

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D827/2010

<b>APPLICANT</b>	Van Pelt Builders Pty Ltd (ACN 078 834 529)
<b>RESPONDENT</b>	Michelle Rose (also known as Moshit Rose)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R. Walker
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	31 March to 1 April 2011
<b>DATE OF THESE REASONS</b>	30 May 2011
<b>CITATION</b>	Van Pelt Builders Pty Ltd (ACN 078 834 529) v Rose (Domestic Building) [2011] VCAT 996

### WRITTEN REASONS PROVIDED PURSUANT TO THE REQUEST OF THE RESPONDENT

1. I heard this proceeding on 31 March and 1 April 2011. At the conclusion of the hearing I made an order in favour of the Applicant for payment by the Respondent of \$94,093.34 plus costs. I gave oral reasons for my decision. No written reasons were requested by the Respondent at the time but they have since been requested. Although the request is out of time I provide the following reasons as a matter of courtesy.

#### Background

2. In this case the Respondent (“the Owner”) entered into a major domestic Building Contract with the Applicant (“the Builder”) to convert a single dwelling house into two apartments.
3. The Builder carried out the work but, notwithstanding her obligations under the Contract, the Owner did not pay it the price. How this situation could have arisen is difficult for me to understand.
4. Following completion of the work the Owner sold both Units. Some money was paid by the Owner after these proceedings were issued. The Builder now seeks the balance of the contract price.

## **The contract**

5. The Builder gave two quotations. In the first, it quoted a price for doing all of the work with the Builder providing all of the fittings and appliances as prime cost items. The Owner considered the price to be too high and following some further discussions all of what were formerly prime cost items, such as the kitchen, the bench tops, the carpet and the staircase were to be supplied by the Owner.
6. There is no evidence as to why that was done but possibly it has to do with how much finance the Owner could obtain. Ultimately, her finance was not obtained but the Builder nonetheless proceeded with the work in the expectation, encouraged by the Owner, that the finance would eventually be forthcoming. It never was.
7. The final contract was for a price of \$117,640.00 Quite obviously the real price was much more than that when the cost of all of the things the Owner was to supply were added in. Ultimately, the Owner did not supply these other things. The Builder was asked to supply them and did so. That suited the Owner because the Builder was supplying them and not getting paid. The Builder issued numerous written variations to incorporate these extra items which the Owner signed.

## **The amounts claimed**

8. The amounts claimed are either the contract price or variations that were signed by the Owner. They are generally not disputed except as follows.
9. The amount claimed by the Builder includes the deposit which Mr Van Pelt said was never paid. The Owner claims to have paid the deposit but I am not satisfied that a deposit was paid. I prefer Mr Van Pelt as a witness to the Respondent and he said that it was not paid.
10. In any event, the Owner did not even claim to have a clear recollection that she paid the deposit. She just thought that she must have paid it. The documents support Mr Van Pelt's evidence that it was not paid. The Owner has been able to produce evidence as to the two payments that she has made and there is no evidence that there was any other amount paid. The amount that she refers to that she thinks she might have paid was \$5,000 but that was not the amount of the deposit, which was \$5,882.00. I think if there had been some difference between the amount that she paid and the amount of deposit that would be one reason why she would remember whether she made the payment or not. I am not satisfied that the deposit was paid.
11. The Owner disputes the amount claimed for the kitchen because the cabinet maker did not sign his quotation for the kitchen. That makes no difference at all. The fact was that the Owner went and spoke to the cabinet maker and sorted out what she wanted. One of the cabinets for

\$3,000 was taken out of the quotation at her request and the figures were adjusted accordingly. The cabinets were then supplied. I have carefully checked the calculation for the cabinets and the amount, which is the amount set out in the variation that the Owner signed, was right.

12. The Owner disputes liability for the roller door. Looking at the plans I think that she is right that the roller door was included so the claim for that is not allowed.
13. Because of the nature of these proceedings I am prepared to accept the Owner's evidence that the amount of \$850.00 in one of the variations should have been \$800.00.
14. It is acknowledged that the amount of \$10,000.00 that the Owner paid in regard to the driveway must come off.
15. I find that the rest of the sum claimed by the Builder is proven, against which credit will be given for the two amounts paid by the Owner of \$150,000 and \$110,000.

### **Interest**

16. It was provided in the body of the contract that interest would accrue on late payments at a rate of 20%. However there is a special condition in the contract that says the applicable rate is the overdraft rate from time to time of Westpac Bank, which is less than half of that 20% and so interest on the overdue amount should be calculated on that basis.

### **Costs**

17. Mr Burns applied for an order for costs. In any proceeding before this Tribunal the starting point is that parties pay their own costs (*Victorian Civil and Administrative Tribunal Act 1998 s.109(1)*). However there is power in the Tribunal to award costs if the circumstances of the case are such that it is fair to do so (s.109(2)).
18. In the present case there was no reason for the Owner to have failed to pay the Builder for the work that it had done. The items that she succeeded on were very minor compared with the contract price. She contrived to have the Builder do the work for her without payment and then did not pay it even when the work was finished. She sold the Units and even then only paid a part of what was due.
19. The Builder should never have been put to the expense of this proceeding and so it is an appropriate case in which to make an order for costs.

### **Conclusion**

20. The Owner's real complaint seems to have been that the ultimate cost was more than she anticipated and she did not make as much profit on the project that she thought she would make. That is no answer to the claim. The fact is that she asked for this work to be done and I must find that she did because she signed the contract and the variations. The contract

specified the agreed price and an agreed price is in all the variations. It is simply a matter of adding everything up.

21. There will be judgement for the Applicant against the Respondent for the unpaid balance of the contract price and variations and interest. Having gone through the calculations I find that the amount due is \$94,093.34 and judgement will be for that sum. There will also be an order for the costs of this proceeding to be assessed, if not agreed, in accordance with Scale "D" of the County Court Scale.

**Rohan Walker**

**Senior Member**