she should recover these.
30. Otherwise, costs are reserved but the parties should note that, prima facie, parties pay their own costs and although the Tribunal has jurisdiction to award costs where it is fair to do so, for relatively small disputes orders for costs are not commonly made.

SENIOR MEMBER R. WALKER