VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D756/2007

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building work – defective work – earlier action for damages for some items no bar to later action for other items that were not the subject of the earlier proceeding – terms of settlement – whether later claim compromised – obligation of builder to follow plans

FIRST APPLICANT	Diane Maree Shaw
SECOND APPLICANT:	Susan Linda Moss
RESPONDENT	Australian Country Retreats Pty Ltd (ACN: 061 367 548)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Small Claim Hearing
DATE OF HEARING	27 February 2008
DATE OF ORDER	3 April 2008
CITATION	Shaw & Moss v Australian Country Retreats Pty Ltd (Domestic Building) [2008] VCAT 575

ORDER

Order that the Respondent to pay to the Applicants the sum of $6,365.00.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the First and Second Applicants	In person
For the Respondent	Mr A.M. Beck-Godoy of Counsel

REASONS

Background

1 By a major domestic building contract dated 17 May 2005 the Respondent, a registered builder ("the Builder"), contracted to construct a single storey brick veneer dwelling and garage for the Applicants ("the Owners") at Lot 549 Warrawong Court Doreen ("the House") in accordance with plans provided by the Owners.

2 Since moving into the House, the Owners have had a number of complaints about it. On 5 March 2007 they issued proceedings in the Civil Claims List claiming damages of $9,917.00 with respect to nine defects which were specified in the application ('the First Proceeding").

The First Proceeding

3 Attached to the form of application which initiated the First Proceeding were several documents including a report from a building expert, Mr Tony Croucher of Buildspect dated 23 October 2006. In this report Mr Croucher set out a number of defects and omissions which he said he had identified and provided costings for rectifying them. Of the nine items claimed in the original application, which the Owners completed themselves, items 1, 2, 3, 5, 6, 7 and 9 are all items referred to by Mr Croucher in his report and the amount claimed in each case is his costing. The other two items were a claim for damage to a side fence and a claim for replacement of a water tank.

4 There were a number of other items of defective or incomplete work referred to by Mr Croucher in his report but they were not the subject of the First Proceeding. That is clear from the fact that the precise sum claimed, $9,917.00, is the total of the amounts claimed with respect to each of the 9 items described in the application.

5 The First Proceeding was referred to mediation between the parties and terms of settlement were then entered into. In the terms, each of the items claimed in the First Proceeding was referred to by number and dealt with in turn. In some instances it was agreed that work would be done or something would be supplied, in other instances a payment was provided for. In regard to item 4, which was the claim with respect to the fence, nothing was to be paid.

6 The last two paragraphs of the terms of settlement read as follows:

> "In consideration of the parties entering into these terms of settlement and subject to their performance, the parties mutually release and discharge each other from all further claims in connection with this dispute and these proceedings.
>
> Where the owner is a party this release does not apply to a breach other than a breach that was known to or to have reasonably be known

to the owner to exist at the time these terms of settlement were executed" (sic.).

7 Pursuant to the terms of settlement various sums were paid and various things were done. There was some dispute about this but it is not now contended that the terms of settlement have not been complied with.

The present claim

8 On 12 November 2007 the Owners commenced the present proceedings to recover damages with respect to 7 other items, all of which were referred to in Mr Croucher's report. The Respondent brought an application pursuant to s.75 of the *Victorian Civil and Administrative Tribunal Act* 1998, seeking to have the proceeding struck out or dismissed on the grounds that the Owners, by entering into the terms of settlement referred to, had compromised their claims. That application came before me for hearing and I dismissed it, ruling that it was at least arguable that the subject matter of the present proceeding had not been compromised and that it should go to a full hearing.

The hearing

9 The full hearing of the matter came before me on 27 February 2008. The Owners represented themselves and Mr Beck-Godoy of Counsel represented the Builder. After hearing briefly from the parties I adjourned the proceeding to the House and the parties showed me each of the items which were the subject of the dispute and gave evidence about them. I then reserved my decision.

Has the subject matter of this claim been compromised?

10 The first matter to be determined is whether the present claim has been compromised by the Owners having entered into the terms of settlement referred to.

11 Mr Beck-Godoy relied upon the comments by Dixon J (as he then was) in *McDermott v Black* (1940) 63 CLR 161 In his judgment in that case his Honour gives a thorough exposition of many of the principles concerning accord and satisfaction including the distinction to be drawn between an accord executory and an accord and satisfaction but I can find nothing in his Honour's comments to support the notion that, if a party compromises one claim for breach of a contract, then all other claims for breach of the same contract are ipso facto also compromised.

12 Mr Beck-Godoy also referred me to the case of *Wells v D'Amico* [1961] VR 672. In that case the defendant drove a car through the window of a shop causing damage to the stock and also damage to the premises. The appellant issued a summons claiming damages for negligence in an amount equivalent to the damage for the stock but by a mistake of his solicitor he omitted to claim also for the damage to the shop. The proceeding was settled by agreement between the solicitors but the appellant refused to sign the terms of settlement because nothing was offered for the damage to the

shop. It was nonetheless held that the proceeding had been settled. Gavan Duffy J said (at p.676):

> "What I have to determine, therefore, is whether the claim for damage done to the complainant's stock is in substance the same cause of action as the claim for damages done to his shop. I think on the whole that it is. The evidence would be substantially the same, namely, proof of negligence and the amount of damage suffered in consequence of it".

13 This case is of little assistance. The question there was, what damage arose as a result of the defendant's negligence? It was a single act of negligence that was alleged and a particular sum was claimed. In agreeing to settle the claim the appellant agreed to accept the defendant's payment of the agreed sum in satisfaction of his claim of negligence and that would be in satisfaction of the claim with respect to any damage that the single act of negligence caused. In the present case, each respect in which the building work was defective or incomplete was, in itself, a breach of the building contract and so a separate cause of action. The mere fact that the Owners could, and usually do, claim for all of the defects in one proceeding does not mean that they are required to do so.

14 Mr Beck-Godoy pointed to the undesirability of allowing an applicant to bring separate proceedings for each of a large number of defects in a building project but in any situation where someone is using the Tribunal's procedures vexatiously the aggrieved party can seek orders to prevent the abuse of process including orders for costs or even, if appropriate, a stay of the proceeding until such time as all of the contemplated further complaints are brought in the one proceeding. There has been some explanation offered here as to why there have been two applications and whatever one might think about the reasons offered the Owners' conduct here falls a long way short of being vexatious. If they have a valid cause of action they are entitled to litigate it if it has not been compromised.

15 It would have been open to the Respondent when it negotiated the terms of settlement of the First Proceeding to have so drafted the release that it covered not only the nine items which the subject of that claim but all other complaints with respect to the work done and the materials supplied as well. However the terms of settlement released and discharged the Respondent only "… from all further claims in connection with this dispute in these proceedings" *(emphasis added)*. The nine specific items claimed are all that the dispute related to and that was also the only subject of the proceeding. The other respects in which the work was defective were not the subject of the proceedings and so I think they were not released. I therefore proceed to deal with these further claims on the merits.

Installation of skylight

16 The plans show that a skylight was to be installed in a north-south direction centrally in the dining area. Because of the way the roof had to be

constructed, the trusses were inevitably going to be positioned in an east-west direction. Because of the size of the skylight shown in the plans it was also inevitable that, unless special provision was made, the bottom chord of the trusses in the region where the skylight was to be installed would prevent its installation. The skylight was provided by the Owners as the contract contemplated but it could not be installed in a north-south direction or centrally. Rather, it had to be installed in an east-west direction around the bottom chords of the trusses in the ceiling. The result is that it is off centre and runs east-west instead of north-south.

17 The Builder argues that the Owners failed to arrange for their contractor to inspect the structure at lock-up stage to ensure that the skylight could be installed in accordance with their requirements. This is an odd argument. By lock up, the roof trusses were already in place and so the problem had already been created. The fact is that the Builder was to construct the house in accordance with the plans and those plans required provision to be made for the installation of the skylight depicted that was to be provided by the Owners. The roof structure should have been built accordingly.

18 It is not sufficient for the Builder to build the house however it likes and then force the Owners to accept the result. Mr Croucher's description of the appearance of the sky light as being an after-thought is an apt one. This part of the claim is proven and I accept Mr Croucher's costing of $3,004.00 to reposition the skylight to the position shown in the plans.

Relocate batten holder from the skylight

19 The contract required the Builder to install a batten holder inside the skylight tunnel in order to illuminate it at night. Instead, the electrician has installed a power point to the outside of the tunnel. It needs to be relocated and, obviously, installed in such a way that it will be possible to change globes. This claim is proven and I accept Mr Croucher's costing of $101.00.

Missing down lights

19. The Owners allege that four down lights purchased by them were left in the care of the Builder and were stolen from the building site. The Owners claim the replacement cost of $300.00. The lights were to have been fitted around the skylight but when the problems arose regarding the positioning of the skylight they were placed instead in a cupboard in the House. Thereafter, various tradesmen worked in the House and eventually the Owners discovered that the lights were gone from the cupboard. The Builder has denied any knowledge of their whereabouts.

20 The problem I have here is, although the lights were initially in the possession of the Builder, when the decision was made not to fit them and they were placed in the cupboard in the House. It is then difficult to say in whose possession they should be considered to be. The Owners were aware that the lights were in the cupboard and they were content that they should

remain there. The lights then disappeared. I am not satisfied with this aspect of the claim.

Bricks in the garage

21 The specifications provided that the bricks to be used should be 50% "clinker" and 50% "red Trevallyn". A feature of clinker bricks are the chunks attached to one side which give them the particular appearance that one associates with clinker bricks. The clinker bricks in the garage were laid with the chunks facing inwards and many of them appear to have been knocked off with a hammer and bolster. The effect is that the external garage wall is smooth without any chunks showing which provides a contrast to the house where the bricks were laid with the chunks pointing outwards as they ought to have been. The special clinker brick feature has therefore been lost in this wall.

22 The Builder argues that the bricks were laid in accordance with specifications and that the Owners requested them to be laid face inwards. The Owners deny this and the letters referred to do not support the Builder's contention. I do not accept that they ever made such a request. I accept Mr Croucher's opinion that it will be necessary to remove a percentage of the bricks and replace them with chunky bricks throughout the garage walls. I also accept his costing of $2,730.00 for doing so.

Location of the front door and jambs

23 The plans provided for the front door to be located off centre to the passage. In fact, the Builder has centred it. This would certainly look better from the hallway but, aesthetics aside, it is not what the Owners wanted nor is it what the plans required. As a result, a piece of furniture that the Owners intended to locate next to the front door cannot now be used for that purpose. In order to accommodate the positioning of the door as the Builder has located it, the Owners have had the path to the front door laid so that it appears centrally placed between the veranda pillars as one approaches the House.

24 Practically, I think it is too late to do anything about this. Notwithstanding that the Owners contend that they informed the Builder about the mistake during construction, it would be pointless to attempt to alter it now. As Mr Croucher's costings show, the cost to reposition it would be considerable and it would really achieve nothing other than to place the front door off centre. It would then possibly not line up with the front path. I think the appropriate thing to do here is to award nominal damages for breach of contract of $100.00. I will not award the cost of relocating the front door because it would not be sensible to attempt to do it and I do not believe that it would be done.

Waste outlet

25 The waste outlet in the bar sink is significantly out of alignment with the tap spout. This was shown to me on site. The reason for this appears to be

the location of the waste pipe underneath. I see no reason why the basin cannot be repositioned so that the waste outlet is directly under the tap which, as Mr Croucher says in his report, is good practice. This part of the claim is allowed and I accept Mr Croucher's costing of $204.00.

Door jambs to bedrooms 1 and 2

26 Too much timber was checked out for the striker plates and the gaps between the jamb and the striker plates have been filled and painted in a very rough manner. I accept this is poor workmanship and I accept Mr Croucher's costing for its rectification at $226.00.

Conclusion

27 Adding up the items I have allowed, there will be an order that the Builder pay to the Owners the sum of $6,365.00.

SENIOR MEMBER R. WALKER