

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. D688/13

CATCHWORDS

Application to reinstate a proceeding on the grounds that the respondents had failed to comply with a settlement agreement. Respondents opposed reinstatement on the basis that there had been no breach of the terms of the settlement agreement.

Proceeding reinstated, and damages awarded in favour of applicant.

APPLICANT	Gaurav Vig
FIRST RESPONDENT	Aladin Rexhepi
SECOND RESPONDENT	Janco Draca
WHERE HELD	Melbourne
BEFORE	A Kincaid, Member
HEARING TYPE	Reinstatement Application
DATE OF HEARING	12 July 2016, 28 September 2016
DATE OF ORDER AND REASONS	23 December 2016
CITATION	Vig v Rexhepi (Building and Property) [2016] VCAT 2192

ORDER

1. The proceeding is reinstated.
2. The respondents must pay the applicant \$2,884.50.
3. Costs reserved. If there is an application by either party for costs, the principal registrar is directed to fix it for hearing before Member Kincaid, allow 2 hours.

A Kincaid
Member

APPEARANCES:

For Applicant

Mr G Vig in person

For Respondents

Mr B Mason of Counsel

REASONS

- 1 This is an application for reinstatement on the grounds that the respondents have failed to comply with Terms of Settlement dated 28 April 2015 (the “**Terms**”).

BACKGROUND

- 2 The respondents are builders, who built a 14 unit development at 130 Cadles Road, Carrum Downs.
- 3 By an agreement dated 7 November 2011, the applicant purchased Unit 10 off the plan.

Applicant takes possession

- 4 Settlement of the purchase took place on 31 May 2012, with the applicant’s lawyers having also reserved his rights in respect of alleged outstanding and defective works.
- 5 The applicant did not occupy the unit for a period of about 6 months thereafter, in order that the respondents could undertake rectification and completion works.
- 6 The applicant obtained a “post final inspection” defective works report from Nicholas Mladichek, building consultant, arising from an inspection by him on 27 June 2012 (the “**Nicholas Mladichek report**”). He obtained a further report from Branko Mladichek, building consultant, arising from an inspection by him on 24 October 2012 (the “**Branko Mladichek report**”).
- 7 The applicant subsequently became dissatisfied with the respondents’ progress concerning rectification works.

Applicant commences a proceeding

- 8 By a proceeding dated 14 June 2013, the applicant sought damages against the respondents in respect of alleged construction defects in his unit.
- 9 The applicant obtained a further expert’s report from Mr Jeff Beck, building consultant dated 29 July 2013 (the “**first Beck report**”). Mr Beck identified defects in connection with the ducted heating, kitchen joinery, floor boards and garage door. His estimate of the cost of rectification works was \$19,878.
- 10 The respondents engaged Mr David Cheong, building consultant, to respond to the Mladichek reports and the first Beck report. Mr Cheong produced a report dated 29 August 2013 (the “**first Cheong report**”). He attached to that report a Scott Schedule (“**Scott Schedule 1**”), containing his views on the liability of the respondents for the then alleged defects.
- 11 The applicant obtained a further report from Mr Beck dated 12 September 2014, in connection with a roof leak caused by allegedly defectively installed

rainwater spreaders in the upper roofs (the “**second Beck report**”). Mr Beck assessed rectification costs for those works in the sum of \$7,831.

- 12 In late September 2014, Mr Beck and Mr Cheong met at the property. Mr Cheong subsequently prepared a further Scott Schedule, setting out in the fifth column (the “**fifth column**”) what he and Mr Beck had allegedly agreed needed to be done in respect of relevant items of claimed defective works identified in the Mladichek reports, the first Beck report and, insofar as it relates to a claimed water leak, the second Beck report (“**Scott Schedule 2**”).
- 13 As a result of these investigations, and the inability of the parties to agree on a course of action, at a directions hearing on 7 November 2014, the Tribunal made directions for the service by the applicant of a particularised Amended Points of Claim.

Parties enter terms of settlement

- 14 The parties attended a compulsory conference at the Tribunal on 28 April 2015. As a result of their discussions that day, they entered into the Terms. Under the Terms, the respondents:

“...agreed to carry out and complete the works set out in Schedule 1 [of the Terms].”

- 15 Schedule 1 of the Terms provided as follows:

Schedule 1

The works described in the far right hand column of the [attached] Scott schedule in respect to Items [identified in the Nicholas Mladichek and Branko Mladichek reports and set out in the first and second columns of the Terms]

- 16 The parties having settled the applicant’s claim, I subsequently dismissed the proceeding by consent, with a right to apply for reinstatement.

Applicant alleges failure by respondents to comply with the Terms- reinstatement application dismissed

- 17 Subsequent correspondence demonstrates that the relationship between the parties became rancorous.¹
- 18 On 27 August 2015 the applicant sought to have the proceeding reinstated. He alleged that the respondents had failed to complete the works within the 60 day period required by the Terms, and that the respondents had failed to undertake many of the rectification works required to be done by the Terms.
- 19 The respondents contended that they had performed the required rectification works.
- 20 I dismissed the reinstatement application on 21 October 2015, with costs to the respondents, because I found that the applicant had failed, prior to bringing his application, to make arrangements for a joint certification by

¹ See *Chronological History of Events* prepared by the applicant dated 1 March 2016 (as amended by the respondents on about 24 September 2016).

Mr Cheong and Mr Beck of the allegedly rectified works, as required by the Terms.

Applicant seeks reinstatement again

- 21 In January 2016, the applicant applied again to have the proceeding reinstated.
- 22 The applicant relied on a further report by Mr Beck dated 29 October 2015 (the “**third Beck report**”), to the effect that defects required to be rectified by the Terms still existed at the date of Mr Beck’s further inspection on 27 October 2015.
- 23 The matter came before me on 2 March 2016. I ordered the respondents to file and serve by 24 March 2016 a further report by Mr Cheong stating in what respects he disagreed with Mr Beck’s views expressed in the third Beck report. I fixed the reinstatement application for hearing on 4 April 2016.

Further reports obtained by the parties

- 24 Mr Beck and Mr Cheong conducted a joint inspection at the house on 17 March 2016.
- 25 Pursuant to my order on 2 March 2016, Mr Cheong subsequently produced a further report by way of a Scott Schedule dated 23 March 2016 (the “**second Cheong report**”), in response to the third Beck report.
- 26 On 4 April 2016, at the request of the applicant, I further adjourned the hearing to 12 July 2016. The reason for this was because the applicant only received a copy of the second Cheong report that day, and wished to obtain Mr Beck’s comments in relation to it.
- 27 The applicant subsequently obtained further opinion from Mr Beck, by a report dated 21 June 2016 (the “**fourth Beck report**”).

The first day of the hearing

- 28 On the first day of the hearing on 12 July 2016, the applicant gave evidence in respect of all 20 items of alleged defective works identified in the fourth Beck report. I heard concurrent evidence from Mr Beck and Mr Cheong concerning them. The applicant had not requested Mr Beck, at that point, to provide his opinion on quantum.
- 29 I was unable, in the time available on that day, to hear evidence concerning the applicant’s further claim that the respondents failed to complete the rectification works within 60 days of the Terms. Also, the applicant had not formulated his submissions as to the claimed loss said to flow from this alleged further breach.
- 30 I adjourned the proceeding to 28 September 2016 for a further half day hearing, with ancillary orders requiring the parties to exchange reports on quantum, and requiring the applicant to provide a chronological sequence of

events in support of his submission concerning the respondent’s alleged failure to complete the rectification works.

- 31 Mr Beck provided a report on quantum dated 7 September 2016 (the “**Beck costings**”). The Beck costings valued the applicant’s total rectification costs claim at \$12,013.
- 32 Mr Cheong provided a report on quantum dated 23 September 2016 in response, which valued rectification costs at \$7,200 (the “**Cheong costings**”).

The second day of the hearing

- 33 The hearing continued on 28 September 2016, for a half day. Towards the end of the hearing, the applicant informed the Tribunal that he would not pursue his alleged delay claim.
- 34 Further, of the 20 or so defect claims the subject of evidence on the first day of the hearing, the subject of the Beck costings, the applicant informed the Tribunal that he would only be pursuing the following claims:

Description of item of work in the first and second columns of the Schedule to the Terms allegedly not rectified	Applicant’s claimed rectification cost (the Beck costings)	Respondent’s claimed rectification cost (the Cheong costings)
Item 8 “Poor finished wall/roof junction, uneven gap.”	\$1120.00 <u>\$425.00</u> scaffolding \$1,545.00	\$440
Item 15 “Loose and badly fitted carpet throughout house, lifting in places”	\$130.00	Accepted
Item 16 “Popped nails in ceiling”	\$3,259.00	\$2,200-\$2,250
Item 18 “Cornice defects”	-	-
Items 22 and 35 “Poorly finished and patchy cornice” “defective cornices and bulkheads”	\$1,270.00	\$800.00
Item 64 “Bow in leading edge [of garage architrave]”	No amount claimed in the Beck costings on the expressed basis that	-

	“this item has been rectified”	
Item 68 “Bows in rendered cladding to front”	\$2,405.00 <u>\$425.00</u> scaffolding \$2,830.00	\$1,650.00
Item 83 “Visible bumps and bulges in ceiling linings”	\$1,198.33	\$550.00
TOTAL	\$10,232.33	\$5,690

- 35 At the end of the second day’s hearing, at my suggestion, and in order to minimise the risks to him of my finding against him in regard to his claimed quantum of loss, the applicant announced that should the Tribunal find that there are outstanding rectification works, he would be content for the Tribunal to “split the difference” between the Beck costings and the Cheong costings.
- 36 The solicitors for the respondents subsequently emailed the Tribunal on 28 September 2016 to the effect that the respondents were agreeable to this course, should the Tribunal reinstate the proceeding and find that an amount is payable to the applicant in respect of any of the claimed defective works.

The claimed defects

- 37 I shall now address the claimed defects, by reference to each of their descriptions in the Schedule to the Terms.

(a) **Item 8**

“Poor finished wall/roof junction, uneven gap.”

- 38 Mr Beck contends in the third Beck report “no work has been completed in straightening the upper story [EPS] cladding in relation to the flashing and the lower roof”.
- 39 A photograph of the alleged uneven gap appears on page 7 of the Branko Mladichek report.
- 40 Mr Cheong contends in the second Cheong report that the photographs reproduced on page 5 of the third Beck report show the bottom edge of the rendered EPS cladding on the upper south elevation towards the west end, and on the upper north elevation from the west end to the corner.
- 41 Mr Cheong further contends that the straightening of cladding at these locations does not appear in the Terms. He contends that the alleged uneven gap shown in the photograph on page 7 of the Branko Mladichek

report (the subject of the Terms) is located on the east elevation towards the north end, and that this has been rectified by the respondents.

- 42 I am not satisfied from the evidence that the applicant has demonstrated, on the balance of probabilities, that the allegedly defective work shown in the photographs reproduced on page 5 of the third Beck report is the same allegedly defective work shown in the photograph on page 7 of the Branko Mladichek report.
- 43 Although the work identified in the photographs reproduced on page 5 of the third Beck report may well be defective work of a similar description to the defective work identified in the photograph, I find that it is not defective work that the respondents were required to rectify pursuant to the Terms.
- 44 In relation to this claim, the applicant has failed to prove that the respondent is in breach of the Terms.

(b) **Item 15**

“Loose and badly fitted carpet throughout house, lifting in places”

- 45 A photograph of the alleged defect appears on page 10 of the Branko Mladichek report.
- 46 Mr Beck contends in the third Beck report “the transition between the upper story hallway and the living room (adjacent to the balcony) has a section which has large lumps where the carpet appears to be not properly stretched”.
- 47 Mr Cheong contends in the second Cheong report that this claimed item is regarded by him and Mr Beck generally of a nature within the description of the defect described in Item 15 of the Terms. However, Mr Cheong considers that this alleged defect is a consequence of rectification works previously carried out by the respondents. He considers that the “unevenness will inevitably settle and become less noticeable due to traffic”, but that “minor work may be appropriate”.
- 48 I find from Mr Beck’s evidence, not vigorously contested by Mr Cheong, that the carpet in the transition area described by Mr Beck needs to be stretched and properly fixed.
- 49 I fix the rectification cost at \$130, as estimated by Mr Beck, and agreed by the respondents.

(c) **Item 16**

“Popped nails in ceiling”

- 50 A photograph of the alleged defect in “bedroom 1” appears on page 10 of the Branko Mladichek report. I note that the words “bowed cornice in ceiling” also appear below the photograph.

- 51 The parties accept that the respondent carried out repairs in purported accordance with the Terms, which involved the replacement of the ceiling. The applicant now complains that the works were carried out defectively, in breach of the implied term of the Terms to carry out the rectification works with due care and skill.
- 52 This breach, the applicant alleges, has had the result that the ceiling slopes from the north side of the room to the south side, and that the order of this ceiling slope is 10 mm. Mr Beck calculated this distance by measuring the distance between the ceiling and the top of the window architrave at north end of the west elevation, and the ceiling and the top of the window at the south end of the west elevation. I find that the plaster ceiling cornices, which follow the line of the ceiling, also deviate by 10 mm. Mr Beck also gave evidence that this has the result that there is 10 mm “more wall” above the top of the north window architrave than there is above the top of the south window architrave.
- 53 Clause 9.17 of the *Guide to Standards and Tolerances 2015* (the “GST”) :
- Straightness and alignment of plaster cornices**
- Plaster cornices are defective if they deviate from a straight line greater than 4 mm over a length of up to 2 m and are visible from a normal viewing position.
- 54 The parties agree that the room length is 3.4 metres.
- 55 The effect of clause 9.17 of the GST is that the greatest deviation allowable for a cornice extending 4 metres, before it is regarded by the GST as a defect, is 8 mm. The deviation of 10 mm within a distance of 3.4 metres therefore amounts to a defect within the meaning of the GST.
- 56 The respondents submit that the appropriate measure is a deviation of 5 mm over a 1.8 metres length, and therefore the alignment of the ceiling is “marginally to tolerance”. I do not accept this submission. It relies on clauses 9.10 and 9.11 of the GST, which is concerned with “the verticality of...wall surfaces” and the “straightness of...wall surfaces” respectively, not the deviation in alignment of a cornice.
- 57 The GST is a non-prescriptive guide to building practitioners and building owners as a convenient reference for acceptable standards of workmanship in domestic building construction. Whether any material failure to comply with its provisions gives rise to a need to rectify depends upon a consideration of the nature of the defect, and whether any and if so what damage has been caused or is likely to be caused by the defect.
- 58 The respondents submit that this is a “minor, aesthetic item...which has no effect on performance”, and that the defect ought not to give rise to an award of damages against the respondents.
- 59 Both the applicant and Mr Beck gave evidence that the 10 mm variance between the tops of the respective window architraves and the cornice line above this is plainly noticeable from the entry door to the room. The

applicant also gave evidence that he is disturbed by this feature, whenever he enters the room. Mr Cheong concedes that there are 2 nail bulges in the north side of the replaced ceiling, therefore agreeing with Mr Beck's observation that 'screw fixings are visible [on the] north side of the new ceiling]'.

- 60 Having regard to this evidence, I am of the view that rectification of the defectively installed ceiling is a reasonable course to adopt in all the circumstances.
- 61 In keeping with the parties' agreement, I fix the rectification expenses at \$2,754.50 being the midpoint between \$3,259 and \$2,250.

(d) **Item 18**

"Cornice defects"

- 62 A photograph of the alleged defect appears on page 11 of the Branko Mladichek report.
- 63 The experts agree that the required works have been completed.
- 64 In relation to this item, I find that the applicant has failed to prove that the respondent is in breach of the Terms.

(e) **Items 22 and 35**

"Poorly finished and patchy cornice"

"Defective cornices and bulkheads"

- 65 Photographs of these alleged defects appear on pages 13 and 18 respectively of the Branko Mladichek report. The experts agree that these works were essentially to make good a paint mismatch only, and that the works have been performed.
- 66 The applicant now contends, firstly by way of the third Beck report and subsequently, that ceiling cornices at the west end of the downstairs living room, upstairs living room and bedroom are sagging or bowing beyond the allowable tolerances in the GST.
- 67 I am not satisfied, from viewing the photographs on pages 13 and 18 of the Branko Mladichek report that the present complaints concerning sagging and/or bowing were works that, on a construction of the Terms, were required to be performed by the respondents under the Terms.
- 68 In relation to this item, I find that the applicant has failed to prove that the respondent is in breach of the Terms.

(f) **Item 64**

“Bow in leading edge [of garage architrave]”

- 69 Photographs of this alleged defect appears on page 32 of the Branko Mladichek report.
- 70 Mr Beck has given evidence that the respondents have rectified the defect. Mr Cheong also tendered a photograph showing that the bow has been straightened. I also find from the evidence that the architrave has since been painted.
- 71 In relation to this item, I find that the applicant has failed to prove that the respondent is in breach of the Terms.

(g) **Item 68**

“Bows in rendered cladding to front”

- 72 Photographs of this alleged defect appear on page 7 of the Nicholas Mladichek report.
- 73 Mr Beck is of the opinion that the lightweight rendered cladding along the south (or front) of the house has either not been rectified, or the rectification has not straightened the walls to be within the “straightness” tolerances set out in the GST. In order to rectify the defect, Mr Beck considers that all the cladding would need to be removed, and the walls re-rendered to match the existing walls.
- 74 The respondents submit that there is no evidence that the variances in the straightness of the cladding result in it not being in compliance with the GST (as opposed to the 2007 edition of the GST).
- 75 More particularly, the respondents rely on Mr Beck’s observation that he does not consider that the variances in straightness are able to be viewed from a normal viewing position.
- 76 There is no evidence that the alleged defective cladding has had any effect on building performance.
- 77 A building owner is, as a general rule, entitled to have a building which complies with the contract requirements, and is therefore entitled to the cost of rectification as damages. However, the High Court in *Bellgrove v Eldridge*² imposed a well-known qualification to the general rule, as follows:

...The qualification, however, to which this rule is subject is that, not only must the work undertaken be necessary to produce conformity, but that also, **it must be a reasonable course to adopt**. No one would doubt that where pursuant to a building contract calling for the erection of a house with cement rendered external walls of second-hand bricks, the builder has constructed the walls of new bricks of first quality the owner would not be entitled to the cost of demolishing the walls and re-erecting them in second-hand bricks. In such circumstances the work of demolition and re-

² (1954) HCA 36

erection would be quite unreasonable or it would, to use a term current in the United States, constitute "economic waste"...We prefer, however, to think that the building owner's right to undertake remedial works at the expense of a builder is not subject to any limit other than is to be found in the expressions "necessary" and "reasonable", for the expression "economic waste" appears to us to go too far and would deny to a building owner the right to demolish a structure which, though satisfactory as a structure of a particular type, is quite different in character from that called for by the contract. **Many examples may, of course, be given of remedial work, which though necessary to produce conformity would not constitute a reasonable method of dealing with the situation and in such cases the true measure of the building owner's loss will be the diminution in value, if any, produced by the departure from the plans and specifications or by the defective workmanship or materials. As to what remedial work s both "necessary and "reasonable" in any particular case is a question of fact** (*my emphasis*)

- 78 Having regard to the proposed costs, and having regard to the principle described in *Bellgrove*, I consider that in all the circumstances, rectification of this alleged defect is not a reasonable course to adopt.
- 79 In relation to this item, I find that the applicant has failed to prove that the respondent is in breach of the Terms, but that even if the respondent is in breach, I do not make an award of damages for rectification costs.

(h) **Item 83**

“Visible bumps and bulges in ceiling linings”

- 80 Photographs of this alleged defect appear on page 16 of the Nicholas Mladichek report.
- 81 Mr Beck states in the third Beck report that the garage ceiling still has obvious lumps and fixing points evident in the fixing plaster, which can be viewed from a normal viewing position.
- 82 The respondents concede that the defect has not been rectified, but that the reason for this is that the applicant breached his obligation, implied at law, to grant the respondents access to the garage in order that they could carry out the rectification works.
- 83 Mr Rexhepi gave evidence that the applicant kept his personal belongings in the garage. He stated that with the exception of being given the key to the garage for the purpose of carrying out one of the items of required rectification works (item 7-the removal of soil against the building), he was not provided with the key again.
- 84 The respondents submit that by reason of the applicant’s failure to provide the respondents with the necessary access to rectify this item, the applicant waived compliance with the obligation to rectify.
- 85 The applicant says that there is no reason why he would not have granted further access to the garage had he been asked. There is no correspondence concerning this issue, and I am therefore bound to make a finding on the oral evidence.

- 86 I have concluded that there is doubt about whether or not access to the garage was freely given by the applicant to the respondents. This being the case, the applicant has failed to persuade me, on the balance of probabilities, that he did not waive compliance with the rectification Item 83. In relation to this item, I find that the applicant has failed to prove that the respondents are in breach of the Terms.
- 87 I make the attached orders. I have heard no argument as to costs, and so I shall reserve costs.

A T Kincaid
Member