VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST **VCAT REFERENCE NO. D627/2004**

CATCHWORDS

[2005] VCAT 542

APPLICANT	Vuka Homes Pty Ltd
FIRST RESPONDENT	Adele Ellen Couty
SECOND RESPONDENT	Patrice Hans Couty
WHERE HELD	Melbourne
BEFORE	Senior Member R Walker
HEARING TYPE	Hearing
DATE OF HEARING	22 February 2005
DATE OF ORDER	31 March 2005

[2005] VCAT 542

ORDER

1. Order that the Respondents pay to the Applicant the sum of $14,230.34.

2. The counterclaim is struck out.

Rohan Walker
Senior Member

APPEARANCES:

For Applicant	Mr D Pumpa of Counsel Mr Zerevni, Director Vuka Homes Pty Ltd
For Respondents	Mrs A E Couty, In Person Mr P H Couty, In Person

REASONS FOR DECISION

Background

1. This is a claim for the Applicant Builder ("the Builder") for the final payment said to be due under a building Contract entered into on 17 June 2003.

2. The Contract related to the construction of a new house for the Respondents ("the Owners") on their land at 1628 Mikey Boulevard, Beaconsfield. The pre-contractual negotiations in regard to price and terms were conducted on behalf of the Builder by a firm called 'Victorian Home Choice', which is a business carried on by a Mr Segaan and a Mr Wijaya. Mr Segaan had known the First Respondent previously and he arranged for the plans for the house to be prepared.

The claims

3. Although the building contract was signed on 17 June 2003, the Building Permit was not issued until 24 September 2003. The Owners complained about the delay. They also complained that work did not commence until 3 November 2003. There is a claim for liquidated damages for delay.

4. On 10 June 2004, the Builder claimed the works were complete. It made a final claim of $21,125.00 on 16 June 2004 and an inspection of the works was conducted the following day. The appliances had not been fitted at the time of the inspection because appliances fitted to unoccupied houses are often stolen. The evidence was, and I accept, that this is a common practice of builders in Victoria. A list was compiled during the inspection by Mr Wijaya and the Owners, setting out matters that the Owners claimed were defects or incomplete work. The list was forwarded to the Builder and certain items were attended to and others were disputed.

5. On 26 August 2004, the Builder issued a notice that items on the list were completed.

Termination

6. On 1 September the Owners gave notice to the Builder alleging a number of breaches and stating that if they were not remedied they would terminate the Contract. On 15 September they served a further letter which alleged that the earlier demand had not been complied with and purported to determine the Contract. The Owners then moved into the house. Since the appliances had not been installed they purchased and fitted their own hot water service, wall oven, cook top and range hood and also had some electrical work done in the garage.

7. The Builder claimed that, in acting as they did, the Owners repudiated the building Contract and, on 17 September 2004, its solicitors purported to accept the wrongful repudiation. Nevertheless, its claim is for the balance due to it under the contract. It is not a claim for a quantum meruit.

The hearing

8. In the course of a two day hearing I heard evidence from Mr Wijaya, Mr Segaan and Mr Zerevni on behalf of the Builder, and Mr Couty on behalf of the Owners. Mr Zerevni was a Director of the Builder and was responsible for supervising the construction of the house. Mrs Couty was present on the first day of the hearing but was unable to be present on the second day when she might otherwise have given evidence because she had to care for a sick child. I do not have the advantage of any evidence she might have given but I draw no adverse inference from her failure to give evidence, which I think has been adequately explained. I now turn to the matters in dispute.

The issues

The claim for extra concrete for the footings

9. During the course of excavation for the footings, some soft spots were discovered, necessitating considerably deeper excavation than would otherwise have been required. According to the soil report, the soil was classified as Class M (moderately reactive). The report required strip footings to be founded at a

minimum depth of 600mm or at least 100mm within stiff silty clay, whichever should be deeper. In order to reach such a foundation the excavation had to be considerably deeper than 600mm. The Contractor carrying out the excavation contacted Mr Zerevni who, through Mr Wijaya, contacted the Owners. It was suggested that the Owners go to the site and satisfy themselves as to the excavation required and Mrs Couty did so. Subsequently, Mrs Couty agreed to proceed – indeed, it would seem she had no option if the house was to be built. Mr Zerevni estimated at the time that the extra cost would be between $2,700 and $3,500. The foundation Contractor proceeded to pour the strip footings, charging $2,376 for an extra 14.4 cubic metres of bulk concrete. According to the Contract, there was a margin of 15% due to the Builder on any extras, so this would make the figure $2,732.40. When Goods and Services Tax of 10% is added, the figure then becomes $3,005.64. There was no claim for additional excavation.

10. The Owners complained that they were given conflicting accounts of the length of the trench that required deepening and that, if the extra depth only related to 12 linear metres, as they claimed the Builder had told them, the depth to achieve an extra volume of 14.4 cubic metres would be unbelievably great. The problem with this argument is that the Owners were not able to give any evidence as to the actual measurements or the amount of extra concrete that was actually required. An opportunity was given to the Owners at the time to satisfy themselves as to the extent of the problem. If they had done so, measurements could have been taken and there would be some basis upon which to make calculations. As it was, some time after 8 December 2003, they subsequently signed a variation for the extra concrete accepting $3,300. This document was tendered, but it was presented and signed after the extra work had been done and there is no satisfactory evidence to support a figure of $3,300.

11. All I have in the way of hard evidence for this item is the invoice from the subcontractor, establishing what the Builder was charged and that the undoubted

fact that a serious problem in regard to soft spots was encountered. On this state of the evidence I accept that an extra 14.4 cubic metres was required due to problems with footings and that this is a proper extra on the Contract. However, I do not accept the figure of $3,300. I infer from Mr Zerevni's evidence that the extra $300 he is claiming possibly relates to the use of a concrete pump but there is no direct evidence about this. The only invoice I have is in regard to the bulk concrete and that is all that I can allow. The Builder therefore succeeds on this item but to the extent of $3005.64, not $3,300.

The bricks.

12. In the pre-contractual discussions with Mr Wijaya, the Owners made it clear that they wanted the doorways and window openings to be edged in a contrasting yellow brick. As a result of these discussions, Mr Wijaya contacted the Builder in order to find out what this would cost and he informed the Owners that the extra price would be "around $2,000". I accept Mr Wijaya's evidence in this regard. The Owners informed Mr Wijaya that they would only pay $250 and a letter to this effect was delivered to the Builder. Thereafter, the brickwork commenced and, after some delay caused by the Owners' concern about the appearance of the bricks, they were laid in accordance with the original discussion. The Builder then claimed a variation of $1,700 for the decorative brickwork. The Owners refused to pay any more than $250.

13. The Builder has produced three invoices from the bricklayer giving a separate price (excluding GST) of $1,337. If a 15% Builders' margin is added to that plus a further 10% for Goods and Services Tax, one arrives at a figure of $1,691.25, hence the amount claimed by the Builder.

14. The discussions about the contrasting brickwork around the window openings and doors occurred before the contract was signed. The decorative brickwork is not shown on the plan and so the Builder might, consistently with the Contract, have built the house without doing it. It has been treated as an extra by the parties

but it has been done by the Builder, not pursuant to the plans but at the request of the Owners. The request of the Owners was to do it at a cost of $250; there was no agreement to pay any greater sum than that. By carrying out the work following notification by the Owners that they would only pay $250, the Builder must be presumed to have accepted their offer to pay that sum for the work and is therefore is confined to a claim for $250.

The balustrade.

15. The plans showed a balustrade across the front of the house. According to the evidence of Mr Wijaya, the draftsman who prepared the plans did so with the aid of a computer which generated a picture of a balustrade. As shown on the plans, it has a top rail, a centre panel made up of closely spaced balusters, and a bottom rail. The central panel is shown as being connected to the top rail and the floor by double spaced vertical members. It is quite an elaborate balustrade and one that would have been costly to construct. On the plans there is the note *"balustrade as per Builders spec."*. When one goes to the specification there is nothing said about the balustrade. The Contract requires the building works to be carried out in accordance with the plans and specifications set out in the Contract. There being nothing to the contrary in the specifications the effect of the plans in the form in which they were prepared for the purpose of the Contract is that the balustrade is to be constructed in the manner depicted in the plans. I do not accept that the words "as per Builders spec." should be interpreted to mean that the Builder could construct any sort of balustrade he pleased.

16. Instead of following the plans, the Builder has chosen instead to construct a very simple balustrade with a top and bottom rail, and vertical balusters nailed to the exterior of the two rails. The Owners frankly acknowledge that they do not intend to dismantle the balustrade as constructed, but seek a credit of $1,000. I am satisfied that it would have cost the Builder an additional $1,000 at the very least, and probably even more, to have constructed the balustrade in the manner depicted in the plans and I therefore find that such a credit is warranted.

The concrete driveway

17. The Owners also make a claim with respect to the paving. The specifications required a "slate look" driveway and footpath "up to 45M^2". According to Mr Wijiya, forty five square metres was the standard allowance and might have been sufficient had the entry to the garage been at the front, as originally contemplated, and not at the side. I am unable to ascertain whether this is so or not but his evidence in this regard was not challenged. Before the contract was signed, it was decided to alter the entrance of the garage to the side instead of the front. The effect of this was to increase the size of the driveway that would be required. When the concreter boxed up for the driveway and the path to the front steps to the house it was apparent that the area to be concreted was substantially more than forty five square metres. Discussions then ensued between the concreter and the Owners and it was agreed between them that he would concrete the greater area in plain concrete for the same price he would have charged for a forty five metre slate patterned driveway. It appears the parties agreed to a resolution of the problem and I do not see any basis upon which I can or should disturb the agreement that was reached. This part of the counterclaim is not made out.

Holes in the timber floor

18. There is a claim by the Owners for damage to the timber floor when the holes for the heating duct inserts were cut. There is insufficient evidence for me to find whether the damage complained of was caused by the Builder or the Owners' own flooring Contractor.

The claim for liquidated damages for failing to finish on time.

19. The works commenced on 3 November 2003. The Contract provided for a construction period of 220 days, which was to expire on 9 June 2004. The Builder claimed that the work was complete on 10 June 2004. The Owners complained that the Builder took an excessive time to obtain the Building Permit. The Contract provides that the Builder is responsible for obtaining and paying for

the Building Permit within 45 days from "title release". There is no evidence as to when this was, although in its Particulars of Claim the Builder says that the "approved plan of sub-division" was received by it on 23 June. A period of 45 days from that time would have expired on 7 August. The Developer's approval of the plans was apparently required and the Builder claims that it was only received on 24 July 2004. The proximity of the driveway to the next door neighbour's boundary line required protection works to be carried out and according to the Particulars of Claim, the calculations for the retaining wall were not received by the Builder until 30 August. The Permit was issued on 24 September. A Protection Works Notice was received by the Builder on 30 September.

20. The Builder complains that more delays arose as a result of the Owners failing to remove the excavated soil from the site. There is nothing in the Contract about responsibility for removing the soil but the specifications provide that surplus soil is to be *"spread over the site or removed by Owner"*. The Owners hired a bobcat and did spread the soil over the site but the effect was to create a fairly thick layer of fill, making it impossible for the plumber to lay the sewer pipe where he had intended. An effort was made to clear the required area to facilitate access by the plumber but due to a misunderstanding between the parties this was not successful. I am satisfied that this caused delays. I am also satisfied that the heaped up soil caused access problems to the Builder during construction as well as inhibiting drainage from the site following rain. The Builder suggested that the delay for the bricklayer was three weeks and for the carpenters two days. I think three weeks is probably an exaggeration but I am satisfied that there was delay and I think it was due to the failure of the Owners to remove the soil or spread it over the site so as to avoid obstructing access to the Builder. The obligation on the Owners to provide access to the Builder is in the Contract.

21. At the Owners' request, the floating timber floor was removed from the scope of works and the Owners brought in their own sub-contractor to put in a solid floor.

The Builder granted access to the site for this purpose and the exact period works were delayed is uncertain but I am satisfied that it would have affected the critical path by some days. There was also a delay caused by the Owners stopping the brickwork while a decision was made about the yellow brick trim around the garage door.

22. All of these things caused delay and on the whole of the evidence I am unable to find that the Builder failed to proceed with the work with all due diligence or that it failed to complete on time. The Owners complain that notices requesting an extension of time were not served but, save for the foundations, the losses of time to which I have referred relate to the actions of the Owners, not circumstances external to the parties. It would be unjust for the Owners to cause delay and then seek to rely upon it. In any event, the Builder claims it was only over time by one day. The final claim was made one week late and the inspection by the parties was 8 days late. Which ever date one chooses, the delays caused by the Owners more than account for it. The claim for liquidated damages is insufficiently supported by the evidence.

The termination of the Contract.

23. Clause 43.2 of the contract provides:

> *"If the Builder is in substantial breach of this contract the Owner may give the Builder a written notice to remedy the breach,:*
>
> - *Specifying the substantial breach;*
> - *Requiring the substantial breach to be remedied within 10 days after the notice is received by the Builder; and*
> - *Stating if the substantial breach is not remedied as required, the Owner intends to end this Contract."*

Clause 43.3 then provides:

> *"If the Builder does not remedy the substantial breach stated in the notice to remedy the breach within 10 days of receiving that notice the Owner may end this contract by giving a further written notice to that effect."*

24. The letter by the Owners of 1 September set out a number of matters requiring "rectification". The first two of these were proper matters for rectification but, according to Mr Couty, they were attended to. The next matter was the hole in the wall next to the return air point. This was the place at which the thermostat for the heating system was to be attached when the system was installed. This was to take place immediately before occupancy and it was not a defect. The fourth matter, the lack of a power point and light fitting in the garage was something that the Builder claims would have been fitted by settlement but was prevented from doing so because the Owners took possession. It was nevertheless an item of incomplete work. The fifth item, the claim for running over time, I find is not established. As to the sixth item, "*the variation in the concrete that you are unable to justify"*, I am satisfied with the Builder's evidence about the concrete. The seventh item is the claim for the holes in the floor but I cannot satisfy myself that this is a defect in the Builder's work. The eighth item, the dispute about the cream bricks is established but this is not a "substantial breach" but a dispute about how much is due. Finally, the balustrade is referred to. I have upheld this claim but even if that was a substantial breach by the Builder, which I do not have to decide, the notice does not require it to be reconstructed in accordance with the drawings. What was being sought was a credit.

17. In all the circumstances I do not think that the notice served by the Owners complies with clause 43 of the contract nor, apart from the balustrade, was there any substantial breach by the Builder. Accordingly, I find that they were not entitled to determine the Contract because there was no substantial default by the Builder at the time.

Conclusion

18. The Builder seeks the amount properly due to it and I think the appropriate course is to adjust the parties' rights in accordance with what has happened. The

Owners are entitled to a credit for what it would have cost the Builder to have provided the various appliances and remaining fittings that the Owners sourced themselves. This is a consequence of me finding that it was not open to the Owners in the circumstances to have determined the Contract. On the evidence of Mr Zerevni, I find that the total cost of the appliances that he would have had to supply to the house if the Owners had not wrongly determined the Contract would have been $3,773. The Owners are entitled to a credit in this sum.

19. Allowing for the appropriate adjustments, the final figure due to the Builder is calculated as follows:

Contract price		$201,500.00
Plus Extras:		
Concrete for deeper footings	$3,005.64	
Sectional lift panel door	$715.00	
Frosted glass to French door	$175.00	
Items in variation 2	$1,223.00	
Coloured bricks	$250.00	
New Connection	$82.00	$5,450.64
		$206,950.64
Less paid		$181,350.00
		$25,600.64
Less Credits		
Delete steps outside family room	$85.00	
Refund for timber floor	$6,135.00	
Saving to Builder on appliances	$3,773.00	
Plus GST saved on appliances	$377.30	
Credit due for balustrade	$1,000.00	$11,370.30
Balance due to the Builder		$14,230.34

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21. There will be an order that the Respondents pay to the Applicant the sum of $14,230.34. Since the counterclaim has been taken into account in arriving at this sum there will be no separate order in regard to it. I shall simply strike it out.

Costs

22. It is not usual to make orders for costs with respect to small claims and both parties have succeeded in part. I was disposed to say in the order that there would be no order as to costs but since I have not heard any submissions on costs I will simply leave the order silent in that regard. If any party wishes to make an application for costs that may still be done although it is not apparent to me why any such order should be made..

Rohan Walker

Senior Member