

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D572/2010

**CATCHWORDS**

Damages – assessment – expert evidence

<b>APPLICANT</b>	Mario Sumic
<b>RESPONDENTS</b>	Eddie Muzaferovic, Georgina Muzaferovic
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R. Walker
<b>HEARING TYPE</b>	Assessment of damages and final order
<b>DATE OF ORDER</b>	31 January 2014
<b>CITATION</b>	Sumic v Muzaferovic (Domestic Building) [2014] VCAT 100

**ORDER**

1. Order that the Respondents pay to the Applicant \$346,781.44.
2. Costs reserved.

**SENIOR MEMBER R. WALKER**

**APPEARANCES:**

For the Applicant	Ms Lardner of Counsel
For the Respondents	Mr B. Reid of Counsel

## REASONS

### Background

1. This matter was determined in accordance with written reasons handed down on 29 October 2013. For the reasons given I made certain findings of fact but a final order could not be made because further evidence was required in order to quantify the cost of rectifying what I found to be defects in the Builder's work.
2. I therefore directed that any further experts' reports relating to the quantification of damages to be assessed in regard to the defects listed in the reasons be filed and served and that each such report be verified on affidavit by the expert concerned. Liberty was given for the parties to apply to cross-examine the opposing expert
3. Further experts' reports have now been received from Mr Pavlekovich-Smith for the Owners and from Mr Browning for the Builder and since neither side has applied to cross-examine either expert on his report final orders can now be made.

### The reports

4. Mr Pavlekovich-Smith costed the whole of the list of defects without providing figures for the individual items. Mr Browning costed the individual items and added an initial figure for preliminaries. Mr Pavlekovich-Smith's figure for all defects that I found was \$230,924.00 including GST. Mr Browning's total including GST was \$34,644.00.
5. Such a great discrepancy is always concerning and calls for a careful examination of the calculations and the underlying assumptions made by each expert. The difficulty of the task is increased because neither expert has been cross-examined on his figures and so I can only take them and the accompanying explanations at face value and give them such weight as appears appropriate.
6. Both experts assume that the various items of work will be carried out together by a single builder and both have allowed a profit margin for the rectifying builder of 15%. Mr Browning has also added a contingency allowance of 10%.
7. The single large item that I found as a defect was the foam cladding and rendering. The other items did not appear to me to be major.

### Preliminaries

8. Mr Pavlekovich-Smith has allowed an overall figure of \$57,000 for preliminaries to carry out all of the work on site that he, on his own assessment, considered ought to be done. Of that, he has allowed \$11,942.42 or a little over 20% as being referable to the defects that I found to be established. He added \$19,000 for scaffolding and \$5,000.00 for an amended building permit, making a total of \$35,942.42.
9. Mr Browning assessed preliminaries and general expenses as being \$13,874.38 and provided a breakdown showing how he arrived at that figure. Mr

Pavlekovich-Smith has assessed preliminaries for a much greater scope of works and then taken a proportion of that figure. That is not the approach that I ought to take. I have to assess solely the cost of rectifying the Builder's defective workmanship as I found it to be. What other work the Owners might choose to do on the site is not relevant to my enquiry.

10. Mr Browning does not appear to allow a cost for an amended building permit. Mr Pavlekovich-Smith's figure of \$5,000.00 included other items and did not say how much related to an amended permit. There is a great deal of other work the Owners wish to do beyond the defects that I found which will necessitate a permit. I should not attribute the whole of the cost of a permit to the Builder's defects. I will allow \$1,000.00. There will also be an adjustment to the contingency figure to reflect the greater cost that I have found as set out below.
11. For preliminaries I will allow Mr Browning's figure plus a further \$1,000 towards the cost of an amended building Permit plus an increased contingency of \$5,085.00. That gives a figure of \$17,095.44, calculated as follows:

Contingency (at a rate of 1% of the overall cost)	\$5,085.00
General builder's clean at end of job	\$ 45.00
Insurances:	
Occupational health and safety	95.85
Contractor's works and public liability	164.32
Construction insurance	<u>264.01</u> \$ 524.18
Access and set up	\$ 160.00
Building permit	\$1,000.00
Scaffolding	<u>\$6,700.00</u>
Total preliminaries	\$13,514.18
Plus margin	\$ 2,027.13
Plus GST	<u>\$ 1,554.13</u>
Total	<u>\$17,095.44</u>

#### **Foam cladding, acrylic render and capping to mini parapet**

12. The cladding was found to be not installed in accordance with the manufacturer's recommendations. The acrylic render was also defective and there is no capping on the parapet on the north-western corner of courtyard. All of those items will be rectified together.
13. Mr Pavlekovich-Smith has allowed an overall figure of \$80,500 for the render and what he considered to be associated work, detailed as follows:

Demolition labour	\$2,400.00
Bins	\$ 900.00
Supply, fit and render cladding	\$36,000.00

Make good all flashings and cappings	\$5,000.00
Stone cladding	\$20,000.00
Complete render to remaining areas that adjoin foam clad areas	\$13,500.00
Acoustic bats to party walls	<u>\$2,700.00</u>
Total	<u>\$80,500.00</u>

14. Mr Browning assessed this item at \$16,569 which, with a builder's margin of 15% and GST, becomes \$20,959.79. The breakdown he gave was:

Demolition	\$2,980.00
Supply, fit and render cladding	\$6,889.00
Scaffolding	<u>\$6,700.00</u>
Total	<u>\$16,569.00</u>

15. Mr Browning's report has the same scaffolding figure under this item as he has included under the Preliminaries figure. In the absence of an explanation I am unable to say whether this is a double counting or simply a coincidence of figures. I must take his figures at face value.
16. In his earlier report dated 8 April 2011 Mr Browning costed this item at \$40,574.45, comprising preliminaries of \$11,996.00, demolition of \$1,990.00, and supply and fix new foam cladding and render finish of \$10,790.00 and then added a margin of 20% plus GST. His calculation is on the basis of there being 83 square metres of cladding to be replaced.
17. The major difference lies in the cost of the replacement of the foam board and the rendering system. Mr Pavlekovich-Smith has costed for 200 square metres whereas Mr Browning has costed only 83 square metres. Mr Pavlekovich-Smith has allowed \$180 per square metre whereas Mr Browning has allowed only \$83 per square metre. The only way that I can resolve the difference in quantities is by reference to the other evidence. Although I have some experience in the interpretation of plans I am not an expert and having looked at them the area to be re-clad is not obvious to me. Although I cannot resolve the issue by reference to the plans I note that the Invoice from the renderer for the work originally done (Tribunal Book page 1561.3) charges for 153 square metres.
18. I cannot make my own calculation of the area in question. I must decide which expert's measurement is more likely to be the correct one. I think I must prefer that of Mr Pavlekovich-Smith over Mr Browning's assessment, which is less than his earlier assessment and allows for an area less than that charged for by the original contractor.
19. Of the other amounts Mr Pavlekovich-Smith has costed and included under this item, I made no finding that the Builder was responsible to remove the stone cladding or to complete the rendering of areas that adjoin foam clad areas and I

made no finding that acoustic bats were to be installed as part of the rectification work. Incomplete work was not the responsibility of the Builder.

20. When those items are deducted from Mr Pavlekovich-Smith's costings the result is \$44,300 and that sum will be allowed, plus margin of 15% and GST, giving a final figure of \$56,004.00.

### **Wall cladding**

21. Harditex wall cladding, commonly known as "Blueboard", which is cladding external walls in various locations is to be removed and replaced with a product called Sycon compressed cement sheet cladding.
22. Mr Pavlekovich-Smith has included the replacement of the Blueboard in his overall figure of \$80,500 but I am unable to see what he has assessed this individual item at.
23. Mr Browning assessed this item at \$2,180.00 which, with a builder's margin of 15% and GST, becomes \$2,757.70. He has allowed two hours labour for a carpenter for demolition and eight hours labour for a carpenter to put up the new cladding. The materials cost is said to be \$1,380.00. I will allow Mr Browning's figure.

### **Floor levels other than the Bedrooms**

23. The kitchen and sitting room floors are out of level by 19mm over 9 metres which exceeds the permitted tolerances set out in the *Guide to Standards and Tolerances*, 2007 Edition and so I found that the out of level floors were a defect. The floors have to be levelled
24. Mr Pavlekovich-Smith said that the floor should not simply be packed which is, he said, poor construction practice. He noted that the walls and ceilings had since been plastered by the Owners. He said that this has exacerbated the issue, in that jacking, packing and replacement of studs to re-align the top plates and beams supporting the floor joists was not feasible. He said that it would now be necessary to remove the particle board flooring, cleat additional floor joists with some minor packing and planning and then re-install the floor.
25. I think that I should assess this item as at the date the Builder was excluded from the site. The fact that the cost of rectification is exacerbated by the Owners having carried out further work including plastering since then is not something for which the Builder should be held responsible. If the floors were to be levelled so as to be within tolerance that should have been done before the walls were plastered.
26. I am unable to adjust Mr Pavlekovich-Smith's figure to what he might have considered the cost of rectification to have been at the relevant time and so I am left with Mr Browning's figure. Mr Browning assessed this item at \$1,990 which, with a builder's margin of 15% and GST, becomes \$2,517.35. That figure will be allowed.

### **Bedroom floors out of level**

27. The same comments are made as to this item which I also found to be a defect. Again I am left with Mr Browning's figure. He assessed this item at \$1,990 which, with a builder's margin of 15% and GST, becomes \$2,517.35.

### **Door heights where ceilings were raked**

28. The original plans required doors to be 2400 high where ceilings were raked. The doorways were constructed for lower doors. The doorways need to be extended in order to comply with the Original Plans. Since no doors have been fitted it was acknowledged that the cost of doing that would be modest. This is a defect.
29. Mr Pavlekovich-Smith has allowed \$11,756.00 for this item, but that figure includes doors and painting. The undersized doorways were not painted when the Builder was excluded from the site and so it is not appropriate to allow painting. Further, it is the doorways to the raked areas alone that were to be assessed. Mr Pavlekovich-Smith's allowance of \$8,100.00 for replacing 27 doors and jambs is therefore beyond what I found to be the responsibility of the Builder.
30. The required scope of works appears to be only adjusting the framing to allow larger openings. Mr Browning assessed this item at \$390 which, with a builder's margin of 15% and GST, becomes \$493.35. That amount will be allowed.

### **Conclusion**

31. I assess the defects for which the Builder is responsible at \$ , calculated as follows:

Preliminaries	\$17,095.44
Replacement of foam board and related items	\$56,004.00
Replacement of Harditex Cladding	\$ 2,757.70
Floor levels other than bedrooms	\$ 2,517.35
Bedroom floor levels	\$ 2,517.35
Doorway heights	<u>\$ 493.35</u>
Total damages to be awarded	<u>\$81,385.19</u>

32. The amount to be awarded to the Builder in the final order is therefore \$218,813.30, calculated as follows:

Cost of work and materials supplied	\$511,849.14
Less: Defects as above	<u>\$ 81,385.19</u>
Value of work and materials	\$430,463.95
Builder's margin of 15%	<u>\$ 64,569.59</u>
Amount due to Builder	\$495,033.54
Less payments made	<u>\$177,000.00</u>

Balance unpaid for work and materials	\$318,033.54
Money lent and legal and consultants' fees	\$ 28,747.90
Total due	<u>\$346,781.44</u>

33. There will be a final order that the Respondents pay to the Applicant \$346,781.44. Costs are reserved for further argument.

**SENIOR MEMBER R. WALKER**