VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D467/2009

CATCHWORDS

Variations, not in writing, requested by owner, requested by builder, ss37 and 38 of the *Domestic Building Contracts Act* 1995, alleged defects, property sold with most of the alleged defects unrectified, measure of damages, land valuation, cost to repair, cost to repair called in aid of land valuation, costs.

APPLICANT	Stelios & Suzie Samaras Pty Ltd (ACN: 005 266 142)
FIRST RESPONDENT	Ayfer Karatekeli
SECOND RESPONDENT	Cengiz Comert
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATES OF HEARING	21 and 22 October 2010 and 4 February 2011
DATE OF ORDER	20 February 2011
CITATION	Stelios and Suzie Samaras Pty Ltd v Karatekeli and Anor (Domestic Building) [2011] VCAT 309

ORDERS

1 The Applicant must pay the Respondents $5,671.

2 There is no order as to costs.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant	21 and 22 October 2010, Mr S. Krischock of Counsel 4 February 2011, Mr S Samaras, director
For Respondents	Mr P. Kounnas of Counsel

REASONS

1 The applicant ("Builder") is a building company operated by Mr and Mrs Samaras. The respondents ("Owners"), Ms Karatekeli and Mr Comert, defend the claim and have counterclaimed against the Builder for work they allege is defective. The Builder's claim is for $5,531.60 for variations they allege the Owners have not paid in full. The counterclaim is for $29,000. The Owners sold the property at around the time of the first hearing and claim either that this sum represents the amount it would have cost them to rectify outstanding defects, or that this is the loss they suffered on the sale of the property because of defects.

2 The work the subject of the dispute was renovation and extension of the Owners' weatherboard home, being to enclose the front verandah, demolish and reconstruct an area at the rear and undertake internal refurbishment, particularly of the bathroom and kitchen. The contract sum has been paid as have amounts for other variations or extras, of which details have not been provided and which are not in dispute. Unfortunately, the lack of particularity about precisely what has been paid, and for what items, means that agreement on other variations might be apparent rather than real.

THE BUILDER'S CLAIM

3 The Builder's claim concerns tax invoice 2561 issued on 28 November 2008 for $8,531, of which the parties agree the Owners have paid $3,000. The items listed on the tax invoice are:

Rear decking and roof	$2,950
Extra for Merbau	$450
Replacing all gutters and downpipes with colourbond	$1,700
New storm water drain on south of the premises	$900
Replacing [rotted] flooring to the existing house	$800
New door frame with side light to the entry	$500
Window locks	$133
Internal door furniture	$323

4 The Owners say that there was an agreement about some of the items claimed by the Builder and the total sum to which the Builder is entitled is $4,205 of which $3,000 has been paid and $1,205 retained to compensate for defects. Early in the hearing, Mr Kounnas of Counsel for the Owners said that the Owners accept that there was a variation for the rear decking and roof of $2,950, replacement of part of the floor for $800, and window locks for $132. Somewhat confusingly, the sum of these items is $3,882. If the internal door locks of $323 are added, the sum is $4,205.

Variation(s) not in writing

5 The contract called for the variations to be in writing and signed by both parties, as does s37 and 38 of the *Domestic Building Contracts Act* 1995 ("DBC Act"). The policy is to protect owners in particular, but builders as well. When variations are not in writing, memories become unreliable as time passes, and there is an entirely unnecessary opportunity for dispute.

6 There are two exception to the requirement that variations must be in writing. The first is in accordance with s38(2) where the variation has been requested by the building owner and will not add more than 2% to the original contract price. The original contract price was $108,000, of which 2% was $2,160.

7 The second exception is under s37(3) which provides that where the builder has sought the variation:

> A builder is not entitled to recover any money in respect of a variation unless-
>
> (a) the builder-
>
> (i) has complied with this section [to obtain the building owner's consent in writing etc]; and
>
> (ii) can establish that the variation is made necessary by circumstances that could not have been reasonably foreseen by the builder at the time the contract was entered into; or
>
> (b) the Tribunal is satisfied-
>
> (i) that there are exceptional circumstances or that the builder would suffer a significant or exceptional 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.

Section 38(6)(b) is identical to s37(3)(b)

8 Section 37(3) was discussed by Senior Member Young in *Pratley v Racine* [2004] VCAT 203. He allowed two variations requested by the builder where the variation and the cost had been discussed with the owners.

9 Variations should be in writing not just to comply with the DBC Act, but also for the common sense reason that the parties might never have reached agreement (as distinct from thinking that they had) and as time goes by recollections become less reliable. The discipline of reducing a variation to writing means that there is no misunderstanding at the time the variation is agreed, and no failure of recollection later.

10 There are two documents relating to the alleged variations. The first is an undated and unsigned note concerning the agreed variations plus the door locks at $4,205. The second is an "authority for variation" written in a hand different from the note for a total of $8,531.60. Although the latter is dated

28 November 2008 and signed next to "contractor", Mr Samaras agreed that it was dated after each of the varied items had been undertaken. Further, it was not signed by the Owners. Its existence supports the view that the Builder knew variations should be in writing. Neither of these documents amount to written variations in accordance with the DBC Act.

Extra for Merbau- $450

11 The Builder gave evidence that the deck was to be treated pine, but the Owners sought Merbau, which was allowed at $450. Mr Comert gave evidence that he understood that the total price for the deck was to be $2,950, that the structural parts would be treated pine and the decking would be Merbau.

12 There appears to be a genuine misunderstanding between the parties – just the type of misunderstanding that variations in writing prevent. I am not satisfied that this alleged variation falls within s38(6)(b) of the DBC Act and I do not allow it.

Replacing gutters and down-pipes with Colorbond - $1,700

13 Mr Samaras gave evidence that the specification called for gutters and downpipes to the new parts of the home to "match existing materials" which I accept was galvanised iron. He said the gutters on the home were old and "weren't the best". He said he replaced the existing gutters and down-pipes as well as installing the new ones. He said he gave Mr Comert a price to do this of $1,700 and aided his memory by referring to an unsigned note that he stapled to the inside of the Builder's copy of the building contract. Mr Samaras claimed the note was given to him by Ms Karatekeli "a couple of months before the end" [of the contract works] during a discussion about what she was and was not willing to pay for.

14 Mr Samaras said in evidence in chief that the Owners asked for a price and he worked out the cost of labour and materials. Ms Karatekeli agreed that the work had been done at the Owners' request and that the reasonable cost of the work was $1,700. I allow this sum as a variation in accordance with s38(2) of the DBC Act.

New storm water drain on south of the premises - $900

15 Mr Samaras gave evidence that there was no storm-water drain to the south of the home – the only drain was along the north, draining to the east, which is at the front of the home. When asked in examination in chief if he had discussed the new drain with the Owners he said he told them he could not drain the whole home with the existing drain and they asked him to change it. He said the Owners asked him how much the storm water would cost and when he said $900, Mr Comert said "the plumber said $800", but that Mr Samaras thought it was unreasonable for the Builder to agree to a variation without a margin.

16 I am satisfied that the Builder needed to install an additional drain, that it and the price were discussed before the work was undertaken and that it is reasonable that the Builder be allowed the variation of $900 under s37(3)(b) of the DBC Act. I therefore allow $900 for this item.

New front door frame - $500

17 The parties agree that the contract did not call for a door frame with a side light, but that this was installed by the Builder with the agreement of the Owners. The parties disagree about what was to happen. The Builder said the agreement was that he would get a price for the Owners and charge them the price to him. Mr Comert and Ms Karatekeli said that the Builder said the frame would be a gift to them by the Builder, unless he had to buy a new door to go into the frame, which he did not have to do.

18 Although the possibility that the Builder might make the Owners a gift of the door frame seems unlikely, I am not satisfied that the parties agreed about what was to happen concerning the door frame. It was the Builder's obligation to get the variation in writing, which he did not do. I make no allowance for the door frame.

Internal door furniture - $323

19 The contract called for door furniture on the new works to match the existing, which I understand were white door knobs with painted flowers. The parties agree that this was not done and that Ms Karatekeli chose the door handles, but they disagree why this happened. The Builder claims that the Owners changed their minds. Ms Karatekeli said that Mr Samaras told her to go to Bunnings hardware and choose what she liked.

20 As the internal door furniture was included on the note and the amount for it was included in the variation sum admitted by the Owners, I prefer the Builder's interpretation. I find the Owners requested the new door furniture and the cost represents the sum to replace the existing door furniture on three doors with the new pattern. I allow $323 as a variation under s38(2).

Total for variations

21 As described above I allow for variations:

Agreed variations	$3,882
Colorbond gutters and downpipes	$1,700
Storm water drain	$900
Internal door furniture	$323
	$6,805
Less paid for these agreed variations	$3,000
Total	$3,805

COUNTERCLAIM

22 The Owners relied both on a report of alleged defects indentified by their building expert, Mr Hank Van Ravenstein of Unitech Consultants and on the report of Mr Peter Gibson of A.E. Gibson. Mr Gibson's report is entitled "valuation report", does not comply with VCAT Practice Note 2: Expert Evidence and is undated. This report was provided to the Tribunal and Builder on the third day of hearing – 4 February 2011, but gave the date of valuation as 22 October 2010. Mr Gibson is a certified practicing valuer.

Measure of damages

23 If the Owners establish that the Builder has breached the contract, they are entitled to nominal damages regardless of whether they have suffered loss. To obtain substantial damages, they must prove the actual loss they have suffered by reason of the Builder's breach.

24 The Owners did not rectify alleged defects before selling the home, so the measure of their loss is the amount by which any defects lowered the price they received for their home.

Valuation

25 Mr Gibson gave evidence by speaker-phone.

26 The property sold for $425,000. Mr Gibson's method of valuation was unfamiliar to me. First he took the value of the property as if it had not been renovated – a sum of $360,000. He reached this valuation in the conventional manner of comparing the property to others in the area. Then he added the cost to the Owners of undertaking the renovation - $108,000 - giving a value of $468,000. From this he deducted amounts estimated by Mr Van Ravenstein, $4,000 for allegedly damaged paving about which no evidence was given and $10,000 on the basis that:

> A prudent purchaser would be expected to make allowances for inconvenience, holding charges and potential costs associated with building works defects not immediately obvious.

27 Having explained to Mr Gibson that his first obligation as a witness is to the Tribunal rather than to the party who has sought a report from him, I asked whether the property, without any defects, could be expected to sell for $468,000. He said that although that amount might be obtained for a similar property half a kilometre from the site, the property, renovated as it was but without faults, could be expected to sell for "say $430,000; $440,000 top dollar". Mr Gibson did not know the size of the land, as distinct from the size of the house on the land. When I asked Mr Gibson what price he would expect to see for a comparable house, he said that there was nothing like it in the area – the house was to a better standard than others that had been sold. Mr Gibson also said that he considered that some of the faults which were visible were builder's defects and some were attributable to the Owners.

28 In order to determine the loss, if any, suffered by the Owners, I make the assumption that if the house were without obvious faults it could have sold for $435,000. This represents a loss to the Owners of $10,000 on the actual sale. With the exception of the floorboards, the Owners did not undertake the work for which they claim. If I am satisfied that the defects other than the floorboards would have cost at least $10,000 to rectify, I will be satisfied that the $10,000 loss can all be attributed to the Builder. If the rectification cost is less, I allow only that amount - the Owners could have mitigated their loss by undertaking the repair work. I only take sums into account where I am satisfied that the items complained of were sufficiently obvious to be apparent to a reasonably prudent purchaser.

29 Had the valuer provided a market value for the house with and without the faults, this exercise would not have been necessary.

Alleged defects

30 I was greatly assisted by the evidence given concurrently by Mr Simpson, who was the Builder's expert witness, and Mr Van Ravenstein.

31 Unless otherwise stated, the sums discussed below are inclusive of builder's overheads and profit and GST.

Floorboards

32 The Owners say that the floorboards were defective because at the point where the floorboards for the extension met the kitchen floorboards, they joined along a line rather than being "toothed" so that the floor would not look obviously extended. As agreed by the parties, the original contract called for yellow tongue floor sheeting which was varied to have a timber floor installed for $800. The Owners claimed the cost of installing a floating floor at the cost of $4,800.

33 Having seen photographs of the floor I am satisfied that the floor as built was not to a standard of reasonable workmanship. However, I am not satisfied that replacing the floor with a floating floor was reasonable in the circumstances. In the absence of better evidence I allow $1,200 to the Owners for this item to refund the variation and give them an amount to represent any necessary demolition.

Allowances against the $10,000:

34 The following items are those which are considered for allowance against the $10,000 loss in the sale price:

Windows

35 Mr Van Ravenstein described two alleged defects – the windows to bedrooms 2 and 3 have been replaced by smaller windows and the external architraves installed by the Builder to cover the gap between the windows and the surrounding weatherboards are MDF.

36 Both experts agree that MDF is never a satisfactory material to be used externally, even under the cover of a car-port. I am not satisfied that the size of the window is defective, in circumstances where no size was nominated on the drawings. However the external use of MDF is clearly defective. In accordance with Mr Simpson's evidence I take into account $1,582.50 which includes a builder's margin and contingency plus GST.

Weatherboards

37 The building experts agreed that some of the weatherboards exhibited poor workmanship and that a reasonable cost to rectify them is $1,633.50. I take this sum into account.

Storm water drains

38 The storm water drain installed by the Builder to the south of the house was visible at the surface and both unsightly and vulnerable to damage. After discussion about how best to rectify the defect and ensure a good flow of storm water, the experts agreed that the barge boards beneath floor level could be removed, the pipe cut off and adjusted to enable it to be clipped beneath the floor, barge boards replaced and any paint damage touched up. The experts agreed that the reasonable cost to undertake such work would be $1,500 and I take this sum into account.

Sub-floor clearance

39 The building experts agreed that this work should be taken and that the reasonable cost of doing so was $330. I take this sum into account.

Tiling

40 Mr Van Ravenstein reported that the Owners told him that the Builder failed to adequately waterproof beneath the tiling. If this is accurate, it could lead to a loss to the purchaser rather than to the Owners. The Owners gave no evidence about this aspect of their claim and in particular, there is no suggestion that this aspect of the claim could possibly have had an impact on the amount the purchaser paid. I note that Mr Gibson's comment on this item was "Defect not obvious by visual inspection" and he made a nil allowance for it.

41 I consider this claim premature and note that if there were to be a defect of this nature, the purchaser could have rights against the Builder under sections 8 and 9 of the *Domestic Building Contracts Act* 1995. No sum is taken into account for this item.

Waterproofing

Shower

42 The building experts agreed that further waterproofing should be undertaken where the tap fitting penetrates the wall tiles and flexible grout

has not been used between the shower base and the tiles. The experts agree that $330 is a reasonable sum and I take it into account.

Bath

43 The experts disagreed about whether the Builder adequately sealed the hob of the bath. I am not satisfied that it is defective and, even if it were, it is very unlikely it would have been taken into account by even a prudent and knowledgeable purchaser. Like the tiling, this claim is premature and I do not take it into account.

Electrical meter box

44 When looking at the front door from outside, the electrical meter box was on the right side before renovations were undertaken. The meter box had to be moved because the front door was moved toward the street. I am satisfied that there was no agreement about where it should be moved to at the time the contract was entered. The Builder moved it to the left of the door. The Owners complained that after the contract was entered they asked that the meter box be relocated to the south of the house, around the corner from the front. I am not satisfied that this was a contractual obligation or that the position of the meter box fell below standards of reasonable workmanship. I do not take this item into account.

Plasterwork

45 Mr Van Ravenstein identified four areas where he said the plaster was poorly finished and gave evidence that the cost of doing so would be $3,614. He provided no photographs except for one concerning a slight difference in ceiling level which could have been visible. Mr Simpson agreed that another area – the bedroom wall, was noticeably defective. Mr Simpson's evidence was that the cost of rectifying the bedroom would be $612.92 inclusive of margin, contingency and GST.

46 I am not satisfied that the defect is as extensive as Mr Van Ravenstein described it, but consider that it is more extensive than Mr Simpson's description. I take into account $2,000 for this item.

Site clean

47 The experts agreed that the cost of $330 to clean the site was reasonable. However I accept the evidence of Mr Samaras that he maintained a clean site and disposed of site rubbish, but that some materials, which might have been useful, were removed from the pile for disposal by someone other than himself and his tradespeople. I therefore find that any building rubbish remaining on site was not the Builder's responsibility. I do not take any sum into consideration for this item.

Fan in bathroom and loose taps

48 The experts agreed that these items were no longer defective when they inspected. Mr Comert said that he had fixed them both and made no mention of a cost to do so. I do not take any sum into allowance for these items.

Walls not parallel

49 No details were given of this alleged defect and the Owners were not able to provide further defects when they gave evidence. No amount is allowed for this alleged defect.

Footing design

50 Mr Van Ravenstein's report had suggested that there might be a defect in the footing design. No details of the alleged defect were given and it is not taken into account, but the experts agreed that there was one stump requiring rectification for which a reasonable price would be $300. I take this sum into account.

Cracking to east of lounge room skirting

51 Although not complained of by the Owners, Mr Simpson identified this crack which he said would cost approximately $600 to rectify. Mr Van Ravenstein agreed with this sum, which I take into account.

Sums taken into account in determining whether the Builder caused the Owners at least $10,000 loss:

• Windows	$1,582.50
• Weatherboards	$1,633.50
• Storm water	$1,500
• Sub-floor clearance	$330
• Waterproofing shower	$330
• Plasterwork	$2,000
• Stump rectification	$300
• Cracking to east of lounge room skirting	$600
Total sum taken into account	$8,276

Loss due to defects

52 In accordance with the previous paragraph, I find the loss suffered by the Owners which is attributable to defects for which the Builder is liable is $8,276.

RECONCILIATION

Payable to the Owners:

Floorboards	$1,200
Loss of sale price due to defects	$8,276
	$9,476
Less payable to the Builder for variations	$3,805
The Builder must pay the Owners	$5,671

COSTS

53 At the end of the hearing Mr Kounnas said that his clients seek costs and that there have been no offer to which s112 of the VCAT Act responds, that is, offers in the nature of offers of compromise. He submitted that, under s109(3)(d) the proceeding was of a nature and complexity to justify an order of costs. Given the size of the award I am not so satisfied and make no order as to costs.

SENIOR MEMBER M. LOTHIAN