

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D340/2007

**CATCHWORDS**

Domestic Building, contract not in writing, alleged variations not in writing, s38 of the *Domestic Building Contract Act* 1995, “exceptional circumstances”, “significant or exceptional hardship to the builder”, “not unfair to the building owner”, cash payment without receipt.

|                        |   |
|------------------------|---|
| <b>APPLICANT</b>       | Sayed Rustom t/as Snab Home Improvements                      |
| <b>RESPONDENT</b>      | Omar Daghistani   |
| <b>WHERE HELD</b>      | Melbourne   |
| <b>BEFORE</b>          | Senior Member M. Lothian                                      |
| <b>HEARING TYPE</b>    | Small Claim Hearing   |
| <b>DATE OF HEARING</b> | 26 October and 5 December 2007                                |
| <b>DATE OF ORDER</b>   | 25 January 2008   |
| <b>CITATION</b>        | Sayed Rustom v Daghistani (Domestic Building) [2008] VCAT 115 |

**ORDER**

- 1 The Respondent must pay the Applicant \$4,305.94 forthwith.
- 2 Liberty is reserved to the Respondent to claim for a potential fault, being a leak in the old porch area.
- 3 The question of interest and costs is reserved with liberty to the Applicant to apply until 29 February 2008.
- 4 The Principal Registrar is directed to refer the file and these reasons to the Building Commission regarding Mr Rustom’s failure to obtain a building permit before commencing work and his failure to enter a written contract with Mr Daghistani.

**SENIOR MEMBER M. LOTHIAN**

**APPEARANCES:**

For the Applicant

Mr A. Dickenson of Counsel

For the Respondent

Mr O. Daghistani in person

## REASONS

- 1 Both Mr Rustom and Mr Daghistani were born overseas. English is not the native language of either and this might explain some of the difficulties they have had. Mr Rustom is a builder trading as Snab Home Improvements and he has been registered since 2002. In early 2004 he met Mr Daghistani and undertook building work for him. The building contract was in writing, the sum was \$11,000.00 and it appears that the contract complied with the builder's obligation under the *Domestic Building Contracts Act 1995* ("DBC Act"). For example, it described the work to be done and the amount to be paid. The whole amount of the sum due to Mr Rustom was paid and Mr Daghistani had no complaint with the work done.
- 2 Towards the end of 2005 Mr Rustom agreed to do more work for Mr Daghistani. Unfortunately, the contract was not in writing, in breach of s31(1)(a) of the DBC Act which provides that a builder must not enter a major domestic building contract (a domestic building contract for more than \$5,000.00) unless it is in writing.
- 3 The parties agree that the price for the contract was \$10,000.00, however they agree on almost nothing else. There is disagreement about the extent of work to be done under the contract. Mr Rustom said that the work was to enclose a verandah and convert it to a living room and to build a deck with a roof. Mr Daghistani's view is that all the items for which Mr Rustom has sought payments as variations were part of the contract deal of late 2005.
- 4 Mr Rustom claims that he has been paid \$8,000.00 whereas Mr Daghistani claims to have paid \$9,000.00. Neither of them have contemporaneous records of payments made and they agree that all payments were made in cash. Mr Daghistani did not ask for receipts for the amounts paid to Mr Rustom. When I asked him why, he said it was because he trusted Mr Rustom.
- 5 In his Points of Claim annexed to the Application, Mr Rustom sought \$10,180.00 as follows:

|  |             |
|--|-------------|
| Reasonable price for works as originally agreed  | \$11,680.00 |
| Variation due to owner's request that four walls be rendered rather than the two that were originally nominated [First variation]        | \$1,000.00  |
| Variation due to owner's request that the area of timber decking be increased from 5 m by 2 m to 8 m by 2 m [Second variation]           | \$2,000.00  |
| Variation due to owner's request that the area of roofing above the decking be increased from 5 m by 2 m to 8 m by 2 m [Third variation] | \$1,000.00  |
| Variation due to owner's request for a retaining wall [Fourth variation]   | \$1,500.00  |

|  |              |
|--|--------------|
| Variation due to owner's request that electrical works be performed (originally the owner was going to engage his own electrician) [Fifth variation] | \$1,000.00   |
| Less total of payments received  | (\$8,000.00) |

- 6 On the second day of hearing on 5 December 2007, Mr Rustom presented a document entitled "Request for costs to additional works". This document was prepared by him after the first day of hearing and itemised some of the variations claimed and gave details of the materials and labour Mr Rustom claimed to have expended. It also added a sixth variation of \$150.00 for "Supplied and Fixed New Jamb Door to laundry door" [sic].
- 7 Like the contract and in breach of ss37 and 38 of the DBC Act, none of the variations were in writing. Further, although Mr Rustom claims that Mr Daghistani requested each alleged variation, he does not allege that Mr Daghistani agreed to a particular price for any of them. He said Mr Daghistani agreed to pay "labour and materials" for each alleged variation.
- 8 A further complication was that no building permit was obtained for the 2005 work and Mr Daghistani had received a notice from the Municipal building surveyor ordering that the work be demolished. On the first hearing day I made certain directions with the aim of discovering whether the Moreland City Council was willing to cancel the building notice. On 23 November 2007 Mr Alan Threadwell, the Municipal building surveyor of Moreland, wrote to Mr and Mrs Daghistani and cancelled the notice. However, he said in the fourth paragraph of his letter:
- "The minor non-complying matters contained in the Report should still be addressed, in particular the riser height to the stair".
- 9 In accordance with the submission of Mr Dickenson of Counsel for Mr Rustom, it appears the report referred to is the report by Roy Harding and Associates Pty Ltd of 9 October 2007 and that the "minor non-complying matters" are items 1.05, 1.10 and 1.13 of the Harding report. All these items need the skills of a carpenter.
- 10 1.05 is to install a timber strap to conceal the join between the new and existing eave linings. Mr Harding assessed the cost at \$65.00.
- 11 1.10 is to uplift and replace decking as necessary and flash over bearers and joists to a distance of approximately 900 mm in from the southern edge of the deck. Mr Harding assessed the cost at \$360.00.
- 12 1.13 is to alter the installation/height of the steps from the veranda so that riser heights are consistent and Mr Harding estimated \$40.00 for this item.
- 13 I note in particular in Mr Harding's supplementary report no. 1 of 26 October 2007 he states that the rate charged by Mr Rustom is \$39.77 per hour exclusive of GST which he describes as "reasonable" whereas the hourly rate he allowed was \$35.00. If the rate for undertaking the work was reasonable, it is also reasonable that it be applied to rectification.

- 14 Taking into account the higher labour rate, I allow \$70.00 for item 1.05, \$380.00 for item 1.10, and \$46.00 for item 1.13; a total of \$546.00 inclusive of GST.

## ENTITLEMENT TO VARIATIONS

- 15 There is a logical impossibility of varying non-existent plans and specifications, however for the purpose of this proceeding, I will treat the verbal contract between the parties as governed by s38 of the DBC Act. I also have regard to s53(1) of the DBC Act which provides:

The Tribunal may make any orders it considers fair to resolve a domestic building dispute.

and to s97 of the *Victorian Civil and Administrative Tribunal Act 1998* (“VCAT Act”) which provides:

The Tribunal must act fairly and according to the substantial merits of the case in all proceedings.

- 16 Mr Rustom claims that each variation was requested by Mr Daghistani. Section 38 of the DBC Act provides in part:

### **38 Variations of plans or specifications – by building owner**

- (1) A building owner who wishes to vary the plans or specifications set out in a major domestic building contract must give the builder a notice outlining variation the building owner wishes to make.
- (2) If the builder reasonably believes the variation will not require a variation to any permit and will not cause any delay and will not add more than 2% to the original contract price stated in the contract, the builder may carry out the variation.
- (3) In any other case the builder must give the building owner either –
  - (a) a notice that –  
...
    - (iii) states the cost of the variation and the effect it will have on the contract price;  
...
- (5) A builder must not give effect to any variation asked for by a building owner unless –
  - (a) the building owner gives the builder a signed request for the variation attached to a copy of the notice required by sub section (3) (a); or
  - (b) sub-section (2) applies.
- (6) A builder is not entitled to recover any money in respect of a variation asked for by a building owner unless –
  - (a) the builder has complied with this section; or

- (b) the Tribunal is satisfied –
  - (i) that there are exceptional circumstances or that the builder would suffer exceptional or significant circumstances or that the builder would suffer exceptional or significant hardship by the operation of paragraph (a); and
  - (ii) that it would not be unfair to the building owner for the builder to recover the money.

- 17 Two percent of \$10,000.00 is \$200.00. With the exception of the sixth claimed variation, all are for more than \$200.00, so s38(2) does not apply.
- 18 None of the claimed variations were in writing. Mr Dickenson referred me to *Pavey and Matthews Pty Ltd v Paul* (1987) 69 ALR 577 and the decision of Deputy President Macnamara in *Lloyd L. Watkins Pty Ltd v Vondrasek* [2006] VCAT 2479. I have also had regard to the decision of Senior Member Young in *Pratley Constructions v Racine* [2004] VCAT 2035.
- 19 There are competing policy considerations when interpreting provisions such as s38 of the DBC Act. They have been drafted to overcome the evils of building contracts where building owners have no idea that they are incurring thousands of dollars of extras or variations, until the often unaffordable bill arrives at the end of the job. On the other hand, some naive builders undertake extensive variations which it would be unjust to allow an owner to enjoy without paying for them.
- 20 I accept Senior Member Young’s reasoning at paragraph 7.18 of *Pratley* that the Tribunal remains bound by the decision of Beach J in *Sevastopoulos v Spanos* (1991) 2 VR 194 as in the words of his Honour s19(1) of the House Contracts Guarantee Act 1987 “specifically excludes any claim whether founded on contract or otherwise”. Section 38 of the DBC Act, like s19.1 of the HCG Act is far wider than the Act interpreted by the High Court in *Pavey*, which limits the relevance of *Pavey* to this proceeding.
- 21 I agree with Senior Member Young’s reasoning that a builder is only entitled to recover if the two-part test is passed – the builder must prove exceptional circumstances or that the builder would suffer significant or exceptional hardship and that it would not be unfair for the owners to pay. As he said: “This is a very onerous section”.

#### **“Exceptional circumstances”**

- 22 There is nothing exceptional about failing to reduce a variation to writing without reason. If cases before the Tribunal are taken as a fair sample of all domestic building contracts, it is distressingly common.

#### **“Significant or exceptional hardship to the builder”**

- 23 Senior Member Young considered the expression “significant hardship” and concluded in 2004 for the particular case he was hearing that any amount greater than \$200.00 would be “of consequence” and therefore

significant. In this proceeding I have regard to the whole phrase. It was always within the power of Mr Rustom to protect himself from the risk of losing the value of variations by ensuring they were in writing. He was the registered builder, his previous dealings with Mr Daghistani indicated he had some knowledge of his DBC Act obligations and yet he failed to take the necessary steps without explanation.

- 24 In this proceeding I do not find that the amount of money alone, which Mr Rustom might forfeit by failing to ensure that variations are in writing, is sufficient to enable me to find that there has been significant or exceptional hardship. In order to so find for this proceeding I needed to be reasonably certain that there was some agreement about each variation for which I allowed an amount and I have also considered the proportion the amount bears to the original contract sum. The cost of the claimed variations in total was over 65% of the original contract sum, and the first, third and fifth variations were each 10% of the original claim and, with the exception of the sixth, the others were a greater proportion. I find the first to fifth variations were “significant or exceptional” when considering the proportion they bear to the contract sum.

**“Not unfair to the building owner”**

- 25 In *Pratley* the owners admitted discussions with the builder about some variations. Senior Member Young decided that where the builder discussed the need for a variation with the owners and gave an estimate of costs, it was fair the owners pay that cost.
- 26 In *Lloyds L. Watkins* Deputy President MacNamara accepted that “extras” of \$3,424.00 for a side fence, requested by the owner and \$3,859.00 for additional electrical work were significant. Nevertheless, for reasons that are not relevant to this proceeding, the payment would have been unfair, and therefore the extras were disallowed.
- 27 The facts in this proceeding differ in two important ways from *Pratley*. The first is that, according to Mr Rustom, the variations were sought by the owner rather than the builder, which would incline me to demand less of the builder. However, as previously mentioned, there is also disagreement about whether any of the claimed variations were, in fact, variations.
- 28 Mr Bulos Saad, a carpenter who works with Mr Rustom, gave evidence for him. Mr Saad impressed me as a careful and truthful witness and his evidence is the best evidence in the absence of credible evidence from the parties. He gave evidence about the second, third, fourth and fifth variations only. Of the fifth, he said he did not hear any conversation. Of the second, third and fourth, he recalled that Mr Daghistani asked for each variation and agreed to pay the cost, which I take to mean the reasonable cost of undertaking the variation. Where Mr Daghistani asked for a variation, received the benefit of it and agreed to pay something for it, it is not unfair that he should pay the reasonable cost.
- 29 I make no allowance for the first, fifth or sixth variations.

**Second variation - request that the area of timber decking be increased from 5 metres x 2 metres to 8 metres x 2 metres**

- 30 In the Points of Claim Mr Rustom claimed \$2,000.00 for this amount and in the “Quote for request to cost additional works” he claimed \$1,939.85. The parties agree that Mr Rustom built the deck and then it was extended.
- 31 I accept the evidence of Mr Saad that he heard a conversation between Mr Rustom and Mr Daghistani where Mr Daghistani asked Mr Rustom to extend the deck and Mr Rustom said there would be an additional cost for doing so. It is most unsatisfactory that Mr Rustom did not reduce the variation to writing, however in these circumstances I find the amount charged which is approximately \$323.00 per square metre is reasonable and I allow to Mr Rustom the cost of the extended deck being \$1,939.85.

**Third variation - extending the roof above the new deck**

- 32 In the Points of Claim Mr Rustom claimed \$1,000.00 for this item. In the request for costs to additional works he claimed \$1,092.09. The circumstances concerning the deck roof are the same as those concerning the deck. The deck roof had been completed and Mr Daghistani asked for an additional area and according to the evidence of Mr Saad, Mr Daghistani agreed to pay the cost of constructing the roof. I also find that the cost which is approximately \$183.00 per square metre is reasonable for a structure clad in laser light sheet and order that Mr Rustom is entitled to \$1,092.09 for this item.

**Fourth variation – retaining wall**

- 33 \$1,500.00 is claimed in the Points of Claim. In the “Request for costs to additional works” the amount is \$1,449.32. Mr Saad said he heard a conversation between the parties where Mr Daghistani asked for the retaining wall to be built and Mr Rustom said that he would do so but did not give a price for the retaining wall. A rough drawing provided by Mr Rustom as exhibit A7 indicates that the retaining wall is between 10 and 11 metres long but does not indicate the height of the wall. Further, in his “supplementary report no. 1” Mr Harding said “I am not privy to work relating to the retaining wall listed as \$1,500.00 in item 2 of this report below”. This note appeared in bold on both page 2 and page 3. The amount of time for building the retaining wall was 30 hours which seems excessive as it was constructed of treated pine posts and “slippers” which I take to be “sleepers”. I allow approximately one third the amount claimed for labour being \$350.00 and \$470.00 for materials. Mr Rustom is entitled to \$820.00 for the retaining wall.
- 34 I allow Mr Rustom \$3,851.94 for variations.

**AMOUNT PAID**

- 35 As mentioned above, Mr Rustom claims to have received \$8,000.00 and Mr Daghistani claims to have paid him \$9,000.00. Neither have provided documents which are particularly convincing in proving their contentions

regarding payment. In this case I impose the obligation upon Mr Rustom to provide documentary evidence of the amounts he received, given his comprehensive failure to comply with his obligations under the DBC Act and his greater command of English. I therefore prefer the evidence of Mr Daghistani that \$9,000.00 was paid. It follows that \$1,000.00 is outstanding under the contract.

#### **RECONCILIATION OF AMOUNTS OWED**

|  |                   |
|--|-------------------|
| Amount outstanding under the contract                      | \$1,000.00        |
| Plus variations  | <u>\$3,851.94</u> |
|  | \$4,851.94        |
| Less cost of rectification of items in Mr Harding's report | <u>\$546.00</u>   |
| Total payable to Mr Rustom                                 | \$4,305.94        |

36 Mr Daghistani must pay Mr Rustom \$4,305.94 forthwith.

#### **LEAK IN OLD PORCH**

37 At the end of the hearing, Mr Daghistani mentioned that he believed there might be a leak in the old porch area. This potential fault is specifically excluded from matters dealt with and should Mr Daghistani believe that there is a fault, he may still claim against Mr Rustom for it.

#### **INTEREST AND COSTS**

38 The question of interest and costs is reserved with liberty to Mr Rustom to apply until 29 February 2008. However the attention of both parties is drawn to s109 of the VCAT Act, and in particular I remark that had Mr Rustom complied with ss 31 and 38 of the DBC Act, the dispute might not have arisen.

#### **REFERRAL TO BUILDING COMMISSION**

39 I direct the Principal Registrar to refer the file and these reasons to the Building Commission regarding Mr Rustom's failure to obtain a building permit before commencing work and his failure to enter a written contract with Mr Daghistani.

#### **SENIOR MEMBER M. LOTHIAN**