

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D673/2006

**CATCHWORDS**

Domestic Building, non-attendance at hearing by Respondent, cost of completion and rectification compared with contract sum, builder's quotation and expert opinion regarding cost of rectification and completion, delay, liquidated damages of zero, general damages, costs.

<b>APPLICANTS</b>	Dianne Whiteside, Neil Whiteside, Kevin Steele
<b>RESPONDENT</b>	Wesley Raymond Taylor
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member M. Lothian
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	3 and 4 April 2007
<b>DATE OF ORDER</b>	30 April 2007
<b>CITATION</b>	Whiteside v Taylor (Domestic Building) [2007] VCAT 658

**ORDER**

- 1 The Respondent must pay the Applicants \$202,263.28 forthwith.
- 2 The Respondent must pay the Applicants' costs to be agreed, but failing agreement, to be assessed by the Principal Registrar pursuant to s111 of the *Victorian Civil and Administrative Tribunal Act 1998* on a party-party basis on County Court Scale D.

**SENIOR MEMBER M. LOTHIAN**

**APPEARANCES:**

For the Applicants	Mr D Pumpa of Counsel
For the Respondent	No appearance



## REASONS

### BACKGROUND

- 1 This proceeding concerns a claim by the Applicants against the Respondent-builder for the cost of completion and rectification of two new homes built at 38 Clyde Street, North Box Hill. The Applicants are respectively the daughter, son-in-law and son of the owner of the land, Mrs Edith Steele.
- 2 The Applicants' nett claim against the Respondent, as particularised in their Schedule of Loss and Damage of 3 April 2004, is \$339,169.28. The prayer for relief in the Points of Claim also sought interest and costs.

### RESPONDENT'S NON-APPEARANCE AT HEARING

- 3 On the first day of the hearing the Respondent failed to appear and I requested that the Bench Clerk telephone him from the hearing room. The Bench Clerk reported that the Respondent said he would not attend the hearing because he was appealing to the Supreme Court. By 3 April 2007, no notice of leave to appeal had been received by the Tribunal and Mr Pumpa of Counsel for the Applicants reported that he was also unaware of any appeal. No notice of leave to appeal has been received by the Tribunal since the hearing.
- 4 The Respondent's absence is regrettable. The Applicants were still required to prove the quantum, and lack of cross-examination from a person with knowledge of the dispute has not assisted me. For example, it is difficult to believe that the Applicants, who appear to be of normal intelligence, experience and wisdom, would sign a building contract for \$485,000.00 inclusive of GST without reading it. It is even more difficult to believe that they would not insist the contract be dated, when the provision for dating is on the same page as their signatures. However that is the sworn evidence of each of them and I must accept it in the absence of internal contradictions in their evidence. The explanation given to me was that by the date the contract was signed the parties realised that they all went to the same church and therefore the Applicants trusted the Respondent.

### THE CONTRACT

- 5 It was the Applicants' evidence that a contract was entered between the Applicants and the Respondent on or about 13 March 2003, for \$485,000.00, inclusive of GST. It is noted that they were not named in the contract other than in the Instrument of Agreement – the space for Owners' names at item 1 of the Appendix (page 33 of MBAV HC-5, Edition 3, 2001) was left blank. Mrs Steele was not named as a party.
- 6 It was also the evidence of the Applicants that, apart from notes on the plans and other drawings, there was no specification, although item 6 of the Appendix referred to "MBA specs" which were described as 25 pages in

length. Mr Paul Moore gave expert evidence for the Applicants and said that the standard Master Builders' Association specification is approximately 65 pages long and the Housing Industry Association specification is 37 pages long.

- 7 The Second Applicant's evidence was that the Builder did not provide a specification and undertook to provide "everything". Some support is lent to this assertion by a typed, unsigned, undated quotation addressed by the Respondent to the First and Second Applicants. Excluding the formal parts, the quotation stated:

D673/2006 A1

QUOTATION

Dear Neil & Dianne,

In response to your request for a written quote for the building of two units at 38 Clyde Street Box Hill North I enclose the following:

For the completion of building works as per plan and including a relatively delux finish to the first unit to assist with an attractive sales figure as follows:

Unit 1

- Downlights to open living areas.
- Ducted heating and cooling.
- Multi function Stainless steel electric oven; gas hob & exhaust.
- Granite or Gemme quartz kitchen bench tops with vinyl wrap doors.
- Upgrade quality tap ware and door furniture. Gainsborough Trilock to entrance.
- One and a half bowl s/s sink and sinkmixer to kitchen.
- Telephone and t.v. aerial prewire.
- Stainless steel laundry trough.
- 80/20 carpet throughout.
- Spa bath where indicated on plan.

Unit 2

- Some downlights in selected areas.
- Ducted heating.
- Choice of nonslip tiles or vinyl in kitchen and wet areas.
- Extra toilet downstairs as discussed.
- Postformed laminate benches to kitchen with vinyl wrap doors.
- One and half bowl s/s sink with sinkmixer to kitchen.
- Stainless steel trough to laundry.

- Gainsborough Trilock to entrance door.
- Telephone & t.w. prewire.
- Berber carpet throughout.

Price includes the demolition and removal of existing buildings.

The sympathetic inclusion of some brickwork from existing dwelling in Unit 2.

All landscaping, driveways, crossovers and intermediate and front fencing Limited excavation work. Retainer walls as per plan.

Connection of services.

FULL INCLUSIVE PRICE \$460,000.00

Full price for above but including all new boundary fencing and insurance against unforeseen difficulties relating to the land itself and excavation work.

\$485,000:00

N.B. The prices above are fixed and will not increase although they are subject to more specific definition by way of the specifications.

They do not include items such as council fees/permits and utilities fees if any (gas and power etc).

I trust this quotation meets with your approval and look forward to a mutually happy and blessed engagement together in this matter.

Yours sincerely

Wes Taylor

- 8 I note the assertion in the quotation that the prices “are subject to more specific definition by way of the specifications.” As the Second Applicant’s evidence is unchallenged, I must assume that the Respondent never got around to providing a specification.
- 9 A document was also tendered by the Applicants (A6) which is unsigned and hand dated 2 June 2005. It is headed “Inclusions in Unit 1 38 Clyde St Nth Boxhill”

### **LOAN OF \$17,000.00**

- 10 I accept the evidence of the Second Applicant that the Applicants between them loaned the Respondent \$17,000.00 to enable him to complete the buildings and none of this sum has been repaid. This evidence is supported by an unsigned letter from “Wes” to “Neil” of 29 June 2005, which was exhibit A7. The Respondent must repay the Applicants \$17,000.00.

### **COMPLETION AND RECTIFICATION**

- 11 The evidence of the Applicants and Mr Moore, that the work is incomplete and requires rectification, is accepted. The Applicants claimed amounts actually expended and amounts for work yet to be completed. Evidence of the work to be undertaken was provided by Mr Moore and his evidence of

the extent of necessary work is accepted. He also provided estimated costs for each item of work and a quotation was provided by Mr Dangerfield of Lantra Constructions. The Moore estimate and the Lantra quotation are alternatives, and for reasons given below, I prefer the Moore estimate.

### **Contract Sum Compared with the Cost of Rectification**

- 12 The sums claimed by the Applicants for completion and rectification are high when compared with the contract sum. However that is irrelevant unless it can be demonstrated that an owner has bargained for a certain standard and is having the work rectified to a higher standard. Clause 10.1 of the Contract commences:

The Builder gives to the Owner the following warranties contained in Section 8 of the [DBC] Act:

The Builder will carry out the Works in a proper and workmanlike manner and in accordance with the Plans and Specifications set out in the Contract.

The standard to be achieved by the Respondent is at least the standard of a builder who builds in a proper and workmanlike manner.

### **Amounts expended by the Applicants**

- 13 Some of the following items have been included in Mr Moore's report. Where this has occurred, the amount actually expended has usually been allowed and the amounts allowed for these items by Mr Moore have been deducted from his total.

#### 'Certificate of Electrical Safety'

- 14 This is a claim by the Applicants for \$165.00 for a number of power points installed by D&W Bons. My task is made more difficult by the lack of an electrical schedule or plan, however it is found on the evidence of the Second Applicant that only half the amount claimed relates to items that should have been completed by the Respondent under the contract, and half was due to after-thoughts by the Applicants. The Respondent must pay the Applicants \$82.50 for this item.

#### Electrical for Unit 1

- 15 The Applicants claimed the amount paid to D&W Bons of \$1,178.00 for checking, altering, fixing and testing unfinished electrical wiring and installation work for unit 1. They also claimed \$55.00 for amounts paid to Bons for colour coding the underground supply mains and supplying house numbers on the meter box. Their evidence is accepted that these items and amounts are necessary and reasonable and \$1,233.00 is allowed.
- 16 It is noted that the same items and amounts have been allowed by Mr Moore in his report at item 16 and 18b of Unit 1, internal and the sum of \$55.00 appeared again in the addendum to Mr Moore's report. \$1,288 is therefore deducted from the sum estimated by Mr Moore.

### Pipe TV & Locating Services

- 17 The Applicants engaged Pipe TV & Locating Services to investigate pits and pipes at a cost of \$363.00. The service provided was provision of video of the areas investigated. The Second Respondent confirmed that they did not make any suggestions for rectification. I find that their services were in the nature of legal and associated costs, and make no specific allowance for them. The Applicants may seek this amount in any assessment of their legal costs.

### Bruce Young & Partners Consulting Structural & Civil Engineers

- 18 The Applicants claim \$330.00 which they said they paid for advice in answer to a query made by the City of Whitehorse arising out of an inspection on 8 December 2004. The query concerned the adequacy of structural elements used by the Respondent. It was necessary for the Applicants to expend this amount to satisfy the query of the City of Whitehorse. The Respondent must pay the Applicants \$330.00 for this item.

### Pulbrook Air

- 19 The Second Applicant gave evidence that the payment to Pulbrook Air of \$180.00 was for completion of the heating and air-conditioning commenced by the Respondent, however the description of work on the tax invoice is "Call fee – Assessment of heating and cooling system". I find the work was in the nature of legal and associated costs, and make no allowance for them. The Applicants may seek this amount in any assessment of their legal costs.

### Toilet

- 20 The Second Applicant said that the Applicants purchased a new toilet for the powder room at the cost of \$199.00 as the toilet supplied but not installed by the Respondent was a cheaper model. The Applicants failed to provide any evidence of the difference between the toilet supplied by the builder and that supplied by them. There is no allowance for this item.

### Garage door remote control

- 21 The Second Applicant's evidence is accepted that a remote control for the garage door was supplied to the Respondent and was returned broken and cost \$50.00 to replace. The Respondent must pay the Applicants \$50.00 for this item.

### Ladder

- 22 The Second Applicant's evidence is accepted that the Applicants bought a ladder at the cost of \$89.00 which was removed from site by the Respondent when he collected items belonging to him. The Respondent must pay the Applicants \$89.00 for this item.

### Paul Moore and Associates

- 23 The Applicants have claimed fees charged by Paul Moore and Associates of \$7,829.00. I find the fees were in the nature of legal and associated costs, and make no specific allowance for them. The Applicants may seek this amount in any assessment of their legal costs.

### Drainage Works etc

- 24 The Applicants claim \$13,732.40 on the tax invoice of AV Chiron for various site levelling and clean-up, drainage and retaining wall works. In accordance with the quotation tendered by the Applicants as A1, I find this was work that should have been undertaken by the Respondent. The Respondent must pay the Applicants \$13,732.40 for this item.

### Concreting Works

- 25 The Applicants claim \$15,598.00 on the tax invoice of Di Ciero's for the supply and laying of driveways, crossings and related items. It is accepted that these are items to be supplied under the building contract. The Respondent must pay the Applicants \$15,598.00 for these items.
- 26 Items 1, 2, 32 and 36 in Mr Moore's report appear to be the same as the items referred to in paragraphs 24 and 25 above. Mr Moore estimated a total of \$28,566.00 for these items which is deducted from the amount estimated by him.

### Latches and screws for unit 2

- 27 Mr Moore gave evidence that the reasonable cost to replace one lock in unit 2 is \$165.00, taking into account the cost of a service call for one lock being the same as a service call where a number of locks are to be rectified. The Applicants gave evidence that they had all door locks replaced in unit 2, where Mrs Steele lives, at the cost of \$995.00 when one door could not be opened and there was concern that she might be locked into a room in her home with no means of escape.
- 28 Mr Moore expressed the view that it was unlikely to be necessary to replace all the locks, however it is found that some rectification to all locks is prudent, particularly where the householder is an elderly person living alone. His evidence is accepted that the amount paid by the Applicants is excessive, and if it were necessary to rectify all locks, the price would have been approximately \$200.00. The Applicants are entitled to \$200.00 for this item, in consequence \$165.00 is deducted from the amount estimated by Mr Moore.

### Bricks purchased by Applicants

- 29 The Second Respondent's evidence is accepted that the Applicants paid \$1,109.38 to Austral Bricks which has not been accounted for in amounts allowed to them by the Respondent. The Respondent must pay the Applicants \$1,109.38 for this item.

### Fee for renewal/extension for building permit

- 30 The Second Respondent's evidence is accepted that the Applicants paid \$200.00 for renewal or extension of the building permit when the work was not complete by the date upon which it was due to expire. The Respondent must pay the Applicants \$200.00 for this item.

### **Quotation by Lantra Constructions**

- 31 The quotation by Mr Dangerfield of Lantra Constructions is \$247,837.50, which excludes items valued by Mr Moore at \$47,014.00. The total of these two sums is \$294,851.50.
- 32 I have been urged by Mr Pumpa to find that the reasonable cost to complete is in accordance with the Lantra quotation. As Mr Pumpa said, Lantra is willing to do the work. However Lantra's quotation provides no indication of its labour charge rate, or its overhead and profit and there is no indication of the Applicants having obtained any other quotation.
- 33 Mr Dangerfield said in evidence that he allowed \$40.00 per hour for carpenters, \$35.00 per hour each for painters and plasterers, \$50.00 per hour for electricians and \$55.00 per hour for plumbers. He did not say whether these rates were inclusive or GST. While these rates appear unremarkable, the line items in his quotation do not distinguish between labour and materials and give no indication of how much time is required for each task.
- 34 I am not satisfied that the Lantra quotation is a competitive quotation – one that the Applicants would be equally happy to accept whether they were to be compensated for it by the Respondent or whether they were to pay it themselves without compensation. In contrast, Mr Moore's estimate is detailed and reasoned.

### **Quantification by Mr Moore**

- 35 Mr Moore quantified the cost of rectification and completion as \$173,965.00 in his report of 5 May 2006, plus a further \$7,443.00 in his report of 15 March 2007, a total of \$181,408.00.
- 36 Mr Moore said that in pricing the items to be completed and rectified he drew on his experience as a working builder. He said he worked as a builder for 18 years and he did not lose money because he was meticulous in estimating. He said that it is important not to make mistakes and that costing must be detailed and cover all items, without "loading the price". He said he believes that if he were to undertake the outstanding work for the price he has estimated, he could do so and make a reasonable return. His evidence is accepted.
- 37 As mentioned above, the sum allowed by Mr Moore includes allowances for electrical works of \$1,288.00; for drainage, concreting, landscaping etc of \$28,566.00 and for latches and screws to unit 2 of \$165.00. Sums have been allowed above for each of these items as already expended. \$30,019.00 is deducted from Mr Moore's allowance. The Respondent must

therefore pay the Applicants \$151,389.00 for items which are yet to be completed or rectified.

## **DELAY**

- 38 In breach of section 31(1)(i) of the *Domestic Building Contracts Act 1995* (“DBC Act”) the contract did not state the date when the work would be finished, or the number of days that would be required to finish the work once it had started.
- 39 I accept the evidence of the Second Respondent that the work commenced in March 2003 and progressed “in fits and starts”, with unit 2, Mrs Steele’s new home, being constructed first and not being habitable until a few days before Christmas in 2003. I accept his evidence that work on unit 1, which was commenced after unit 2 was habitable, is still incomplete.

## **Liquidated Damages**

- 40 The Applicants have claimed liquidated damages from 1 July 2004 to 24 November 2005 calculated at \$400.00 per week. Item 17 of the Appendix was left blank, and beneath the space left for insertion of liquidated damages was printed: “(if nothing stated, Zero)”. The claim by the Applicants was under an amendment to the contract that they say occurred on 10 May 2004. The Applicants tendered document A4, which is an undated, unsigned document addressed to “Neil and Dianne” from the Respondent. The Second Applicant said that it came to him and his wife as an e-mail, but he saved it as a Microsoft Word document and did not include details of sender and receiver and the date. It is hand-dated, presumably by one of the Applicants.

- 41 The relevant parts of the letter are:

I have received your email and sympathize with the gravity [of] your concern, you may be assured that moves are presently afoot to complete all of the unfinished work at your mum’s as well as progressing with the unit at the front.

Your allusion to my having too much work in some ways may have contributed to hindering progress, and I have been concerned more recently with tidying up loose ends on the smaller jobs so as to free us to be able to concentrate on the most important job at Clyde Street.

... I therefore wish to offer compensation of \$400 per week commencing from 30<sup>th</sup> June 2004 for every week overdue past that date, this to be taken off any monies owed at the end of the job.

- 42 The Applicants said that the amendment to the contract was supported by consideration of their forbearance not to end the contract at about the date of the above letter.
- 43 On the first day of the hearing I invited the Applicants to produce the e-mail referred to in the first line of the above letter, which they failed to do and failed to explain on the second day of the hearing. I am aided by the rule in

*Jones v Dunkel* (1959) 101 CLR 298 in coming to the conclusion that their own e-mail would not have assisted their case.

- 44 I therefore do not find there was consideration to support amendment of the contract by the letter of 10 May 2006, therefore the contract was not amended and the Applicants are only entitled to liquidated damages of “zero” during the life of the contract.

### **General Damages after the Contract was Terminated**

- 45 The evidence of the Applicants is accepted that the contract was terminated on 24 November 2005. This conclusion is drawn from Exhibit A9 being two letters of 4 November 2005 and 24 November 2005 which are respectively a notice to remedy or have the contract terminated under clause 20.1 of the contract, and the termination notice.
- 46 After the date of termination, item 17 of the contract no longer governed the relationship between the parties. I accept that Unit 1 should have been well and truly completed to allow it to be rented by the date the contract was terminated and at the date of hearing remained incomplete.
- 47 There is evidence in the form of a letter from a real estate agent, Charlotte Pascoe, of Philip Webb Pty Ltd of 27 March 2007 that “if this house was offered for rental in the current market it would achieve a rental of \$400 - \$450 per week. While this market is very strong, this price would certainly have been achievable over the past few years.” General damages are allowed at \$425.00 per week from 25 November 2005 to 31 March 2007 – 70 weeks, being \$29,750.00.

### **DUE TO THE RESPONDENT UNDER THE BUILDING CONTRACT**

- 48 In accordance with the evidence of the Applicants I deduct \$28,500.00 which they say is the balance of the contract price due to the Respondent. I note that because the Respondent’s defence and counter-claim were struck out, there has not been a claim before me by the Respondent for an amount nor has there been a claimed set-off.

### **SUMMARY OF ACCOUNTS**

Amounts due to the Applicants:

Loan \$17,000.00

Completion and rectification:

Amounts expended

- “Certificate of electrical safety” \$82.50
- Electrical for Unit 1 \$1,233.00
- Bruce Young & Partners Consulting Structural &  
Civil Engineers \$330.00

• Drainage works etc	\$13,732.40
• Concreting works	\$15,598.00
• Garage door remote control	\$50.00
• Ladder	\$89.00
• Latches and screws for unit 2	\$200.00
• Bricks purchased by Applicants	\$1,109.38
• Fee for renewal/extension for building permit	\$200.00
Nett costs estimated by Mr Moore	\$151,389.00
General damages for delay	<u>\$29,750.00</u>
	\$230,763.28
Less amount due to the Respondent under the contract	<u>\$28,500.00</u>
The Respondent must pay the Applicants	\$202,263.28

## **COSTS**

49 I was urged by Mr Pumpa to make an order for costs in circumstances where, he asserted, the Respondent failed to provide a comprehensible defence. He also asserted that the complexity of the case necessitated legal representation and the quantum in dispute imposed a gravity that makes costs appropriate.

50 In considering whether to make an order for costs I must consider s109 of the Act which provides in part:

### **109. Power to award costs**

- (1) Subject to this Division, each party is to bear their own costs in the proceeding.
- (2) At any time, the Tribunal may order that a party pay all or a specified part of the costs of another party in a proceeding.
- (3) The Tribunal may make an order under sub-section (2) only if satisfied that it is fair to do so, having regard to:
  - (a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as
    - (i) failing to comply with an order or direction of the Tribunal without reasonable excuse;
    - (ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;
    - (iii) asking for an adjournment as a result of (i) or (ii);
    - (iv) causing an adjournment;

- (v) attempting to deceive another party or the Tribunal;
- (vi) vexatiously conducting the proceeding;
- (b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;
- (c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;
- (d) the nature and complexity of the proceeding;
- (e) any other matter the Tribunal considers relevant.

51 The amount awarded is substantial, and although I am not satisfied that this fact alone justifies an award of costs it inclines me toward that view. Given the amount in dispute, it was desirable for any party so seeking to be legally represented, but permission for legal representation alone does not necessarily justify an award for costs. The absence of the Respondent has shortened the length of the hearing, but as Mr Pumpa submitted, did not shorten the need for proper preparation as he notified neither his opponents nor the Tribunal of his intended absence. The dispute was not highly complex, however when combining the degree of complexity with the amount in dispute, I find it reasonable that the Applicants should have an award of costs.

52 The Respondent must pay the Applicants' costs to be agreed, but failing agreement, to be assessed by the Principal Registrar pursuant to s111 of the *Victorian Civil and Administrative Tribunal Act 1998* on a party-party basis on County Court Scale D.

**SENIOR MEMBER M LOTHIAN**