

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D45/2007

**CATCHWORDS**

Building contract – defective work – direct engagement by owner of builder’s carpenter to do extra work  
– work defective – no breach by builder – work stopped because owner suspected defective work –  
suspicion unfounded – damages arising from stoppage not the responsibility of the builder

<b>APPLICANT</b>	Chandra Shekar
<b>RESPONDENT</b>	Nada Domestic Builders
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R. Walker
<b>HEARING TYPE</b>	Small Claim Hearing
<b>DATE OF HEARING</b>	23 March 2007
<b>DATE OF ORDER</b>	17 April 2007
<b>CITATION</b>	Shekar v Nada Domestic Builders (Domestic Building) [2007] VCAT 664

**ORDER**

1. Order the Builder return to the site and complete the work in accordance with the contract and in accordance with the attached reasons.
2. Any further dispute should be the subject of fresh proceedings.
3. The proceeding is otherwise dismissed.

**SENIOR MEMBER R. WALKER**

**APPEARANCES:**

For the Applicant	In person
For the Respondent	Mr N. Kulathayendran in person

## REASONS

### The proceeding

- 1 The Applicant (“the Owner”) seeks damages against the Respondent (“the Builder”) for alleged breaches by the Builder of a building contract entered into between them on 15 July 2006.
- 2 The matter came before me for hearing as a small claim on 23 March 2007. The parties represented themselves and no witnesses were called. After hearing from the parties I visited the site and inspected it in their presence. I then informed them that I would provide a written decision.
- 3 After the proceeding had been issued the Applicant sent an amended claim into the Tribunal listing 27 items and it was this document that formed the basis of the application that was considered at the hearing. I will deal with the items in the order in which they appear in that list.

#### 4. Installation of brackets for beams

- (a) The renovation required the removal of an internal wall. After work commenced it was discovered that the wall was structural and further work would be required, in accordance with the design of an engineer, to support the roof following the removal of the wall. The Builder submitted a claim for a variation which the Owner did not accept. The Builder then suggested that he would obtain the materials for the Owner for the required work and the Owner could make his own arrangements with the carpenter. This was agreed to. The Builder obtained the timber for which he was paid by the Owner and the Owner paid the carpenter to carry out the work. It appears that the amount that the Owner paid the carpenter also included other materials purchased by the carpenter himself. The Owner then paid the plasterer to make good the plasterwork following the installation of the beams.
- (b) The Owner now complains that the carpenter did not install the required brackets for the beams as specified in the engineer’s design. He says that these will now need to be installed and after the installation the building surveyor will need to revisit the site and inspect the work. He claims the cost of installing the brackets and the cost of that inspection. The Builder argues that the failure to install the brackets was a failure by the carpenter who was engaged directly by the Owner. The Owner replies that he was the Builder’s carpenter.
- (c) In my opinion, the fact that the bulk of the carpentry work was done by the carpenter at the direction of and as sub-contractor for the Builder does not alter the fact that, in regard to this particular work, the carpenter was contracting directly with the Owner. If his work is defective, that is not a breach of any contract that the carpenter has with the Builder. It is a breach of the contract that he has with the

Owner. Since the Builder did not contract with the Owner to carry out this work then the Owner's remedy is directly against the carpenter, not against the Builder. This part of the claim must therefore fail.

- (d) The Owner objects that, because the Builder refused to provide a breakdown of the amount of the proposed variation specified in the notice of variation he was given, the Builder gave him no option but to engage the carpenter directly. However the situation arose, the contract for the installation of the beams was between the Owner and the carpenter. In any case, it would seem from the amounts paid by the Owner to various people with respect to the work that the amounts sought by the Builder in the variation were not excessive.

7. Replace plaster boards in kitchen

This part of the claim is related to the first and involves the repair of the plasterwork that would have to be removed to allow the building surveyor to inspect the brackets in the beams that the carpenter did not install. This fails for the same reason as the last item.

8. Cover the exhaust fan area in the study with plaster board and complete other plastering work and other incomplete work

- (a) The Builder acknowledges that the plastering is incomplete and is prepared to return if permitted to do so by the Owner. The same answer applies to items 4, 5, 7, 9, 10, 11, 12, 13, 14, 15, 16 and 21 which all relate to incomplete work. The reason the work is incomplete is that, on 14 December 2006 the building surveyor issued an order under s112 of the *Building Act* 1993 directing the Owner and the Builder to stop work. Paragraph 5 of the recital to the document provides as follows:

“The reason why this order is issued are that:

- 5.1 Sewer leak may cause damage to the proposed extension/existing house
- 5.2 Reframe inspection for connection of beams has not been carried out”.

- (b) As already stated, since the Owner engaged the carpenter directly to install the beams, any difficulties arising from their inadequate inspection or construction is the responsibility of the Owner not the Builder. As to the sewer line, it appears that, when the ground was excavated for the foundation of the strip footings and the stumps for the extension, the sewer line was damaged by the Builder's plumber. The plumber was engaged to repair the damage. On 28 October 2006 the Owner wrote to the Builder saying that there appeared to be moisture under the house in the area where the broken pipe was mended. He wrote again on 12 November asking the Builder to “fix

the leaky sewer pipe”. He made the same request in a further letter of 19 November.

- (c) On 7 December the Owner wrote to the Builder saying that he made enquiries with the architect and the Plumbing Commission about the consequences of a leaky sewer pipe and requested that the “problem” be fixed immediately. He enclosed a plan indicating where he believed there was moisture present.
- (d) On 11 December 2006 the Owner wrote a detailed letter to the building surveyor setting out all the enquiries that he made about the suspected leak and pointing out the brackets on the beams to be installed had not been installed.
- (e) The following day the building surveyor visited the premises and on 12 December wrote to the Owner saying that the “problem” must be resolved by a registered plumber and a certificate of compliance provided. In the last paragraph of his letter he says:

“I have formed an opinion that there is some concern of future damage to the building due to dampness/excessive moisture. A structural engineer must carry out an inspection and forward the report to myself. I have issued stop building work order in order to give you some time to resolve these issues. The cost of this order and cancellation of order if complied as per your original building permit conditions is on hourly basis of \$250.00 which in your case is about \$750.00 plus GST \$75.00”. (sic.)

The stop order was attached to this letter.

- (f) On 20 December 2006 a plumber engaged by the Owner put a video camera through the sewer line but was not able to get the camera through the first 90° bend. The plumber reported that the bend appear to be holding a great deal of water which he thought was due to a blockage or break in the pipe. However when he ran the camera from the inspection opening under the house to the point of connection to the old sewer that section appeared to be sound. He concluded that there was a fault occurring between the new sewer pipe and the connection from the existing drain.
- (g) Following representations by the Owner the Plumbing Industry Commission visited the property and requested the pipe to be exposed. The inspector noted that there was damp soil under the extension but concluded that the sewer was not leaking. Some other defective items of plumbing were addressed but these were not, it seems, related to any dampness under the house.
- (h) It appears to me that the work on the site was stopped because of the order by the building surveyor. The order was made because of the Owner’s concerns as to a possible leaking sewer pipe which proved to be unfounded and the lack of proper fixing of the beams that the Owner engaged the carpenter to install. This being so, the stop order

was not related to any default of the Builder and consequently the delay in the work is not the fault of the Builder. Accordingly, there is no reason why the Builder ought not to be permitted to return to the site to complete the outstanding items.

7. Relocation of two external power points

These were located at the rear of the house but are now covered by the extension. The Owner wishes the Builder to extend them to the rear of the extension. There is nothing in the contract documents to indicate that this is within the scope of the Builder's work. This part of the claim fails.

8. Replace external spot lights

There were two external spot lights near the rear of the original house that are now on each side of the house as extended. These have been replaced by simple bayonets by the electrician. The Owner wishes these spot lights to be replaced and I can see no reason why this ought not to be done. As part of the completion work the Builder must refit the original spot lights that are in the possession of the Owner.

9. Reinstatement of concrete path

There was a concrete path that extended from the rear of the house to the clothes line next to where the strip footing for the brick wall extension had to be excavated. As a consequence of the excavation, this section of path was destroyed. I am not satisfied that the reinstatement of this path is within the scope of the Builder's work so this part of the claim is dismissed.

10. Brick up hole in wall

A hole in an external wall next to the broken path was made because the plumber was directed by the Commission to extend the sewer pipe so that it could be plunged. Since this arose as a result of inadequate work by the plumber this is the Builder's responsibility and the wall must be reinstated.

11. Cost of lifting the stop work order

Since the stop work order arose as a result of works carried out by the Owner's contractor and as a result of his concerns about the sewer, which turned out to be unfounded, there is no ground for claiming the cost from the Builder.

12. Collecting rubbish and moving it to one place

The Owner claims \$320.00 for his labour in cleaning up the Builder's rubbish. I have insufficient evidence to be satisfied as to this item. It is unknown whether this work would have been necessary if the work had not been interrupted by the Owners' concerns which led to the stop work order. In any event, the evidence as to how much rubbish was collected on what days and by whom was not particularised. I am not satisfied as to this item.

13. Other claims

- (a) Claims have also been made for the Owner's time in addressing his concerns and his complaints to the Builder, including photocopying, stationery and postage. I am not satisfied that these items should be allowed. There is also a claim for liquidated damages but since most of the delay seems to have arisen as a result of the Owners' own concerns I am equally not satisfied as to that claim.
- (b) Finally, the Owners' claim that the Builder was to provide all relevant certificates. This is a legal requirement and will have to be attended to by the Builder at the conclusion of the work.

14. Defects apparent on the inspection

Apart from the items raised in the Owner's list I noticed on site that the brick sills under the windows of the extension have been built hard up against the underside of the aluminium window frames. This is not permissible because the windows themselves are mounted in the internal stud wall and as the timber shrinks the windows may be damaged. The relevant standard requires a gap of 10mm to be allowed between the top of the brick sill and the underside of the window. Hence all brick sills in the extension will need to be removed and re-laid to allow this gap as part of the completion works.

**Conclusion**

- 15. There will be an order that the Builder return to the site and complete the work in accordance with the contract and in accordance with these reasons. Since all that I am doing is affirming what the Builder is bound to do in any case under the contract, any further dispute should be the subject of fresh proceedings. The proceeding is otherwise dismissed.

**SENIOR MEMBER R. WALKER**