

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO.BP701/2014

CATCHWORDS

Domestic Building Contracts Act 1995 – claim for work and materials – complaint of defective and incomplete work - no counterclaim brought – defence that work worth less because incomplete and defective – proof of quantum of defective and incomplete work – quotation some evidence of cost of rectification - quality of evidence – *Victorian Civil and Administrative Tribunal Act 1998* – s.97, 98, 100 and 102 – duty of Tribunal to receive evidence and give it such weight as is appropriate – *Guide to Standards and Tolerances 1997* – not prescriptive

APPLICANT	VJV Pty Ltd (ACN: 153 135 703)
FIRST RESPONDENT	Mr Andrew Snioch
SECOND RESPONDENT	Mrs Kuzara Michelle
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	24 February and 30 March 2015
DATE OF ORDER	9 April 2015
CITATION	VJV Pty Ltd v Snioch (Building and Property) [2015] VCAT 408

ORDER

Order the Respondents to pay to the Applicant the sum of \$762.50

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr D. Whitrod Manager
For the First Respondent	Mr A. Snioch in person
For the Second Respondent	Ms M. Kuzara in person

REASONS

Background

- 1 The Respondents (“the Owners”) are the owners of a dwelling house in Sydenham (“the House”). The Applicant (“the Builder”) is a builder.
- 2 On Christmas Day 2011 there was a heavy storm during which a large number of roofing tiles on the House were smashed by hailstones and the House became inundated with water.
- 3 The Owners claimed indemnity for their loss under the terms of their insurance policy but it was some considerable time before the claim was accepted and arrangements could be made for rectification work to be carried out. In the meantime, the House remained unoccupied with the roof covered by a tarpaulin and the interior finishes deteriorating due to the continued and prolonged presence of water.

The rectification

- 4 The Builder provided a quote to rectify the damage in July 2012 for a price of \$79,890. The quote was accepted and a contract was signed between the parties on 11 September 2012.
- 5 A deposit of \$3,994.50 was paid and the work was then carried out. On 17 December 2012 there was an inspection of the House and a list of defects was prepared by the Owners who were dissatisfied with the work.
- 6 Their principal concern was with the floorboards. The House is built on a concrete slab and the floorboards are laid on battens fixed to the slab. When the flood occurred, water got underneath the floorboards and lay between the boards and the concrete slab. Part of the rectification work involved removing floorboards on both sides of each room in order to allow the passage of air from one side of the floor to the other. Drying machines were also brought in. When the flooring was finally dry it was found that there was considerable cupping to many of the floor boards and that they needed to be sanded back level and refinished.
- 7 After the sanding and refinishing the Owners were dissatisfied with the undulation of the floor which they blamed on the water penetration. They sought the cost of replacement of the floor from their insurer. This further claim was rejected following which some further work was done on the floor by the Builder and the Owners finally took possession.

The claim

- 8 On 28 June 2013 the Builder submitted a final invoice for \$5,762.50 which the Owners refused to pay. A further invoice was then submitted by the Builder claiming interest.
- 9 On 28 November 2014 the Builder commenced this application to recover the amount of its final invoice plus interest of \$843.09.

The hearing

- 10 The matter came before me for hearing on 24 February 2015. The Owners appeared in person and the Builder was represented by its Manager, Mr Whitrod.
- 11 During the hearing it became apparent that the Owners wished to raise a number of allegations concerning defective workmanship that were not the subject of any Points of Defence or Counterclaim. I adjourned the matter part heard to an on site hearing at the House and gave directions for the filing and service of any additional material.
- 12 Pursuant to this direction the Owners obtained a further expert's report from a Mr Crifo and served it on the Respondent.
- 13 The on site hearing took place on 30 March 2015 when I inspected the House in the presence of the parties and with the assistance of Mr Crifo's report. After hearing from the parties and concluding the inspection I informed them that I would provide a written decision.

The respective claims

- 14 There appears to have been no dispute as to the final invoice rendered by the Builder. The question is, whether the work is incomplete or defective and to what extent. The Owners also complained that, between 17 December 2012 and the date upon which they finally moved in following the refusal of their insurance company to replace the floor, they had to live in alternate accommodation for which they seek damages.
- 15 Apart from the rectification of the floor, which I have already described, the scope of works involved removing the ceiling and insulation and the plaster from one side of every wall in the House. Not every surface that I observed was the work of the Builder.
- 16 The author of the report has gone from room to room making notes as to various matters that he observed. No cost of rectification is provided in the report but the Owners have obtained an "estimate" from a Builder that it will cost \$7,450 to carry out the work detailed in Mr Crifo's report.
- 17 There is no counterclaim seeking payment of the costs the Owners claim they will incur in rectifying and completing the items that have been identified. Nevertheless, it is always open to a party for whom work has been done to defend the claim for the costs of the work by leading evidence that, due to some defect or deficiency, it is worth less than the amount contracted for. See *Hanak v Green* [1958] 2QB 9). One possible measure of the reduced value might be the contract price less the reasonable cost of rectifying and completing the work.

Cost of rectification/completion

- 18 I have no sworn evidence from an expert witness as to the reasonable cost of attending to the matters identified in Mr Crifo's report. What I have is a quotation from a builder. Strictly, a quotation is not an assessment of the

reasonable cost of carrying out the work that it describes. Rather, it is the price for which the author of the quotation is prepared to do that work. The evidence before me is therefore less than ideal to say the least.

Nevertheless, this Tribunal is established to enable modest claims to be litigated by unrepresented persons and quotations are commonly relied upon in the absence of any other evidence. Were we to insist upon strict and formal proofs for every issue in a claim such as this it is unlikely that many would ever be litigated, whether here or elsewhere.

- 19 The Tribunal is required by s97 of the Act to act fairly and according to the substantial merits of the case in all proceedings. It is not bound by the rules of evidence or any practices and procedures applicable to courts of record and it may inform itself of any matter it sees fit. It is however bound by the rules of natural justice. It can conduct hearings in the absence of parties based entirely upon documents (s.100(2)).
- 20 The evidence proffered by parties before the Tribunal, particularly by unrepresented parties is of very uneven quality. However, by s102 the Tribunal is bound to allow the party to present it and must then give it such weight as its nature and the surrounding circumstances warrant, subject always to the overriding obligation to act fairly and in accordance with the rules of natural justice.
- 21 Although better evidence might be preferred, a quotation from a builder to carry out the work described in it for the sum of \$7,450 is at least some evidence of what it will cost to carry out that work. In the present case it was not suggested on behalf of the Builder that some other figure would be more appropriate although Mr Whitrod pointed out that a number of the matters referred to in Mr Crifo's report did not relate to matters that were within the scope of works undertaken by the Builder.
- 22 Although the report proceeds on a room by room basis identifying specific items, there is a commonality in regard to many of the complaints and so I will deal with them according to type.
- 23 Mr Whitrod, the Builder's representative, pointed out that the inspection by Mr Crifo was done with the aid of a torch. He pointed out that by the *Guide to Standards and Tolerances* 1997 (Section F) surfaces of floors, walls and ceilings are to be viewed from a distance of 1,500mm. The actual section of the Guide to which he is referring is on Page 12, which is in the following terms:

“Generally, variations in the surface colour, texture and finish of walls, ceilings, floors and roofs and variations in glass in similar transparent materials are to be viewed where possible from a normal viewing position. A normal viewing position is looking at a distance of 1.5 metres or greater (600mm for appliances and fixtures) with the surface on material being illuminated by “non critical light”. “Non critical light” needs the light that strikes the surface is diffused and not glancing or parallel to that surface.

Slight variations in the colour and finish of materials do not always constitute a defect.”

- 24 Although the Guide is not a prescriptive document it is a useful guide as to what is reasonable in terms of finish.

The floor

- 25 Although this was the original complaint by the Owners I could see nothing wrong with the floor. Further, despite the thoroughness of Mr Crifo’s report he makes no reference to the floor nor does he suggest that there is anything wrong with it. I am not satisfied that any defect in the rectification work with respect to the floorboards is established. The earlier reports obtained would suggest that the floor has not been over sanded as the Owners had feared.

The square-set of the ceilings

- 26 Instead of a cornice, the junctions of the walls and ceilings have been “square set”, that is, the plane of the wall and the plane of the ceiling at each point meet at a right angle. Mr Crifo has identified a number of areas where he says that the lines require further works to achieve a level line. These were in the entry, the long wall in the dining room, the opposite wall in the dining room, the family room, the hallway, bedroom 2, bedroom 3, the en suite to bathroom 2.
- 27 Of these, I am satisfied that the square set in the entry, family room, hallway, bedroom 2 and bedroom 3 all require attention. I was not satisfied as to the others. I could see nothing wrong.
- 28 Although I looked carefully at the positions indicated by Mr Crifo’s report I could not see any deficiency in the areas apart from those that I have indicated.

Paint and plaster touch-ups.

- 29 There were a number of places where Mr Crifo said paint touch-ups were necessary. There are also some minor plaster blemishes, indentations, bubbles and cracks that will need to be filled, sanded and touched up. I am satisfied as to the items identified in the entry (cracked ceiling, plaster trowel marks to wall) the hallway way, bedroom 1 wall, bedroom 2 ceiling, kitchen ceiling, bathroom 1 wall (two positions only - the third was not within the scope of works), a bump in the wall and substantial cracking in the plaster above the shower and in the en suite.
- 30 As to the others, when viewed from a distance of 1500 mm I was unable to see any deficiency.
- 31 I accept Mr Crifo’s opinion that the living and dining area ceiling requires another coat of paint. The coverage seems to be poor but although the Owners are concerned that the joints and plaster joins can be seen I had great difficulty seeing anything and I think that any concerns will probably be addressed by this further coat of paint.

Architrave mitres

- 32 The architraves from around the doorways and windows in many instances have been installed carelessly and there is a ridge where the two pieces of timber meet. They need to be sanded and repainted in all of the areas identified in Mr Crifo's report. I am satisfied completely as to this item.

Bulkheads cracking

- 33 I find that this part of the plasterwork was not within the scope of works and was not done by the Builder. No allowance can therefore be made.

Leaking shower recess

- 34 The shower is set into a metal frame on the floor and water has been escaping from under the frame, tracking along the tiled floor and has affected the architrave on the window. This is a defect. According to Mr Crifo's report the gap needs to be sealed and that was not disputed by Mr Whitrod. The affected piece of architrave will also have to be replaced and repainted.

The alfresco roof

- 35 This is clad in normal corrugated Colorbond and, in some sections, by corrugated clear plastic. It has leaked in a number of spots. Part of this might be due to the fact that it does not have sufficient fall for roofing material of this nature. That is not the Builder's fault because it simply replaced the sheets over the existing frame.
- 36 However I accept that the sheets have been placed without sufficient overlap and that some work needs to be done in lifting them and repositioning them and refixing them.
- 37 There was some discussion on site about the installation of an apron flashing between the fascia and the flatter part of the roof but it was not suggested that there was such a flashing in the original roof that the Builder replaced.

Orders to be made

- 38 The question then becomes how much of the amount of \$7,450 should be allowed by way of assessment of the extent by which the work is incomplete or defective.
- 39 Looking at the scope of works overall in Mr Crifo's report and comparing that with the items that I have allowed and approaching the matter on a conservative basis, because the deficiency in proofs is that of the Owners not the Builder, I think I should deduct an amount of \$5,000 from the Builder's claim to take account of these items.
- 40 As to the claim for interest, although interest can be awarded pursuant to s.53 of the Domestic Building Contracts Act 1995, it does not seem to me that the Builder should be awarded interest because the work is to some degree incomplete.

41 I will order the Respondents to pay to the Applicant the sum of \$762.50, calculated as follows:

Final invoice	\$5,762.50
Less allowance for incomplete and defective work	<u>\$5,000.00</u>
	<u>\$762.50</u>

SENIOR MEMBER R. WALKER