

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D650/2010

CATCHWORDS

Domestic building – contract to build to lock up stage – meaning – witness credibility

APPLICANTS	Nedan Spiroski and Venda Spiroski
FIRST RESPONDENT	Ilija Andonov
SECOND RESPONDENT	Vaitex Pty Ltd (ACN 087 747 751)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	1-3 August 2011
DATE OF ORDER	6 September 2011
CITATION	Spiroski v Andonov and Anor (Domestic Building) [2011] VCAT 1689

ORDER

1. Venda Spiroski is added as an Applicant to this proceeding.
2. Order the Second Respondent, Vaitex Pty Ltd, to pay to the Applicants \$127,148.00.
3. The claim against the First respondent is dismissed.
4. The Counterclaim is dismissed.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr D. Pumpa of Counsel
For the Respondents	Mr P. Lithgow of Counsel

REASONS

Background

- 1 The Applicants (“the Owners”) are the owners of land in Craigieburn (“the Land”). Their son Mr Yane Spiroski was originally the sole owner of the Land. He then transferred an undivided one third share to each of the Applicants and some time afterwards transferred his remaining interest to them. Nothing turns on this change of Ownership.
- 2 The Second Respondent (“the Builder”) carries on business as a builder. The First Respondent (“Mr Andonov”) is a registered building practitioner and a director of the Builder.
- 3 On about 10 November 2006 the Owners and the Builder entered into an agreement (“the Contract”) for the Builder to construct a house to lock up stage on the Land to a design by Mr Andonov.
- 4 The Contract consisted of a Master Builders’ Association HC-5 (Edition 3-2001) form of contract and some hand drawn plans prepared by Mr Andonov’s son. It also incorporated some engineering drawings but there were no formal specifications.
- 5 There is a document dated 10 November 2006 that the parties signed which sets out a number of matters. It is headed “Contract to Lock Up Stage” and is not described as a specification. It looks to me like a preliminary agreement entered into between the parties prior to the signing of a formal contract and it was signed before the form of contract was signed. Although it is agreed by the parties that it was intended that this document would stand as the specifications for the Contract it does not contain sufficient information to amount to a specification in any practical sense.
- 6 Mr Pumpa points to the requirement in s.31 of the *Domestic Building Contracts Act 1995* that a builder must not enter into a domestic building contract unless the contract contains a detailed description of the work to be carried out. In the absence of a proper specification, the Contract does not contain such a description and so the Builder should not have entered into it.

Construction

- 7 By the terms of the Contract, the construction period was to be 357 days, including 137 anticipated delay days. Liquidated damages for late completion were \$250.00 per week and the progress payments were to be made as follows:

Deposit	5%	\$22,000.00
Concrete in foundations	20%	\$88,000.00
Brickwork to ground floor level and garage	20%	\$88,000.00

Frame and roof frame	40%	\$176,000.00
Windows in place brickwork and roof tiles	50%	\$66,000.00

These figures included Goods and Services Tax.

- 8 The deposit was paid on 13 September 2006 and work commenced sometime before 20 December 2006. The steel for the slab was inspected on 19 November and it would be reasonable to assume that work would have commenced a few days before that date. Nevertheless, the Plaintiff's claim is based upon a commencement date of 20 December 2006 which gives a due date for completion of 15 November 2007.
- 9 Mr Lithgow submitted that, because of the state of the title to the land, it was not possible to calculate the construction period for the purposes of the Contract pursuant to Clause 8.1. I do not accept that submission. Clause 8.4 provides that the Builder must reach completion by the Completion Date which is calculated with reference to the actual commencement date plus the construction period.
- 10 Work proceeded quickly at first, slowed and then stopped and restarted a number of times. It was stopped for long periods.
- 11 The cumulative delay became very substantial indeed. On 13 August 2009 there was work still to be done to get the building to lock up stage. The Builder undertook to complete that work (good weather permitting) by 15 September 2009 but that did not occur.
- 12 It was then agreed to extend the time to 15 October 2009 but the works were still not completed.
- 13 It is not suggested in the Amended Points of Claim that there has been any formal termination of the Contract and I do not find that either party ever terminated the Contract prior to the commencement of these proceedings.

This application

- 14 On 5 August 2010 the present application was issued claiming damages for incomplete and defective work.
- 15 Points of Defence were filed asserting:
 - (a) a failure by the Owners to pay progress payments when due;
 - (b) that the rendering had not been done because the Owners could not make up their mind about the colour;
 - (c) that there was a balance due of \$11,000.00 due under the Contract; and also seeking a number of alleged variations.
- 16 Witness statements were filed by both sides and the matter came before me for hearing on 1 August 2011 with four days allocated. Mr Pumpa of

Counsel appeared on behalf of the Owners and Mr Lithgow of Counsel appeared on behalf of the Builder and Mr Andonov.

- 17 Lay evidence was given for the Owners by their son, Mr Yane Spiroski and also by the first named Owner, Mr Nedan Spiroski. For the Builder I heard evidence from Mr Andonov.
- 18 Expert evidence was given by:
- (a) Mrs Haines of Energylab, concerning matters to do with the energy rating for the house;
 - (b) Mr N. Kukulka, a building expert;
 - (c) Mr John Gibcus, an engineer and building expert whose report was tendered without him appearing or being cross-examined;
 - (d) Mr Douglas Buchanan, a quantity surveyor who quantified the items of defective and incomplete work identified by Mr Gibcus; and
 - (e) Mr David Gairns, a building expert who also provided quantification of the items in dispute.

The first four gave evidence for the Owners and Mr Gairns gave evidence for the Builder.

- 19 The hearing took two and a half days and written submissions were submitted by Counsel at the end of the following week, 12 August 2011.

The witnesses

- 20 I thought that Mr Yane Spiroski and Mr Nedan Spiroski gave credible evidence.
- 21 There were serious matters of credit raised as to Mr Andonov and I was most unimpressed by his evidence. In case of conflict I prefer the evidence of Mr Nedan Spiroski and Mr Yane Spiroski over that of Mr Andonov for the following reasons:
- (a) Mr Andonov admitted having altered the amounts of two invoices that had been submitted to him by tradesmen for the Owners to pay. He did that in order to increase the amount that the Owners would pay him with respect to the work performed by those tradesmen. The amounts were substantial. He altered one account from \$12,750.00 to \$22,750.00 and the other from \$1,050.00 to \$4,050.00. In his witness statement he says that he realises now that he should not have done it, that it was an attempt at the time to ensure that he was paid for the work that he has done and was being required to do. Had the deception not been discovered by the Owners they would have paid an extra \$13,000.00 to the Builder. Whatever his motives, that is fraudulent conduct. The money has since been repaid by the Builder.
 - (b) The certificate of compliance provided to Mr Andonov by the roof plumber for the plumbing work on the roof flashing specifically excluded responsibility for the garage flashings. Instead of providing

the original certificate to the Owners he sent them a photocopy. Before making the photocopy he masked out the qualifications in the certificate so as to make it appear as though it was a certificate of compliance with respect to the whole roof. He provided no satisfactory explanation for his conduct in this regard. He claimed that the plumber who had done the other work had gone interstate and that he was unable to get a certificate from him. There was no corroboration for this claim which is less than convincing. In any event, that would be no excuse for fraudulently altering a plumbing compliance certificate.

- (c) Some of his evidence in regard to the building issues, for example, the alleged fall on the external balcony, was illogical and so not credible.
- (d) Various excuses were provided by Mr Andonov for his conduct and his lack of progress on the job. One was a concern that he claimed to have about the ownership of the land. The Contract was signed by all three owners and so I do not believe that he had any real concern. Another was a belief that he claimed to have that, until the contract was dated, it was not in force. I do not believe that a builder of his experience would have held such a belief. Finally, there was no formal suspension of the work by the Builder for these or for any other reasons.
- (e) Mr Andonov claimed that there were variations to the work and that he was concerned about whether he would be paid for them. I am not satisfied that he had any genuine concerns about payment and there was no documentation of any request for a variation or any authorisation of any extra work.

Payment of invoices.

- 19. Mr Andonov said a substantial cause of the delay in the work was the financial inability of the Owners to pay to have it done. He said that his claims for payment were not met, that the Owners told him that they could not afford the full payments and that they had to sell another property in order to raise the funds to finish the house. According to Mr Andonov, this last consideration held up construction for some months.
- 20. On the Owners' evidence, the practice adopted by the Builder, which was not in accordance with the Contract, was that Mr Andonov would appear at their door and tell them how much he needed. He would then write up an invoice for that amount, they would give him a cheque and he would mark the invoice as paid. The invoices tendered are in accordance with their version.
- 21. They said that every time that he asked for money they gave it to them. I accept that evidence. There is nothing on any of these invoices to indicate that anything other than the full amount was paid or that anything other than the amount that was paid was owing.

22. The works were never suspended by the Builder because of non payment or for any other reason, nor is there any evidence in writing to support Mr Andonov's story that payment by the Owners was a problem. I do not believe him.

Warranty Insurance

23. Clause 5 of the Contract required the Builder to obtain warranty insurance. None was obtained. Mr Andonov sought to overcome the problem by applying for the building permit in the name of Mr Yane Spiroski as owner-builder. Despite his assertions to the contrary I accept the Owners' evidence that this was not done with their consent or understanding. The Builder is therefore in breach of the Contract in this respect.
24. The evidence of the Owners was that the insurance would have cost \$3,760. Mr Andonov agreed that it would cost about \$3,000. In the absence of better evidence I will allow \$3,000.

Liquidated damages

25. A total of 142 weeks is claimed for liquidated damages at \$250 a week, amounting to \$35,500.00. This is said to be the period from when the work ought to have been completed, which was 15 November 2007, until the hearing. My calculation is 141 weeks. Mr Pumpa submits that the whole of that period should be allowed because of Mr Andonov's continuing promises to complete the work.
26. The Owners' explanation for not terminating the Contract was the difficulty of finding anyone else to complete the work. That is a difficulty parties commonly claim to have but there is no reason to suppose that no one could have been found to complete the work.
27. Nevertheless, the Contract remained in force. No notice terminating the Contract under the terms of the Contract or under the Act was served by the Owners upon the Builder. The conduct of the Builder was so at odds with its contractual obligations as to amount, arguably, to a repudiation of the Contract but it is not obligatory for a contracting party to accept a repudiation. Unless and until the innocent party elects to accept the repudiation and terminate the Contract, it remains in force. The innocent party can insist upon performance of the agreed bargain and part of that performance is the payment of the agreed liquidated damages which will continue to accrue for so long as the Contract subsists.
28. Payment for the whole of the period, namely, \$35,250, should therefore be allowed.

Personal liability of Mr Andonov

29. The contracting party was the Builder, not Mr Andonov personally. In a number of letters that he signs he adds the name of the Builder, suggesting that he signed those letters on its behalf.

30. On 13 August 2009, after the involvement of Consumer Affairs Victoria, the Builder undertook to carry out all outstanding work. By a further letter in Mr Andonov's own name and without any mention of the Builder he stated:
- “Further to my earlier letter, I confirm that I am fully responsible for the completion of the job, as listed on my previous letter. Furthermore, \$10,00.00 has been taken for plumbing, \$8,613.60 has been taken for cement sheets and \$8,847.00 being for water, electricity and insurance”.
- 22 He then gives his driver's licence number and signs the letter. It is argued on behalf of the Owners that, unlike the other letters this is not expressed to be an undertaking on behalf of the Builder but rather a personal undertaking. That is not entirely clear. He refers to his previous letter which was written on behalf of the company.
- 23 Notwithstanding these letters the work was not done and, following further conversations between the Owners and Mr Andonov, the Owners granted the Builder until 15 October 2009 to complete the work. The work was still not completed.
- 24 In the Amended Points of Claim the claim against Mr Andonov is put as warranting the completion of the works and also agreeing to complete the works and the rendering, that is, that he undertook personal responsibility to do so.
- 25 The problem with this claim is that it is unclear from the letter whether it is written by Mr Andonov on his own behalf or on behalf of the Company. It is also unclear what Mr Andonov is “warranting” or agreeing to complete. The term, “completion of the job” would appear to relate to those parts of the work that had not been completed. There is nothing said about assuming personal responsibility for defects or failure to follow the requirements of the Contract.
- 26 For this claim to be established I would need to be satisfied on the balance of probabilities that there was an agreement that Mr Andonov would be personally responsible for one or more of the Builder's obligations. I am doubtful as to whether there was or not and so the burden of proof is not discharged.
- 27 I am therefore not satisfied that the claim against Mr Andonov personally is established.

Expert evidence

- 28 As to the existence of the defects and incomplete work, I must weigh the evidence of Mr Gibcus, Mr Kukulka and Mr Buchanan against that of Mr Gairns.
- 29 The instructions to Mr Gibcus and Mr Kukulka were generally in accordance with my findings, whereas Mr Gairn's instructions from Mr Andonov were not reliable, given Mr Andonov's lack of credibility. As to

the costings, Mr Buchanan is a Quantity Surveyor whereas Mr Gairns is a building expert with a more general expertise.

The scope of works

30 The Contract was to build to lock up and it was to build in accordance with all legal requirements. That included a requirement that the house as built would have a five star rating.

31 The claims are as follows:

(a) Provide control joints

The existence of this defect was not disputed. It will be allowed at Mr Buchanan's costing of \$5,665.00.

(b) Provide overlooking screens to the study

This is probably required but I am not satisfied that it is within the scope of works.

(c) Provide sub-floor ventilation

No sub-floor ventilation was provided. This was also not disputed and Mr Buchanan's figure of \$8,794.00 will be allowed.

(d) Provide 50mm set down for upper floor balconies

The final finish of the balcony floor was by the Owners and the Builder claims to have left a 50 mm set down on the balcony as constructed. On the basis of these instructions, Mr Gairn has rejected this claim. However I agree with Mr Pumpa that that is impossible on the drawings for there to have been such a fall. They show a differential thickness of the trusses of 50 mm. The required fall on the balcony would then eliminate any step down. I accept that the balcony needs to be lowered. Further, it is constructed of timber particle board. Mr Andonov instructed Mr Gairns that the flooring of the balcony was only temporary. I do not believe that it was intended to be temporary. Mr Gairns did not cost this item so I will allow Mr Buchanan's costing of \$18,794.00.

(e) Provide non-slip treads to the internal stairs

I agree with Mr Gairns that this is not part of lock up and so it is not within the scope of works.

(f) Provide step into garage

I agree with Mr Gairns that this is not part of lock up and so it is not within the scope of works.

(g) Provide lift off door to toilet

I agree with Mr Gairns that this is not part of lock up and so it is not within the scope of works.

(h) Failing to provide low E glass so as to achieve Five Star rating

The general notes in the plans require “Low E glass” to be supplied for the windows. This is special glass that has insulation properties and it was specified in order that the house could achieve the Five Star rating that it needs to have for the issue of a building permit. The Energy rating report provided by Mr Andonov’s son for the purpose of obtaining the building permit was calculated on the basis that Low E glass would be supplied. The Builder has installed ordinary glass, which is much cheaper, and partly as a consequence of that, the house now does not achieve a Five Star rating.

An attempt was made by the Builder to show that it could achieve such a rating on the basis of unrealistically heavy insulation in other areas but I find on the evidence that this could not possibly be achieved.

It was also suggested on behalf of the Builder that a film could be applied to the windows to improve their performance. The evidence is insufficient to establish that this is a reasonable course of action. Mr Gairns had not used the film. In any case, the plans specified Low E glass and that is what should have been supplied.

To justify the glass used the Builder points to the description in the quotation that has been incorporated into the Contract, which states: “Aluminium windows as per plan (clear glass) and argues that this means that only clear normal glass is to be supplied and not Low E glass. On this basis, Mr Gairns has rejected this item and suggested that the windows throughout the house that the Builder has supplied must be regarded as temporary. I do not accept that position. No builder would fit windows to a house that would then have to be removed and replaced in order to obtain a certificate of occupancy. Temporary doors may be fitted to achieve lock up but not temporary windows.

In any case, even according to the document the Builder seeks to rely upon, the windows are to be “as per plan” which specifically says that they are to be Low E glass. It is not established that Low E glass cannot also be clear.

According to Mrs Haines’ evidence, the most cost effective way to deal with the problem is to substitute the windows with double glazed units. I will allow the amount calculated by Mr Buchanan as the cost to provide double glazing which is \$36,884.00, compared with the cost of replacing the windows with Low E glass, which Mr Buchanan costed at \$54,237.00.

(i) Failing to provide sufficient insulation

I am not satisfied that the provision of insulation is part of lock up.

(j) Provide evidence of waterproofing of wet areas.

I am not satisfied as to this item. It seems that the Owners acknowledge that the floors of the wet areas have been waterproofed. In any case, it is not established that this is part of lock up and so within the scope of works. Mr Gairns says that it is not.

(k) Reduce the height of the wall on the Northern boundary

A section of the wall on the northern boundary is too high, because of its proximity to the fence. The Builder acknowledges that this is the case but claims that the Owners instructed his carpenter not to step the height of the wall down. The Owners deny any such instruction and the carpenter was not called. This is a part of the scope of works and the Builder is responsible for the defect. Mr Gairns did not price this item. I will allow Mr Buchanan's costing of \$5,811.00.

(l) Connect shower waste to sewer

I am satisfied that this was part of plumbing rough in, which is part of lock up, and will allow Mr Buchanan's costing of \$95.00.

(m) Replace plaster soffit lining with cement sheet

Mr Gairns said that this was not part of lock up. The Contract provision is ambiguous. It is not something that is clearly part of lock up. It is also unclear whether this lining was installed by the Owners or the Builder. I am not satisfied as to this item.

(n) Replace south west gutter with Colourbond.

This was acknowledged. I will allow Mr Buchanan's figure of \$290 which is less than Mr Gairn's figure.

(o) Extend downpipe to ground

The Builder claims that this was done by the Owners. However, despite Mr Andonov's assertion to the contrary, the provision of down pipes was within the scope of works and so it was for the Builder to do it and to do it properly. Mr Buchanan's figure of \$224 will be allowed.

(p) Rough render

This has already been rectified. I am satisfied on Mr Gibcus' evidence that the work was defective. I will allow Mr Buchanan's figure of \$4,716.00. Mr Gairn did not assess this item.

(q) Downpipe brackets rendered over.

This has also been rectified and is proven by Mr Gibcus' report. I will allow Mr Buchanan's figure of \$2,907.00. Mr Gairn did not assess this item.

(r) Rough cut tiles

This is acknowledged. Mr Gairn's figure is more than Mr Buchanan's figure of \$814.00 so I will allow the lesser sum.

(s) Downpipe from upper roof and lower roof

There are a number of problems involving lack of fall in a box gutter and a non-compliant downpipe. I think the scope of works described by Mr Gairns should be sufficient and I allow his figure on \$3,904.00.

The Building Commission direction

23. The Building Commission issued a direction on 13 May 2011 requiring certain work to be done and the Owners claimed further amounts for Bojak Constructions to carry out that work. However it seems to me that those items are taken up in the items above.

The counterclaim

24. The counterclaim is that the Owners owed the Builder \$11,000, being the balance of the Contract Price. However the Owners' evidence, which I accept, is that they have paid the whole of the Contract price. The counterclaim will therefore be dismissed.

Orders to be made

25. There will be an order on the claim for \$127,148.00, calculated as follows:

Defects and incomplete work:	\$ 88,898.00
Cost of Domestic Building Insurance:	\$ 3,000.00
Delay damages:	<u>\$ 35,250.00</u>
Total	<u>\$127,148.00</u>

26. The claim against Mr Andonov and the counterclaim will both be dismissed.

SENIOR MEMBER R. WALKER