

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

VCAT REFERENCE NO. D757/2010

**DOMESTIC BUILDING LIST**

**CATCHWORDS**

Domestic building – defective work – cost of rectification – unsworn evidence on both sides – tribunal not bound by the rules of evidence - all material sought to be relied upon to be given weight according to its probative value as assessed by the Tribunal – evidentiary value of a quotation

<b>APPLICANT</b>	Wincrest Homes Pty Ltd (ACN 002 989 755)
<b>RESPONDENTS</b>	Kim Benjamin, Phillip Hurst
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R. Walker
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	7 March 2011
<b>DATE OF ORDER</b>	31 May 2011
<b>CITATION</b>	Wincrest Homes Pty Ltd (ACN 002 989 755) v Benjamin and Anor (Domestic Building) [2011] VCAT 999

**ORDER**

1. The Application is struck out.
2. Order on the Counterclaim that the Applicant pay to the Respondents \$11,735.9.1

**SENIOR MEMBER R. WALKER**

**APPEARANCES:**

For the Applicant	Mr J. Shaw of Counsel
For the Respondents	In person

## REASONS

### Background

- 1 The Respondents (“the Owners”) are the owners of a house (“the House”) and land in Wandong. The applicant (“the Builder”) was at all material times a registered builder.
- 2 By a major domestic building contract dated 19 May 2008 the Builder agreed to construct the House for the Owners for a price of \$286,787.00.
- 3 Construction commenced on 25 September 2008 and was due to have been completed by 13 May 2009. It was not.
- 4 A dispute arose between the parties as to allegedly defective work and a number of building reports were obtained by the Owners. Little was done by the Builder about the defective work and the Owners served a notice of termination.
- 5 The Owners entered into occupation of the House without paying the final claim of the Builder of \$28,679.17.
- 6 By this proceeding the Builder claims the final claim and the Owners counterclaim for defective and incomplete work and damages for substantial delay, amounting in all to \$54,039.60. After deducting the Builder’s final claim, they seek the balance of \$25,270.43.

### The hearing

- 7 The matter came before me for hearing on 7 March 2011 with 2 days allocated. Mr Shaw of Counsel appeared for the Builder and the Owners represented themselves.
- 8 After hearing evidence from the parties I visited the House and inspected the alleged defects in the presence of the parties. I informed them that a written decision would be provided.

### The facts

- 9 The Builder is based in Sydney and carries on its building business there. At the relevant time it was also carrying on business in Victoria but it has since ceased operations in Victoria. Whether for that or for some other reason, it is apparent from the evidence that the project was very poorly supervised and progress was very slow.
- 10 In the course of construction, in February 2009 the Builder went into administration. The Owners were informed the fact by the administrator and by Vero, the supplier of the domestic building insurance. This was part of a restructuring of the Builder’s business and the Builder continued and still continues in existence. The Owners were content to allow construction to proceed notwithstanding the restructuring.
- 11 The frame stage was claimed by the Builder on 12 December 2008 but the frame was not passed by the building surveyor until July 2009. The claim

for frame stage was re-issued on 31 August 2009 and then paid by the Owners.

- 12 Lock up stage was claimed on 17 July but the brickwork had not been completed and no window sills had been constructed. The claim was re-issued on 31 August 2009 and then paid by the Owners.
- 13 The first list of defects and complaints accompanied an email from the Owners to the Supervisor on 13 October 2009. The list in question was derived from a report the Owners obtained from Melbourne Property Inspections Pty Ltd on 7 October. After sending this to the Supervisor on 13 October they met him on site and went through the items on the list shortly afterwards. According to the Owners' evidence he agreed to address the issues raised in the report.
- 14 On 18 November another list of 44 items was compiled. It was then that the Builder asked for the fixing stage payment although it is apparent that the House had not reached the fixing stage by that date. The architraves and skirtings had not been done, no kitchen was installed until the end of September and the pantry was not installed until 29 November. The fixing stage was paid in mid December.
- 15 In the meantime, on 11 December 2009, the Builder submitted an invoice for the completion stage. A walk through took place on 14 December and 28 items requiring completion were listed at the request of the Owners. The Builder's representative attached green stickers in many places indicating what needed to be attended to. In particular, many stickers were attached to the walls, indicating deficient paintwork. According to the Owners' evidence, many of the defects listed were attended to but many more were not.
- 16 A meeting then took place between the Owners and three representatives of the Builder. They went through the list and further items were added. The Builder agreed that the remaining items would be attended to but nothing was put in writing and no time was specified.
- 17 According to the Owners' evidence, weeks then went by with no-one on site. They asked the supervisor when they could move in but received no date. The carpet was their responsibility and they had to defer having the carpet laid. They then sought legal advice.

### **Purported termination**

- 18 On 9 February 2010 the Owners served a notice upon the Builder pursuant to Clause 42 of the contract purporting to terminate it immediately on the ground that the Builder had assigned its estate for the benefit of its creditors or made a composition or arrangement with them or had a receiver, manager, administrator, etc. appointed. Since they had known that since part of the way through construction and had nonetheless elected to proceed, it is questionable whether they were entitled to terminate the

contract on that ground. However there appears to have been no response to this notice and the Owners moved into the House on 17 February 2010.

- 19 The Builder then wrote, saying that the Owners were not entitled to take possession but that the Builder would ignore that provided the “money due” was paid. The letter concluded with the sentence: “The building work at the home is complete.”
- 20 The Owners have largely finished the work themselves and claim the cost of doing so. They also seek damages for defective work and liquidated damages.
- 21 Although the Owners have purported to terminate the contract in doubtful circumstances nothing turns upon that. It is clear that the Builder was not proceeding with the work with anything like reasonable diligence and completion was very much overdue. Further, in the letter referred to, it asserted that the building work was complete, indicating quite clearly that the Builder was not going to do anything further. Accordingly, I am not concerned with differentiating between incomplete and defective work.
- 22 The Builder claims the final payment. The Owners are content to pay the final claim subject to their counterclaim. Consequently, the sole issue to be determined is the Counterclaim which the Owners seek to set off against the amount of the final claim.

### **Liquidated damages**

- 23 What the termination did achieve from the Builder’s point of view was an end to the accumulation of liquidated damages. By 9 February 2010 these amounted to 272 days at a rate of \$250 per week. This amounts to \$9,714.30 in liquidated damages and that part of the Owners claim will be allowed.

### **The other claims made by the Owners**

- 24 These items are dealt with in two expert reports, one by Mr Paul for the Owners and one by Mr Ryan for the Builder. Neither expert was called but their reports were put in evidence without objection and I accept them at face value, including the qualifications of the two experts which are set out in the body of each report.
- 25 Mr Ryan has provided costings for the items acknowledged by the Builder. For quantification of these and the other items, the Owners rely upon a quotation obtained from another builder, a Mr Rechichi, who carries on business as PMR Builders (“PMR”). Mr Rechichi was not called but the quotation was produced and relied upon by the Owners.

### **Expenses already incurred**

20. A number of expenses have already been incurred by the Owners since moving in order to make the House habitable. Receipts for all these sums were produced. They were as follows:

(a) Painting

Amongst the items complained about by the Owners were deficiencies in the painting. On one of the inspections numerous green stickers were applied to the wall by the Builder's supervisor to indicate the areas that required further attention. At the time the Owners moved in, none of the deficiencies indicated by the green stickers had been attended to and they engaged a painter to paint the inside of the House at a cost of \$5,257.28.

(b) The light switch

A light switch had been installed in the middle of the wall of a room behind a pillar. This was not the position for the switch indicated on the electrical plan. The Owners paid \$170.00 in the moving and patching of the light switch.

(c) Floor under dishwasher

The floor under the dishwasher was very rough, due to the relocation of some plumbing by the Builder. The tiling was to be the responsibility of the Owners but the surface was too rough to permit tiles to be laid. The Owners incurred a further \$260.00 in rectifying the floor under the dishwasher.

(d) The range hood

Photographs of the range hood showed that it was bent and the skirt was separated from the chimney. It was also not vented into the roof space. The Owners purchased a new range hood at a cost of \$479.00 and incurred \$440.00 in removing the old range hood and having another one fitted. The total expense in this regard was therefore \$919.00.

(e) Testing the gas

When the Owners entered into possession of the House they had to engage a plumber to test the gas pipes for leaks. According to the plumber's account he had to remove a natural gas regulator on the stove connection and connect the ducted heating in the ceiling space to the gas line provided. He noted that the heater was overheating due to faulty wiring within the unit and that the stove had been fastened by means of a roofing screw through the side cupboard into the side of the stove. These matters were rectified at a cost of \$528.00

(f) External drainage

The House is constructed upon a sloping rural block. The external drainage to be provided for the House included two pits at the rear and one at the front. The Owners complained that the external drain is ineffective and tendered a number of photographs showing a large body of water banked against the side of the slab following heavy rainfall. The Builder tendered a Statutory Declaration from a plumber

to the effect that he had done what was required by the plans but it would seem from these photographs that, whatever drainage the Builder installed, it was not effective. The Owners engaged a plumber to excavate around the rear of the House to a level that provided sufficient fall away to eliminate water pooling and to supply and install crushed rock to the new excavated area. This cost \$2,832.50. It seems clear that the external drainage constructed by the Builder was insufficient and that the work carried out at the Owners' expense was needed to properly drain the area. The claim will therefore be allowed.

### **Defects claims**

- 26 Apart from these items there are a list of claims set out in the experts' reports. During my visit to the site with the parties and we went through the Scott Schedule that had been very helpfully prepared by Mr Shaw from the two reports. The schedule is based upon the building report of Mr Paul on behalf of the Owners and Mr Ryan on behalf of the Builder. The authors of these reports did not give evidence and it was agreed that I would treat the content of the reports as being evidence.
- 27 In quantifying damages for defective work the Owners are to be put in the position they would have been in if the contract had been performed. The issue is the reasonable cost of rectifying the work. I have no sworn evidence as to these matters, only documents, in the form of a detailed quotation and an expert assessment. A building expert assesses what the reasonable cost should be. A quotation from a rectifying builder states what that particular builder will charge to do the work. There is always a difficulty where the two figures differ.
- 28 On the one hand, the Builder might say that figure provided by the quoting builder might be unreasonable. He might not want the job or he may be loading his figure because his services are in demand or to make an excessive profit. In that regard we are sometimes presented with what appear to be inflated quotations in this Tribunal and it is important to bear in mind just what a quotation is when deciding what weight to give it.
- 29 On the other hand the Owners can argue that the quotation is the best evidence of the real cost they will incur, whereas an expert's assessment is only an estimate of what that might be. In a case of conflict, there is no hard and fast rule as to what figure should be accepted. The Tribunal should look at all the evidence and make a finding as to what, on the balance of probabilities, is the amount that will compensate the Owners for their loss.
- 30 In this case, a careful examination of the PMR quotation shows similar figures to Mr Ryan's assessments, although in regard to some items the figure is higher or lower. I am satisfied that the PMR quotation is a reasonable assessment and not inflated.

31 The items claimed to be defective are as follows:

(a) Height of the baths

According to Mr Paul, the bath height in the en suite is 682mm. According to Mr Ryan it is 650mm. In either case, it is more than the 545mm provided in the plan. The Owners say that the height of the bath is inconvenient and they want it lowered 545mm. I am not satisfied that the Owners agreed to the change. There is no variation and they are entitled to have the bath at the height specified in the contract documents. This item will be allowed. However the other bath in the main bathroom was chosen by the Owners and the dimensions of the bath would dictate its installed height. For lowering both baths the PMR quotation is \$2,816.00. Mr Ryan has assessed the cost of lowering both baths at \$2,295.00. Since the Owners are only entitled to have one bath lowered I will allow only one half of the PMR figure, which is \$1,408.00.

(b) The vanities in the bathroom

By variation dated 10 May 2008 it was agreed that the bathroom cabinets would be in accordance with a brochure for a "Sandhurst" bathroom in both the en suite and the bathroom. The variation form says that they shall not be square semi-recessed but oval porcelain in standard type cabinet form. The vanity that has been installed in the en suite is not in accordance with the variation. Instead of sitting in a wide vanity top in accordance with Exhibit V the basins are perched on the edge of a very narrow vanity only 370 mm wide. To replace the vanity unit and basins in the en suite according to the approved plans will cost \$2,585.00 according to the PMR quotation. Mr Ryan has not commented on the cost so this sum will be allowed.

(c) Recesses in shower walls

Recesses were to be constructed in the showers in both the en suite and the main bathroom but they have not been provided. Mr Ryan has assessed the cost of providing them at \$2,245.00 and so the amount claimed with respect to this item of \$550.00 by the Owners is reasonable and will be allowed.

(d) Dampness

Dampness has been detected in the window reveals. The Owners' claim for this item for \$275.00 to clean out the weep holes around the dwelling compares favourably with Mr Ryan's higher figure and will be allowed.

(e) Install towel rail in ensuite

No towel rails were installed. The Builder claimed that this was because the Owners were undecided as to where they should be placed. The Owners deny that. The towel rails are required by the contract. The Owners' claim of \$110.00 to install the towel rail in the ensuite compares favourably with Mr Ryan's greater figure and so will be allowed.

(f) Striker plates to en suite door

These need to be adjusted and the figure of \$27.50 is agreed.

(g) Main bedroom to en suite short wall out of plumb

There was a dispute about this between the experts. Mr Ryan said that there was no defect or loss evident but Mr Paul said it was not within the required tolerance. Upon inspection it was apparent that the wall is not square. It dips in 4mm over a metre, it is also out of perpendicular by 10mm over 2 metres, although it straightens slightly as it goes up. I therefore accept Mr Paul's evidence and allow the claim for bringing the wall into tolerance at \$1,628.00.

(h) Supply and fit hanging rods to walk in robe

These were not supplied and the figure of \$38.50 is not disputed.

(i) The bedroom one door is twisted.

Mr Ryan said that there was no defect. I examined the door on site and although it is slightly distorted I agree with Mr Ryan that it is within tolerance.

(j) No towel rail installed in the main bathroom.

The figure of \$110.00 is claimed and compares favourably with Mr Ryan's higher figure.

(k) No double power point provided in the garage ceiling.

This is agreed but there is a large difference between the two assessments. Mr Ryan allows half an hour for an electrician plus \$10 for materials and arrives at a figure of \$37.50. The PMR quotation for the same work is \$275. If there were other electrical work to be done, there might be some justification for Mr Ryan's approach but since a licensed electrician will have to travel out to the site for this purpose alone I do not believe that he would charge as little as \$27.50 for the visit. I will allow the PMR figure of \$275 as the likely actual cost.

(l) Garage skirting boards of two different heights.

There are skirts of 190mm width in some places and 120mm width in others. I am satisfied with the Builder's explanation on this item, which is that it was to improve the appearance of the interface between the step down in the slab and the stud wall. I do not believe that the different sizes are unsightly.

(m) Front doors not sealed on bottom edge

The front doors are not sealed to their bottom edges and have swollen, causing them to bind and stick together. The Owners claim the PMR quotation of \$396.00 with respect to these two items and that compares favourably with Mr Ryan's assessment so that sum will be allowed.

(n) The robe door

The robe door in bedroom 4 has been chased out to receive a recessed handle. This was done on the wrong side and there is now a hole in the inside face of the door which was left in that condition by the Builder. The Owners claim is to replace the door at a cost of \$704. I think that is excessive. It is a particle board door intended to be painted and so the hole can be filled, sanded and painted. That is what was suggested by Mr Ryan. He has assessed the cost of that at \$180.00 and that sum will be allowed.

(o) The laundry door

The Owners claim to replace the laundry door which Mr Paul said was twisted. Mr Ryan said it was not twisted. Upon inspection it was found that Mr Ryan was correct. It was slightly twisted but within tolerance.

(p) Toilet roll holders

The toilet roll holders in both the main toilet and the en suite toilet are coming apart. The Builder suggested on site that this was simply a matter of adjustment but it seems to me that they are unsuitable and should be replaced. The amount claimed of \$123.00 will be allowed.

(q) Toilet seat

The toilet seat was loose and needs to be properly fixed. Mr Ryan said that the Owners had removed the seat for cleaning purposes and had trouble replacing it. The Owners denied the allegation and say that it become loose within a few days after they moved in. It seems to me that some allowance ought to be made for getting the toilet seat into a proper condition and so the amount claim of \$55.00 will be allowed.

(r) Bathroom mirror

The mirror in the bathroom is too small. There is no dispute as to this item and the amount claimed of \$418.00 will be allowed.

(s) Family room wall

Mr Paul says that the family room wall is out of plumb by 12mm. Mr Ryan acknowledges the kitchen cornices are slightly out in approximately two areas but says that there is no defect. Upon inspection on site it is clear that Mr Paul is right and that the wall is out of plumb and beyond tolerance. There is an amount of \$1,320.00 claimed with respect to straighten the north wall in the kitchen and \$1,628.00 to straighten the north wall near the rumpus room door which is the one that is 12mm out of plumb. Those figures in the PMR quotation will be allowed, totalling \$2,948.00.

(t) Family room door striker plate.

This requires adjustment and the amount sought of \$27.50 is agreed.

(u) Hall door

Mr Paul said that the hall door was twisted but Mr Ryan says it was not. On site it was found to be slightly twisted but within tolerance.

(v) The return wall to bedroom 3.

Mr Paul said that this is substantially out of square and that was apparent on inspection. The problem is accentuated by reason of the square floor tiles in the passageway. Mr Ryan says that the tiles, which were laid by the Owners, create an illusion that the wall is out of line. They certainly highlight the problem but the wall is nonetheless substantially out of plumb and well beyond tolerance. I also agree with Mr Paul that the hall wall is more than 17mm out of parallel. To plumb both of these walls, an amount of \$3,575.00 is claimed and that sum will be allowed.

(w) Trims to window heads

Mr Paul pointed out that no trims have been provided to a number of window heads. This item is accepted and the PMR quotation of \$88.00 claimed compares favourably with Mr Ryan's higher figure.

(x) Blow outs in brickwork

Photographs were produced in regard to this item and some patches were pointed out on site. I agree with Mr Ryan that it simply requires some re-pointing but a bricklayer will need to be brought to the site to do it and the mortar will need to be matched. For those reasons I think that the PMR quotation of \$401.50 is more likely to reflect the loss than Mr Ryan's assessment of \$65.00.

(y) The eaves

The eave sheeting is loose in the ceiling above the entry in the eaves. An amount of \$660.00 is claimed for that in the PMR quotation. Mr Ryan has assessed the cost of repair at only \$70.00. The difference seems to be that PMR has allowed the cost of replacing the sheets. Mr Paul's comment on this item is that the "holes" need to be repaired. He does not suggest that the sheets be replaced. The onus of proof being on the Owners I will allow Mr Ryan's figure.

(z) Bird proofing

Gaps have been left in the eaves allowing the entry of birds and vermin. These need to be sealed off. An amount of \$385.00 is claimed but Mr Ryan has assessed the cost at \$270.00 and I will allow the higher sum as the likely cost that the Owners will incur.

(aa) The rear roof of valley.

This is an extraordinary defect to have been left unrectified by a major Builder. Some of the trusses or roof frame timbers have pushed into the area of the valley and instead of rectifying the problem and laying straight valley timbers, the Builder's workmen have bent the timbers in the valley

over the faulty roof timbers and then bent the valley iron over the top. The result is not only unsightly in itself but reflects something wrong in the roof timbers themselves which could be serious. An amount of \$5,060.00 has been claimed with respect to this item. Mr Ryan has assessed a figure of \$980.00 as the cost of removing the roofing sheets and valley irons to the affected area, removing the offending trusses or roof frame timbers and relaying the roofing and valley gutter. He says that this would take two carpenters one day with a minimal amount of materials for which he has allowed a further \$100.00. Mr Ryan's figure assumes a minimal amount of work. The quotation that the Owners have received from PMR is what it will cost them to have the work done. There must be an element of uncertainty as to what is required and that will inevitably be reflected in the price that the Owners will have to pay. In this instance the Builder has had ample opportunity to rectify this startlingly obvious defect and has not done so. To have continued with the construction when the roof timbers were out of position to this extent and simply bent everything over the defect is extraordinary behaviour. I must find on the balance of probabilities what loss will be suffered by the Owners by reason of this defect that the Builder must knowingly have allowed to occur and remain in the structure. It seems clear to me that the Owners will not be able to have this rectified on Mr Ryan's figure but will have to pay PMR \$5,060.00 and so that is the sum that will be allowed.

#### Conclusion

32. The total of all of these sums is as follows:

Liquidated damages:	\$ 9,714.30
Amounts already spent:	\$ 9,966.78
Defects:	<u>\$20,734.00</u>
Total:	\$40,415.08
Less final payment	<u>\$28,679.17</u>
Balance due to Owners:	<u>\$11,735.91</u>

#### Orders

33. There will be an order that the Application be struck out and that the Builder pay to the Owners \$11,735.91.

**SENIOR MEMBER R. WALKER**