

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D498/2008

CATCHWORDS

Agreement to work on an hourly basis at an hourly rate – no fixed scope of works – estimate given – difference between estimate and quotation – cost plus contract – *Domestic Building Contracts Act 1995* - s. 13 restrictions on entering into – whether a “range” can amount to a fair and reasonable estimate of the cost of the work - no counterclaim for amounts unpaid to builder – order that reasonable cost to rectify defects be set off against money owed – s53 Domestic Building Contracts Act 1995

FIRST APPLICANT	Paul Wright
SECOND APPLICANT	Annette Wright
RESPONDENT	Alan Palmer t/as AC & VL Palmer
WHERE HELD	Mildura Magistrate’s Court
BEFORE	Senior Member R. Walker
HEARING TYPE	Small Claim Hearing
DATE OF HEARING	2 October 2008
DATE OF ORDER	15 October 2008
CITATION	Wright v Palmer trading as AC & VL Palmer (Domestic Building) [2008] VCAT 2116

ORDER

I fix the damages payable by the Respondent to the Applicants with respect to the claims made in this proceeding at \$445.00 and direct that this sum be set off against the greater sum owed by the Applicants to the Respondent for the work that was done.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	In person
For the Respondent	In person

REASONS

Background

1. Mr and Mrs Wright (“the Owners”) are the owners of a 1920’s style weatherboard house at 232 Wade Avenue, Mildura (“the House”). Mr Palmer (“the Builder”) is a registered builder carrying on business under the name of AC & VL Palmer.
2. In September 2007 the Owners, who had been introduced to the Builder through a mutual friend, asked him to quote to do some work they wanted done to the House. The work is set out in two documents, the first being a fairly sparse hand drawn plan that has no dimensions on it and is not to scale, and the second being a list of 14 items (“the List”) described in very general terms. It is clear from perusing these documents that they do not set out a precise scope of works. For example, items 10 and 11 are referred to in terms of a probability of some things being required to be done and item 14 talks about replacing roofing ion where deemed necessary.
3. The Builder did not give a quotation but rather, an estimate dated 13 September 2007. This document goes to the heart of the case and is expressed as follows:-

“ESTIMATE ONLY: For renovation work at 232 Wade Avenue Mildura as per owners’ directions supplied (#1-14)

\$18,000.00 - \$20,000.00 plus GST. All accounts to be paid weekly @ \$35.00 per hr. + GST”.

The agreement

4. There is a fundamental distinction between a quotation to do a specific scope of works for an agreed figure and an estimate of what it will cost to carry out contemplated work. In the case of a quotation, the Builder says that he will carry out all of the work included in the scope of works for a particular price. The quotation might be expressed as an offer capable of acceptance or it might be so expressed as to be a mere invitation to do business. In either case, if the Owner accepts the quotation (if it is an offer) or engages the Builder to do the work in accordance with the quotation, he agrees to pay him the quoted price for doing the work.
5. In the case of an estimate, the document comprising the estimate neither offers to carry out any work nor expresses a willingness to do work for any particular price. All the document does is express the Builder’s estimate of what the work will cost. Not being an offer it is not something that is capable of acceptance. The estimate might be a particular figure or a range between two stated figures, as in the current case.
6. In this case, it is clear that the document is an estimate and not a quotation. Its terms suggest that the Builder will carry out the work as per the Owners’ directions and for doing so will be paid on a weekly basis \$35.00 per hour plus GST. The amount to be paid to the Builder is an hourly rate for the

work actually done, not an agreed sum for the whole of the work in the List and plan. Mrs Wright said that she asked Mr Palmer about preparing a contract but he said that they would “make it up” as they went along. This reinforces the view that the scope of works was uncertain and indeed, that was the Builder’s evidence. It is therefore not possible to spell out a contractual undertaking by the Builder to carry out all of the work on the List.

7. Not having agreed to do all of the work he would not be in breach of contract if he should not do anything on the List. However anything that he did do would have to be paid for at the agreed rate.

The nature of the agreement

8. Since the work to be done pursuant to the agreement was the renovation of a home, it was a contract to do domestic building work (*Domestic Building Contracts Act 1995* - s.5(1)(b) and s.3) and since the amount the Builder was to receive under the contract could not be known at the time the contract was entered into, it was a “cost plus contract” pursuant to s.3 of the Act.
9. By s.8 of the Act, the Builder warranted (inter alia) that the work was to be done in a proper and workmanlike manner and the materials to be supplied by him would be good and suitable for the purpose.
10. Because it was to renovate an existing building and because the cost could clearly not have been known without carrying out some of the work, the Builder did not breach s.13(1) of the Act when he entered into the contract.
11. By section 13(2), a builder must not enter into a cost plus contract which does not contain a fair and reasonable estimate by the builder of the total amount of money he is likely to receive under the contract. Although what was given was a range between two figures and although I think that giving ranges in this context is not to be encouraged, the scope of works in this case was quite vague. It was not certain whether some items would be done or not. The total ultimately charged was below the bottom of the range but all of the work contemplated was not done and extra work was done beyond that contemplated. I think on balance that if the work contemplated had been done and no more the cost is likely to have been at the bottom of the range. If the extra work contemplated had been done as well the cost is likely to have been towards the top of the range. I am therefore satisfied that the figures given did amount to “a fair and reasonable estimate” within the meaning of the section.

The work

12. The Builder commenced work on 9 October and during the course of carrying it out, had further discussions with the Owners in which it was agreed that some work on the List would not be done and other work would be added.

13. On 13 October the Owners requested the Builder to stop work because their funds were required for another purpose. Work resumed a month late on 14 December and then stopped for the Christmas break.
14. There were four days work done in January and then the Owners requested the Builder to cease work and demanded a refund of all monies they had paid.

Accounts and payments

15. The Owners have paid the following sums to the Builder for labour and materials in accordance with accounts rendered, namely:

<u>Date</u>	<u>Billed</u>	<u>Paid</u>
14/10/2007	\$3,621.85	\$3,621.85
28/10/2007	\$4,166.55	\$4,166.55
27/11/2007	\$7,877.87	\$7,877.87
07/02/2008	<u>\$3,657.50</u>	<u>\$1,828.75</u>
	<u>\$19,323.77</u>	<u>\$17,495.02</u>

The difference between these totals is \$1,828.75, payment of which has been demanded by the Builder's solicitor. However there is no counterclaim before me seeking payment of this sum. I am only dealing with a claim by the Owners.

The claim and hearing

16. The Owners claim is that the work is incomplete and defective. They have tendered a quotation from another builder to carry out an extensive scope of works for a cost of \$9,485.00. This bears no relation to the deficiencies I have found in the work. They also claim the cost they incurred in removing rubbish from the site to the tip and they produced invoices for that totalling \$305.00.
17. The matter came before me for hearing as a small claim at Mildura on 2 October 2008. The parties represented themselves and after hearing their evidence and that of Mr Palmer's employee carpenter, Mr Vance, I visited the site and inspected the work. I then informed the parties I would provide a written decision.

The alleged defects

18. The Owners' criticisms of the work followed the 14 items on the List. The following numbering is as per the List:
 1. This was to move a window from one side of the house to the other and it was not done. Mr Palmer says that he advised the Owners that it would be a waste of money moving the same window from one side of the room to the other. Since no work was done, none of the amounts charged by the Builder to the Owners relate to this item.

2. This was to install a window. The Owners agree that it was installed but say that the Builder's carpenter had to be reminded to do so. Since the work was done there is nothing in this item.
3. Some windows were to be replaced. The Owners changed their instructions in regard to the size and positioning of the windows. There seems to be no dispute about this item, save for a complaint by the Owners that they cannot hang their dryer above the washing machine because the window is there. Mrs Wright acknowledged that she changed her mind about the positioning of the windows. The plans show the window was to be moved but it is unclear on the evidence whether this window has been moved or not. If it was, there is no evidence that they objected to the positioning of the window when it went in. If it was not, they have not been charged for moving it. There is insufficient evidence for me to find that the positioning of the window was otherwise than in accordance with the Owners' instructions.
4. The fascias were to be replaced. The Owners complained that the front fascia has a bend in it and that, when nailing the corrugated iron onto the top of the fascia, the board was split in a number of places. The splitting is presently noticeable but should not be as noticeable when the fascia is painted. This is a difficult item because the Builder has installed the fascia in line with the existing posts which themselves were out of line, hence the slight bend. The alternative would have been to pack out the cutaway in one of the posts to create a straight line but that would have moved the fascia away from the roofing iron creating a gap. Further, the roofing iron was nailed instead of screwed in order to match the rest of the roof. I think that nailing the iron instead of screwing it was a reasonable decision on the part of the Builder. The design of the fascia is that it has the usual saw cut on the inside towards the bottom for the insertion of a soffit lining which would conceal any damage caused to the fascia by the nailing on a roofing line. The only foolproof way to have done this job to create a straight finish would have been to replace the posts, which do not match the house anyway, and re-roof the veranda which would have been expensive and would have been at the cost of the Owners. That could still be done if that is what the Owners want. As it is, I think what the Builder did was reasonable in the circumstances and I am not satisfied that this work is defective.
5. All gutters and downpipes were to be replaced and perhaps two more might be added. An old downpipe has been reused outside the laundry but I accept the Builder's evidence that that is only temporary. A proper downpipe needs to be provided but the Owners have not been charged for that. At the front corner of the House near the driveway, the Owners contend that there should have been another downpipe to drain what they consider to be a large area of roof.

However when one looks at the area of the part of the roof in question, it is not so large as to require an additional downpipe. Certainly, one could be installed but that would be a borderline decision and the additional downpipe would be near the driveway and would be installed at the Owners' cost. I agree with the Owners' complaint about the downpipe at the other end of the veranda. A plastic stormwater pipe has been used which looks quite incongruous. I find this to be a defect. The pipe will have to be replaced with one matching the guttering material used. I assess this item at \$50.

6. A new interior wall was to be erected to create a hallway between the laundry and the bathroom and the third bedroom. This was done. According to the Builder, the old studwork on the opposite wall was out of plumb to a considerable degree and he had to straighten it in order to get perpendicular walls on either side of the corridor created by the new wall. From my observation, the work in regard to the walls and ceilings supplied by the builder is of a good standard. The Owners complain that the floor in the third bedroom was out of level. It was difficult for me to assess the extent to which it was out of level because the room was full of the Owners' belongings. However the floors were not replaced as part of the work done. Indeed, the Owners informed me that they had been told that there was no need to restump the house and replace the floors. It is always a problem when renovating an old house that the new work will be straight whereas the old parts of the house will have settled over the years into a position that would be well out of level. When looked at together with the new work the difference will always be noticeable. The only answer is to renew everything but that is usually a substantial cost. I am not satisfied that there was any contract that the Builders would replace the floors and the mere fact that the floor now looks out of level compared with the new work does not establish bad workmanship.
7. Item 7 is not in dispute.
8. A number of doors were to be replaced. The Owners complain that the toilet and bathroom doors were badly fitted. The fitting seems to be adequate but the toilet door does not latch. The striker plate needs a slight adjustment. This is really a maintenance item but since the Builder has left the site I will treat it as a defect, albeit one that should take less than 5 minutes to remedy. I will allow \$20.
9. Item 9 relates to item 1 which was not carried out.
10. The Owners complain that the floor of bedroom three was not level. This item was referred to in connection with the removal of an exterior wall. Since that work was not done it is not been charged for.
11. The Owners acknowledge that there was no need to raise the roof area.
12. This is not in issue.

13. It was contemplated that the ceilings would all be replaced but the ceiling material in the laundry was not. It appears to have been fibro-cement sheet with the joins covered by strapping. The strapping has been removed. As it presently appears, it is unsightly because the gaps need to be filled and the ceiling needs to be painted. The ceiling is level and straight and new cornices have been installed around the junction between the ceiling and the wall. According to the Builder the ceiling was not replaced because there was no need to replace it. Had the Builder replaced the ceiling he would have charged the Owners for the time taken and the materials used in doing so. It is not suggested that there was any contemporaneous complaint at the time by the Owners that this ceiling was not replaced. In any case, the Owners have not been charged for its replacement.
14. Roofing iron was to be replaced if necessary. In this regard the Builder has tidied up and made good the edge of the roof line where the chimney used to be but no other roofing iron has been replaced. Obviously, if the Owners wished to have any roofing iron replaced it can be done but the Builder has not charged them for doing so.

Further complaints

19. Apart from the foregoing, there are the following further complaints:
 - (a) The shower set was installed defectively. The set comprises a base, 2 flexible plastic wall sections intended to be glued to the walls, a third glass wall and a glass door. The Builder had three attempts at installing it. On the first two occasions the shower set delivered was, according to the Builder, defective. There being nothing to the contrary, I accept that evidence. In any case, the Owners have only been charged for installing it once since a credit has been given with respect to the time taken on the earlier attempt. Nevertheless, there are deficiencies in the installation. First, the junction between the plastic wall panels in the shower base ought to have been sealed with a good bead of silicone. The silicone job in this respect is very poor indeed and it will have to be removed and replaced. The plastic sheet attached to one of the walls has been insufficiently glued and it is coming away in the middle. According to the Owners, this is particularly noticeable when they take a shower. It is quite clear that the side glass panel has been installed back to front, although with what consequence I cannot say. Finally, neither the shower rose nor the taps seem to be as rigid as they should be. The whole installation has the appearance of being the work of a carpenter without any involvement of a plumber, although I might be wrong. I am satisfied that the shower will have to be reinstalled but there is no reason why it needs to be replaced. An allowance should be made for labour in this regard and since I have no other guide as to what this will cost I will allow \$300.00 for a plumber, including call out, labour and a small amount of materials.

- (b) A scratch on the toilet seat was not shown to me on site but it is acknowledged that it exists. I will allow \$25.00.
- (c) The hand basin vanity is chipped. The chip is not seen unless it is pointed out. The top section, which is the basin, protrudes over the lower vanity and so covers the chip from view unless one is standing in the doorway looking towards the vanity. It appears that, earlier on, the top basin section required replacement, having cracked some time after installation. I am satisfied that it is more likely than not that the chip occurred during that replacement because it is not in a position where it is likely to have occurred during normal use. To replace the unit would be excessive. I will allow \$50.00 for some cosmetic repair which is all that should be required.
- (d) In regard to the claim for the tipping of the rubbish the Builder has not charged the Owners for that and it was a not a term of the contract that he would be responsible for it.

Conclusion

- 20. Most of the claim fails because it was misconceived. The Owners have only been charged for what the Builder did. They cannot maintain a claim against him for what he did not do because there was no contract requiring him to do it. If he had done it, he would have been entitled to be paid for it at the agreed hourly rate.
- 21. I fix the damages payable by the Builder to the Owners with respect to the defects at \$445.00 and direct that this sum be set off against the money owed by the Owners to the Builder for the work that was done. There is therefore no money to be paid on this order. This is an unusual order but I find that it is fair to make it so as to resolve a Domestic Building Dispute. I make it pursuant to s.53(1) of the Domestic Building Contracts Act 1995. I cannot make any order in favour of the Builder for the balance because there is no counterclaim.

SENIOR MEMBER R. WALKER