VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D406/2006

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building – defective workmanship – cost of rectification – additions to words to plans to enable permit to be issued – change made to design by mistake – change not noticed by parties when new copies of plans initialled –no intention to change design – obligation of builder to build according to contract plans not altered plans – demand for increase for delay – no lawful basis – whether claim made in good faith – claim compromised and lesser sum paid - good consideration – payment actuated by mistake of law – recoverable on claim for restitution

APPLICANT	Henrica (Harriet) Vrijken
RESPONDENT	Onley Constructions Vic Pty Ltd
WHERE HELD	Melbourne
BEFORE	Senior Member Walker
HEARING TYPE	Hearing
DATE OF HEARING	16 August 2006
DATE OF ORDER	13 September 2006
CITATION	Vrijken v Onley Constructions (Domestic Building) [2006] VCAT 1910

ORDER

Order the Respondent pay $9,090.00 to the Applicant.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	In person
For the Respondent	Mr Onley, Director

REASONS

The proceeding

1 This proceeding concerns the construction by the Respondent ("the Builder") of a dwelling house for the Applicant ("the Owner") at 11 Clendon Street Berwick.

2 The matter came before me for a small claim hearing on 16 August 2006. The Owner appeared in person and the Builder was represented by its director, Mr Onley, a Miss Fairclough, who works in the Builder's office and a Mr Cartwright who was the Builder's supervisor on the job towards the end of construction.

3 Apart from the oral evidence a large amount of written material was handed to me during the hearing that the parties wanted me to read and consider. Since this was going to take some time I told them I would provide a written decision.

4 There are four items claimed.

Shower Door and Mirrors in the bathrooms

5 It was not disputed that the specifications required the shower screen and the two mirrors to be frameless. A framed shower door was installed and the mirrors have white plastic frames. The Owner seeks to have these replaced with a shower door and mirrors in accordance with the contract. She produced a quotation from Crystal Interior Concepts ("Crystal") to do the work for a price of $1,870.00. This company was the supplier of the incorrect shower screen and mirrors that were installed in the house by the Builder. According to the Owner's evidence, which I accept, the Builder had agreed to replace the mirrors and the shower screen but despite a number of telephone calls in December 2005 and January 2006 nothing was done.

6 The Builder does not dispute responsibility for the incorrect shower screen and mirrors. It no longer deals with Crystal but with another supplier, Pakenham Doors and Screens ("Pakenham"). It has produced a quotation from that company in the sum of $1,247.40.

7 The Pakenham quotation is much less detailed than the Crystal quotation and a comparison of the two shows that the mirrors to be supplied by Crystal are larger than those to be supplied by Pakenham. Since Crystal supplied the shower screen and mirrors that have been installed, it would presumably have the correct dimensions. It does not appear that Pakenham has inspected the site. It was not suggested by the Builder that the sizes given in the Crystal quotation were incorrect. On balance I think the quotation from Crystal is to be preferred.

8 Mr Onley suggested that the Builder should have the opportunity to replace the mirrors and shower screen but I think the relationship between the

parties has deteriorated to the extent that this would not be a practicable option. I will allow the claim of $1,870.00 with respect to this part of the claim.

Laundry

9 The Builder did not construct the laundry the way the Owner wanted it, which was the layout depicted in the contract drawings. All the negotiations leading up to the signing of the contract were conducted by the Owner with a Mr Ferdie Vogt, the Builder's sales representative. During these negotiations the standard display home design was very substantially altered. In particular, it was agreed between the Owner and Mr Vogt that the laundry layout would be changed to reduce it considerably in size and place the trough and washing machine taps on the stud wall separating the very narrow laundry from the built in robe in the adjoining bedroom. To this end, the plan was altered by Mr Vogt using "whiteout" and the positions of the trough and washing machine were drawn in using a pen. Mr Vogt told her they would proceed in this way rather than send the plans back to the architect to be redrawn in order to save time. There had been a number of redrafts of the plans which had caused a lot of delay.

10 The building contract was signed on 4 March 2005. The plans referred to in that contract, dated 24 February 2005, were initialled by the parties and show the "whiteout" alteration made by Mr Vogt for the laundry. Since the contract refers to these plans, they are the contract plans and that is how the Builder was required to construct the laundry.

11 On 11 April 2005 Mr Vogt rang the Owner and said that there had been some minor changes to the architect's plan that the Owner would need to come and sign. She met him that day at a display home and he pointed out three changes, which were:

a On the first page, a note to the effect that the Owner was to provide an 1800mm high paling fence to the boundary. The Owner thought this strange, since a fence had already been built;

b On the second page, a note to the effect that waterproofing to the wet areas was to be provided in accordance with AS 3740-2004;

c On the third page, the letters "AG" were added in four places.

12 She was not told of any other changes and did not notice any. Believing they were the only changes she signed these plans ("the April plans") but was not given a copy.

13 After construction commenced the Owner noticed that the plumbing rough-in had been done with a view to installing the washing machine and trough on the opposite wall, next to the toilet, which was how it had been positioned in the architect's original plans. She consulted the copy of the April plans which she had since received and discovered that the page

showing the layout of the laundry was as the architect had originally printed it and not according to the contract drawings.

14 When I asked the Builder's witnesses why the plans had to be changed, Miss Fairclough said that the building surveyor required additional information to be put on them to enable the building permit to be issued. This makes sense as to the changes drawn to the Owner's attention but there was no explanation given for the change to the laundry design. In the absence of such an explanation I find that the omission to correct the relevant page to accord with the contract plans was a mistake. There was no agreement to change the design.

15 Perhaps the architect had simply printed out a further copy of that page which would not, of course, have shown the handwritten alteration. However the fourth sheet of the April plans, being the electrical plan, shows the layout of the laundry as altered by Mr Vogt. There is no explanation as to why one page would have been reprinted and another not.

16 Despite the protestations of the Owner from as early as the rough-in stage, the Builder proceeded to construct the laundry in the manner required by the April plans and not according to the contract drawings, arguing that the contract drawings have been superseded by the April plans which the Owner initialled.

17 I do not accept this argument. The intention of signing the April plans was not to change the design but rather, to insert further information into the documents to facilitate the granting of the building permit. The Owner's evidence in this regard is reinforced by the fact that the hand alteration to the electrical plan, showing the correct layout for the laundry, was not changed and this was also initialled. The onus is on the Builder to prove that the contract has been varied in the manner it suggests. The only variation supported by the evidence is a variation by the insertion of the matters referred to by Mr Vogt in his conversation with the Owner which induced her to initial the April plans.

18 The Owner has produced a quotation from Woftam Group Pty Ltd dated 23 May 2006 to relocate the tub and cabinet and all the plumbing and fit out the laundry in the manner required by the contract plans for a price of $5,720.00. Mr Onley said the work in relocating the plumbing would require cutting into the slab which might compromise its integrity and lead to termite infestation. He also said that that the quote was excessive but has not provided any other price for carrying out the work. Considering the amount of work involved which would entail substantial plumbing and retiling, it does not appear to me that the quotation is manifestly excessive.

19 Although there has been a breach of contract there might seem to be little difference between the required layout and what was built. I considered whether it might be more appropriate to order compensation rather than require the Builder to bear the cost of moving the trough and washing machine taps from one wall to the other. However the Owner says that she

wanted the laundry laid out in the agreed manner because she has a tendency to bump into things and believes that the way it is now will be more awkward for her, particularly after the installation of a dryer which would be very close to the laundry door.

20 Where a Builder contracts to build a house in a particular way, the Owner is, subject only to questions of reasonableness, entitled to receive what the Builder contracted to provide (see *Belgrove v Eldridge* (1954) Argus LR 929). The amount quoted is not so great that to put the laundry into the state required by the plans would be an unreasonable course. I will award the amount sought.

The price increase

21 On 16 March 2005, that is, only 12 days after the date on the contract, the Owner received a form of variation from the Builder in the following terms:

> "As per your signed P.B.A. dated 30/09/05, Onley Constructions have not been able to commence any building works on site as per 16/03/05 therefore as per your signed P.B.A. a price increase of $2,500.00 will apply".

The term: "P.B.A." refers to an earlier agreement ("the Preliminary Building Agreement") signed by the parties dated 30 September 2004.

22 The Owner objected to this variation but was informed by staff of the Builder that she had to pay it and that to cancel the contract would cost her a substantial sum. She suggested she was told this sum was $36,000.00 and that figure appears on one of the documents she produced but without any annotation next to it. Certainly, under the terms of the building contract there is provision for payment of certain sums by the Owner if the contract is terminated otherwise than through the fault of the Builder but I think it unlikely she would have been required to pay an amount of that magnitude. After the Owner's refusal to pay the increase the Builder agreed to reduce the claim to $1,500.00 which the Owner paid. She now seeks to recover that sum.

23 I asked the Builder's witnesses how it could justify claiming a variation increasing the price of the contract by reason of delay only 12 days after the building contract was signed. Mr Onley produced the Preliminary Building Agreement which sets out particulars of the house to be constructed by the Builder for the Owner with an "estimate" of $139,210.00. The documents continues:

> "It is agreed that the $2,500.00 deposit of which is included in the "Estimate Total" is paid on the signing of the Preliminary Building Agreement and that the builder shall commence the plans, specifications, level survey, soil report and rescode analysis immediately. If for any reason the job is cancelled, work done to the date of the cancellation, together with administrative charges will be calculated and deducted from the deposit with the balance refunded to the client within 30 days. Should this amount exceed the deposit an

> account will be forwarded to you for the outstanding amount. If we are unable to commence construction within 4 months of your initial deposit then at the discretion of the Builder you may incur any future price increases".(sic.)

24 After this document was signed and the $2,500.00 deposit was paid, numerous delays were experienced in settling the design of the house that the Builder was to construct. The Builder's witnesses suggested these were the fault of the Owner but she blamed the Builder's architect. Whoever was at fault the parties continued to negotiate as to the design and finally the plans Mr Vogt altered by hand were agreed upon and initialled. At the same time, a contract was signed for a contract price of $146,778.00. This is not the amount referred to in the Preliminary Building Agreement. There is no evidence about how the price in the building contract was arrived at nor has the Builder led any evidence as to any "future price increases" referred to in the Preliminary Building Agreement.

25 It is unnecessary for me to consider whether and to what extent the *Domestic Building Contracts Act* 1995 affects agreements such as the Preliminary Building Agreement because I think that was only intended to regulate the parties' rights until a building contract was entered into. As soon as the parties signed the building contract the Preliminary Building Agreement merged with it and ceased to have any further operation. The parties rights were then to be found in the building contract. There is no provision in the building contract allowing the Builder to increase the contract price by $2,500.00 less than 2 weeks after the contract was signed just because it signed the contract considerably later than it had originally anticipated. Before signing the contract it should have satisfied itself that the price for which it was to build the house was sufficient.

26 Mr Onley nevertheless says that the Owner signed the variation and the Builder bona fide reduced it to $1,500.00 from the $2,500.00 it had originally sought. The Owner admits having signed the variation but says that she was told she had no option but to do so.

27 The Builder had no legal entitlement whatsoever to demand payment of the increase. However the compromise of a disputed claim is good consideration for an agreement to pay a lesser sum, even if the original claim is bad in law, provided only that the claim is made honestly *(see Halsbury Laws of Australia para 110-760)*. I accept that the Builder's staff might have believed it was entitled to make the demand but that belief was quite unreasonable.

28 A payment voluntarily made cannot generally be recovered in the absence of mistake but in this case there was a clear mistake on the part of the Owner, namely, that she was lawfully obliged to pay the money the Builder demanded. I am satisfied that but for that mistake the payment would not have been made. That the mistake was causative of the payment is sufficient to make the payment recoverable on a claim for restitution (see *Hookway v Racing Victoria Limited* [2005] VSCA 310).

29 I do not need to consider whether the conduct of the Builder in demanding the payment amounted to unconscionable conduct within the meaning of s.8A of the *Fair Trading Act* 1999.

Cleaning

30 The Owner also claims for the cleaning of the house following the final inspection. At the time of this inspection there were plasterers at work and a great deal of plaster dust in the house. In regard to the presence or otherwise of the plasterers I prefer the evidence of the Owner to that of Mr Cartwright. The Owner complains that the premises were not cleaned prior to her moving in and has produced two statutory declarations to that effect. The degree of dirt described in the evidence of both the Owner and Mr Cartwright is not reflected in the statutory declarations filed by the Owner or in the general tenor of her evidence so there must have been some cleaning after the plasterers left. I think the evidence of the Builder that there was a "general Builder's clean" is likely to be correct and that the dust observed by the Owner when she took possession of the house had settled since. She cleaned the house herself but is now seeking the cost of having a professional cleaner thoroughly clean it, which she says will be $300.00. I am not satisfied as to this part of the claim.

Defects

31 The Owner claimed that a large number of the defects identified at the final inspection were not fixed and she had also identified further defects. These were not subject of the claim and I have not considered them. If she wishes to pursue a claim in regard to any of those it will need to be by means of a fresh proceeding.

Conclusion

32 There will be an order in favour of the Owner against the Builder for the payment of the sum of $9,090.00.

SENIOR MEMBER R. WALKER