

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D1003/2011

**CATCHWORDS**

Painting work, defective and incomplete works, measure of damages.

|                        |  |
|------------------------|--|
| <b>APPLICANT</b>       | Ms Helen Spencer   |
| <b>RESPONDENT</b>      | Identity Home Improvements Pty Ltd (ACN 123 653 798)                             |
| <b>WHERE HELD</b>      | VCAT and on site   |
| <b>BEFORE</b>          | Member M. Farrelly   |
| <b>HEARING TYPE</b>    | Hearing  |
| <b>DATE OF HEARING</b> | 30 January 2012(VCAT)<br>14 February 2012 (on site)                              |
| <b>DATE OF ORDER</b>   | 24 February 2012   |
| <b>CITATION</b>        | Spencer v Identity Home Improvements Pty Ltd (Domestic Building) [2012] VCAT 213 |

**ORDER**

The respondent must pay the applicant \$4,834.40

**MEMBER M. FARRELLY**

**APPEARANCES:**

|                    |                         |
|--------------------|-------------------------|
| For the Applicant  | Ms H. Spencer in person |
| For the Respondent | Mr V. Amato             |

## REASONS

- 1 The applicant (“the owner”) owns a home in Bentleigh East Victoria (“the home”). In this proceeding the owner seeks damages from the respondent in respect of alleged incomplete and defective painting works.

## BACKGROUND

- 2 In March 2010 the owner obtained a quotation from a builder, Mr Rummel (“the builder”) for various renovation works at the home. On the builder’s recommendation the owner contacted the respondent to obtain a quotation for painting works to the home.
- 3 On 10 March 2010, after inspecting the home, the respondent provided the owner with a quotation for exterior painting works in a sum of \$12,989.98. The owner accepted the quotation and paid a deposit of \$2,000 to the respondent on 29 March 2010. The respondent commenced the painting soon after.
- 4 On about 6 April 2010 the agreement between the owner and the respondent was varied to include, at an additional cost of \$1,700.10, further works :
  - interior painting of two childrens’ bedrooms and certain windows,
  - painting of the carport beams.
- 5 A short time later it was agreed that the respondent would carry out additional interior painting works (“the additional interior painting”). There is no dispute that the respondent carried out the additional interior painting and that, in respect of such work, the owner made a cash payment to the respondent in the sum of \$5,300 on 16 July 2010. There is, however, a dispute between the owner and the respondent as to whether the additional interior painting was work under the owner’s contract with the builder (and as such carried out by the respondent in its capacity as subcontractor to the builder) or additional works in the contract between the owner and the respondent.
- 6 The painting, including the additional interior painting, (collectively “the works”) was carried out by the respondent over the period late March 2010 to June 2011. During this period the respondent’s workers returned on several occasions to rectify some areas of the works, both interior and exterior, where paint had begun to peel off.
- 7 In early July 2011 the owner engaged Mr McKinnon of the Master Painters Association of Victoria to inspect and report on the quality of the works. Mr McKinnon inspected the home on 11 July 2011 and provided his report to the owner dated 14 July 2011. In his report Mr McKinnon identifies various areas of the works which he considers are of poor standard or, in some cases, incomplete. Mr McKinnon’s report provides no details as to

the scope of required rectification works or the cost of any such works. The owner has obtained 2 quotations for rectification works.

### **THE PROCEEDING**

- 8 The hearing commenced on the afternoon of 30 January 2012. At the end of that day the hearing was adjourned to continue on the site on the morning of 14 February 2012 to allow for a view of the home (“the view”).
- 9 The owner and Mr McKinnon gave evidence for the applicant. The director of the respondent, Mr Amato, gave evidence for the respondent.

### **WAS THE ADDITIONAL INTERIOR PAINTING PART OF THE CONTRACT ?**

- 10 As noted above, there is dispute as to whether the additional interior painting falls under the contract between the owner and the respondent.
- 11 The owner says she was advised by the builder to make payment for the additional interior painting direct to the respondent because it was the respondent who was carrying out such work.. The respondent does not dispute this. There is also no dispute that Mr Amato ( the respondent’s representative on site) requested that the owner make the cash payment direct to him and that the owner made such payment, \$5,300, on 16 July 2010. There was no invoice provided by either the respondent or the builder in respect of that payment.
- 12 Mr Amato contends that he took receipt of the cash payment not for the respondent but on behalf of the builder and that he subsequently (that same day) handed the payment to the builder and then immediately received back from the builder payment (for the respondent) of \$4,000. Mr Amato confirmed that the respondent had no paperwork to evidence such transaction. Nor did the respondent seek to call evidence from the builder. Mr Amato also confirmed that he did not inform the owner that he took receipt of the cash payment on behalf of the builder or that he intended to pass on the payment to the builder.
- 13 I am satisfied, on the balance of probabilities, that it was agreed by the parties that the additional interior painting was part of the contract between the owner and the respondent. I am also satisfied that the agreed total price for the works under that contract was \$19,990.80 which has been paid in full to the respondent.
- 14 Pursuant to section 32J of the *Fair Trading Act 1999*, it was a term of the contract that the works would be undertaken with due care and skill.

### **THE VIEW**

- 15 The home, a three bedroom weatherboard house with bull nose verandah, was constructed around 60 years ago. The lounge and master bedroom look out to the front of the property, the west side. At the view I inspected the works with the owner, Mr McKinnon and Mr Amato to assist me in determining whether any of the works were incomplete or defective.

## **INTERIOR WORKS**

### **WEST FACING FEATURE WINDOWS IN LOUNGE AND MASTER BEDROOM**

- 16 There is no dispute that the windows (installed by the builder as part of the renovation works carried out in 2010) were to be stained and finished with a clear gloss coat to match the existing original surrounding interior woodwork including picture rails and skirting boards. There is no dispute that the windows, though stained, have no clear finish coat. It is also not in dispute that the stain colour is slightly different to the surrounding woodwork and that in some areas the stain has been applied thinly and/or has faded since it was applied.
- 17 Mr Amato contends that it is practically impossible to achieve an exact match with woodwork stained and gloss coated many years ago. He says the respondent tried several stain colours before settling on a colour which he considered to be an acceptable, close match and which the owner accepted. As to the lack of a final clear gloss coat Mr Amato says that the owner advised him, when the stain colour was settled, that the works to the windows were “sufficient” and that he took this to mean that the respondent should do no further work to the windows.
- 18 I accept the respondent’s evidence that agreement was reached as to an acceptable stain colour match, however I also accept the owner’s evidence that she did not agree that the respondent need not carry out any further work to the windows. I find that the work is incomplete. I accept Mr McKinnon’s evidence that the required completion work includes a light sand, followed by one further coat of stain, followed by application of the clear gloss coat finish.

### **LOUNGE WALLS AND CEILING**

- 19 The owner’s primary complaint is that the north facing plaster wall and the ceiling are “patchy” in appearance by reason of insufficient paint coverage and / or inadequate sanding/preparation. Mr McKinnon says the ceiling has poor paint coverage and an uneven finish.
- 20 The alleged “patchiness” of the northern plaster wall is not apparent when facing the wall front on. A very slight variation in finish is just perceptible when viewing the length of the wall from a position immediately adjacent to the wall with the predominant light (daylight) in front of one’s vision. I find that the finish to the wall is acceptable.
- 21 At the southern end of the lounge ceiling there is a very noticeable large brown stain which has been caused by a water leak. The owner concedes that the water leak and resulting damage is not the responsibility of the respondent. This water stain aside, the ceiling does appear a little “patchy” as though it requires one further coat of paint. I accept the evidence of Mr McKinnon and find that the painting of the ceiling is inadequate, although

the respondent has no liability in respect to the water leak and resultant damage.

- 22 Mr McKinnon and the owner also say that the stained timberwork in the lounge room has paint spots/overruns in a number of locations. They also say that the stained timber skirting boards are marked by a fine mist of paint spots. The respondent provided no comment. I accept the evidence of the owner and Mr McKinnon and find that these areas of work are defective.

## **THE KITCHEN**

- 23 There is an obvious large patch of peeling paint on the southern wall above the window. Mr McKinnon also pointed out a couple of smaller spots of peeling paint on the ceiling and the eastern wall above the kitchen bench. Mr Amato explained that the peeling was the result of poor adhesion of the acrylic paint applied by the respondent to the pre existing enamel painted surface. Mr McKinnon agreed and said that rectification would require stripping the acrylic coat, “roughing up” the enamel surface and then reapplying acrylic coats of paint. I accept Mr Amato’s explanation. I find that the respondent has failed to adequately prepare the enamel coated walls and ceiling prior to painting with the result that the painting is defective. I accept that rectification work, as outlined by Mr McKinnon, will be required to the walls and the ceiling.
- 24 I also accept the evidence of the owner and Mr McKinnon that the respondent is responsible for a number of small paint spots on the lino floor. As part of its contractual obligation, the respondent ought to have removed the paint spots.

## **FAMILY ROOM**

### **Ceiling**

- 25 The ceiling of the family room comprises oregon beams and wood panelling which was, prior to the works carried out by the respondent, colour stained. The owner’s complaints are that:
- there are a number of small holes/notches in the timber which were not filled prior to painting;
  - there are gaps (not filled) where the beams meet the wood panel ceiling;
  - the paintwork coverage is inadequate in that the original colour of the stained woodwork is perceptible in a number of areas.
- 26 Mr Amato contends that the notches and small holes in the timber are part of the natural look and finish of the timber. He says further that it is merely a matter of differing opinion, and not a “quality” issue, as to whether the notches and holes in the timber and the small gaps between the beams and the panelling should be filled. In his opinion it was reasonable to leave the holes, notches and gaps unfilled. As to the paint coverage, Mr Amato says

that he applied a couple of coats of undercoat but as the stained finish remained visible he then applied two or three coats of “zinza stain seal” before applying several top coats of paint.

- 27 The owner says she expected a finish without visible gaps, holes and notches.
- 28 I accept Mr Amato’s evidence and find that it was reasonable that the respondent not fill the holes, notches and gaps. I also find that, in light of the pre-existing state of the timber, the painted finish achieved to the ceiling is acceptable.

### **Family room miscellaneous**

- 29 I accept, as pointed out by Mr McKinnon and the owner, there are a number of instances of paint marks/spots on the timberwork, the door frame and the aluminium window. I find that the respondent has failed to adequately clean these areas and, accordingly, has failed to meet its contractual obligation.
- 30 Mr McKinnon pointed out that the north facing window frame return has a different finish to the face of the frame. I accept Mr Amato’s evidence that the window frames sat proud of the walls by around 10-15 mm and that the gaps were caulk filled prior to painting. I accept Mr Amato’s evidence that the paint finish necessarily appears different on the caulked areas. I find that these works are not defective.
- 31 I accept, as Mr McKinnon pointed out, that the south facing entry timber architrave and the bathroom entry architrave have a number of dints and small holes indicating poor preparation prior to painting. This constitutes defective work and I accept that rectification will require, as Mr McKinnon says, sanding, filling and repainting the architraves.
- 32 Mr McKinnon and the owner pointed to areas of the painted skirting board in the family room which they say has an unacceptably rough finish by reason of small amounts of grit under the paintwork. Having viewed the skirting boards, I find them to have an acceptable finish.

### **EASTERN BATHROOM**

- 33 A portion of this bathroom ceiling is similar to the family room ceiling in that it is comprised of an Oregon beam with wood panelling which was, prior to the painting, colour stained. The owner’s complaints in respect of this ceiling are the same as her complaints in respect of the family room ceiling. I find, as I did in relation to the family room ceiling, the painting to this ceiling is acceptable.
- 34 I accept, as pointed out by Mr McKinnon and the owner, that there are a number of small areas of paint over-run on tiling in the bathroom which require cleaning. The respondent has failed to adequately clean paint marks from the tiles.
- 35 I have addressed the bathroom entry architrave in paragraph 31 above.

### **HALL BETWEEN BATHROOM AND FAMILY ROOM**

- 36 This small section of hallway has, like the family room, a timber panelled ceiling. The finish is inferior to the family room ceiling in that the pre existing stain colour is clearly still visible. I accept Mr McKinnon's evidence that one or more further coats of paint is required to bring the painting to an acceptable finish.

### **WESTERN (GIRL'S) BEDROOM**

- 37 The owner's complaint is that the cutting in around the feature pink painted wall is of poor standard. I do not agree. When viewed from an ordinary viewing position (that is, a not close up viewing position) the cutting in appears neat. In light of this, and the fact that the aged plaster corners do not provide a straight line such as one would expect from new plaster, I find the painting to be of acceptable standard.

### **WESTERN BATHROOM**

- 38 As pointed out by the owner and Mr McKinnon and conceded by Mr Amato, the respondent has failed to apply a final clear coat finish to the stained door. The work is incomplete.
- 39 I accept the evidence of Mr McKinnon that the cutting in to the ceiling is noticeably "thin" in a few areas and paint touch up work is required. .

### **BOY'S BEDROOM**

- 40 Mr Amato agrees with the owner that the paintwork to the picture rail is inadequate in that the pink undercoat is viewable along the top edge of the picture rail. This is defective work requiring rectification.

### **MAIN BEDROOM**

- 41 I have addressed the stained feature window in this bedroom in paragraphs 16 to 18 above.

### **EXTERIOR PAINTWORK**

#### **VERANDAH**

- 42 I find there are defective works in that, as pointed out by the owner, there are a number of obvious paint spots on the verandah timber flooring which will need to be cleaned/alternatively sanded back and repainted.
- 43 The owner claims that the painting to the verandah flooring is peeling or wearing prematurely in a number of spots. I accept the evidence of Mr Amato that the areas are high traffic areas which are showing nothing more than signs of ordinary wear and tear. Other than the paint spots referred to

in paragraph 42 above, I find that the painting of the verandah flooring is acceptable.

## **WEST WALL**

### **WEATHERBOARDS**

- 44 Save for a few new weatherboards replaced by the respondent, the weatherboards to this section of the home are the original boards. The owner and Mr Amato both gave evidence that, after the boards were first painted by the respondent, the paint began to peel off in some areas and the respondent attended to rectification which included stripping and repainting the boards. The owner's complaint is that the boards are again showing small signs of paint bubbling which will lead to further peeling. On inspection of the weatherboards I accept the evidence of Mr Amato that the paintwork is not bubbling or peeling. I find the paintwork to the weatherboards is acceptable.
- 45 I find there exists defective works in that, as pointed out by the owner and Mr McKinnon:
- there are a number of small rust stains on the fascia at the western face where the respondent has failed to properly punch and fill nails;
  - there are a few minor areas of paint over run on windows/front door/eaves that will require cleaning/touch up painting.

### **CARPORT**

- 46 I accept the owner's evidence, not disputed by the respondent, that the contract works included the painting of the vertical posts to the carport. The posts have not been painted and, accordingly, these works are incomplete.
- 47 I also accept the evidence of the owner, not disputed by the respondent, that the paved driveway in the carport has a few obvious paint marks which will need to be cleaned and that there are a number of small painted areas around the eaves and chimney requiring cleaning/touch up painting.

### **EAST FACE**

- 48 The rear deck/floor has been painted in the same manner as the front verandah floor. There is a section of the flooring, a couple of square metres in size, where the paintwork is particularly worn or peeling. Unlike the front verandah, it appears to be more than normal wear and tear. I accept the evidence of Mr McKinnon that the paint has been poorly applied. This is defective work requiring rectification.
- 49 The eastern face of the home ( and the southern face at its eastern end) comprises vertical wood panelling which has been painted by the respondent. Mr Amato concedes that the return edges to the wood panelling have been inadequately painted. I further accept the evidence of Mr McKinnon that the painting of the wood panelling to the entire east

face (and the eastern end of the south face) is defective in that a further coat of paint is required.

- 50 I also accept, as pointed out by Mr McKinnon, that at the eastern most section of the east face (the exterior to the eastern bedroom) the painting to the beams protruding under the eave is defective or incomplete as the beams clearly require a further coat of paint.

### **SOUTH FACE**

- 51 The eastern end of the south face has addressed in paragraph 49 above.
- 52 The respondent concedes that it has not painted a small window towards the western end of the south face. This is incomplete work.
- 53 I accept, as pointed out by Mr McKinnon, that there are a number of areas to the south face that require minor paint touch ups /cleaning. These areas include the protruding pipes, the weatherboards adjacent to the hot water service and a few small areas of the window frames and eaves, all of which I find constitute minor defects in the works.

### **FRONT FENCE**

- 54 The owner's complaint is that the paint works to the front picket fence are thin or incomplete in a few areas (particularly the inward facing side of the fence) and that the painting is defective in that it is beginning to bubble / peel in a few areas. Having viewed the fence I accept the evidence of Mr Amato and find that the paint is not bubbling/peeling. I also find however that a couple of areas at the base of the inward face of the fence have not been painted. These "missed" areas are incomplete work which will require touch up painting.
- 55 The respondent installed two timber decorative balls on top of the picket fence. There are some emerging splits in the timber balls. I accept Mr Amato's evidence that supply and installation of the balls was not included in the contract works and that, as the fence was missing a couple of balls, the respondent purchased and installed new balls as a "freebie" for the owner. I also accept Mr Amato's evidence that the splitting of the balls has not been caused by inadequate or defective painting or installation of the balls. I find that the respondent has no liability in respect of the balls.

### **DAMAGES**

- 56 In respect of the areas of the works which are incomplete or defective as noted above I find the applicant is entitled to damages for breach of contract. The measure of such damages is described by Park B in **Robinson v Harman**<sup>1</sup> ... *the rule of common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can*

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<sup>1</sup> (1848) ALL ER 383 at 385

*do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.*

I consider the applicant is entitled to an award of damages in a sum sufficient to complete rectification of the incomplete and defective works.

- 57 The owner has provided two quotations for rectification works. The first, a quotation of CPJ Master Painters dated 7 September 2011, allows a sum of \$24,750. I do not accept this quotation as it provides for a scope of rectification work far in excess of the scope of rectification I find reasonable and necessary.
- 58 The second quotation dated 8 September 2011 by “Finishes Unlimited” allows a sum of \$12,086. Although the quotation provides for a scope of rectification work in excess of that which I consider reasonable and necessary, such excess is not as marked as the CPJ Master Painters quotation. For this reason, and in the absence of any other evidence as to rectification costs, I prefer the Finishes Unlimited quotation as a starting point for the calculation of damages.
- 59 In quantifying a sum for damages I consider it fair to nominate a percentage of the Finishes Unlimited quoted sum, the nominated percentage being my estimate as to the reasonable scope of required rectifications in comparison to the scope in the Finishes Unlimited quotation. In my estimation a fair and reasonable percentage is 40% which equates to a sum of \$4,834.40. I am satisfied this is a fair allowance for the rectification of the works which I find are incomplete and defective.
- 60 Accordingly, I order the respondent must pay the applicant \$4,834.40.

**MEMBER M. FARRELLY**