

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO BP624/2016

CATCHWORDS

DOMESTIC BUILDING – Painting works – whether painting defective – Reference to *Guide to Standards and Tolerances 2015* – Evidence – sufficiency of evidence – Damages.

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| APPLICANTS | Craig Youl |
| RESPONDENT | Michael Renn |
| WHERE HELD | Melbourne |
| BEFORE | Senior Member E. Riegler |
| HEARING TYPE | Hearing |
| DATE OF HEARING | 16 August 2016 |
| DATE OF ORDER | 7 September 2016 |
| CITATION | Youl v Renn (Building and Property) [2016] VCAT 1515 |

ORDER

1. The respondent must pay the applicant \$3,930.
2. Liberty to apply on the question of costs and reimbursement of the application filing fee, provided such liberty is exercised within 14 days of the date of this order.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant Craig Youl in person

For the Respondent Michael Renn and Simone Renn in person

REASONS

INTRODUCTION

3. The applicant operates a painting business, trading under the name *CD Youl Painting*. In this proceeding, he claims \$5,570 from the respondent in respect of painting work undertaken for the respondent at a property located in Tyabb (**‘the Property’**). The respondent disputes the claim made by the applicant and alleges that the painting work is defective. The respondent further alleges that the applicant’s subcontractors damaged newly laid carpet, such that his loss far exceeds the amount claimed by the applicant. Consequently, the respondent contends that no money is therefore payable to the applicant.

BACKGROUND

4. In October 2015, the applicant was contacted by Simone Renn, the wife of the respondent, and asked to provide a quotation to undertake painting work at the Property. The Property was approximately 40 years old and had recently been purchased by Mrs Renn. It required interior and exterior painting, including some patchwork of existing walls.
5. According to the applicant, he first met Mrs Renn on 30 October 2015, at which time he discussed the proposed scope of work and gave some indication as to when the painting work could commence. The applicant said that no specific price was given, although he indicated to Mrs Renn that he would charge \$45 per hour per person plus GST and materials. He told Mrs Renn that the total cost of the painting work would be in the vicinity of \$10,000 to \$14,000.
6. Originally, the scope of painting work entailed one coat of paint to the ceilings and two coats to the walls and woodwork. Basic white was to be applied to the ceilings and off-white to the walls. An enamel oil paint was to be applied to the timber surfaces.
7. According to the applicant, Mrs Renn later changed her mind and requested that acrylic paint be substituted for the oil paint. This then required that there be three coats of paint on the woodwork. The applicant told Mrs Renn that this increased the price and he advised her that the total cost of the painting works would be in the vicinity of \$18,000 to \$20,000.
8. No written contract or quotation was ever prepared. Nevertheless, the parties agreed to proceed on the basis of the applicant’s oral estimate. Indeed, there is no dispute between the parties as to the amount ultimately charged by the applicant. The dispute between the parties relates to the quality of work performed by the applicant and whether damage suffered by the respondent, in order to make good defective painting works and consequential damage, can be set off against the applicant’s claim sufficient to extinguish it.

9. The painting work commenced on 15 December 2015. It was anticipated that the work would be completed by the end of that year, so as to allow the respondent and Mrs Renn to occupy the Property by that time. According to the applicant, he met the respondent soon after starting work to discuss the scope of work in detail. During the course of that discussion, the respondent advised the applicant that he intended to do some of the preparation work himself so as to reduce the ultimate cost of the painting work. The work that the respondent was to undertake included removing cork boards, some plastering work and some filling of walls.
10. The painting works proceeded through December, Christmas and the New Year. According to the applicant, an inspection was carried out by the respondent and Mrs Renn prior to the final coat of paint being applied. He said that the respondent identified some defects which were then attended to by the applicant's main subcontractor, Eric O'Toole.
11. The final coat of paint was applied in early January 2015. The applicant contends that this then constituted completion, save for some minor touch-up work, which he suggested was best undertaken after the respondent and Mrs Renn moved into the Property, so that any damage occasioned through that process could also be attended to at the same time. According to Mr O'Toole, Mrs Renn told him that she was generally happy with the quality of work undertaken up to that point in time.
12. A final account in the amount of \$5,570 was given to the respondent or Mrs Renn on 13 January 2016. Subsequently, Mrs Renn contacted the applicant and asked whether the applicant could return to undertake some touch-up work before new carpet was installed into the Property. The applicant advised that he would arrange for Mr O'Toole to return to the property for two hours in order to undertake final touch-up work.
13. Mr O'Toole returned to the Property on 18 January 2016. He said that upon arrival he was greeted by both the respondent and Mrs Renn, who then proceeded to show him numerous post-stickers affixed to all rooms which were said to indicate particular defects in the painting work. Some of the post-stickers had notes stating *fill* or *sand* on them. He recounted that there were approximately 6 to 12 post-stickers in each room. Mr O'Toole asked the respondent what those notes meant. He was told that they identified defects. He was further told that the respondent had inspected the painting works at night with a torch in order to identify those defects. According to Mr O'Toole, he advised both the respondent and Mrs Renn that it was incorrect to identify defects through that method. He said that the surface of the walls did not display any imperfection when looked at in natural light.
14. Having regard to the extensive number of the identified defects, Mr O'Toole contacted the applicant and advised that he would not be able to complete the list within the two hours allocated. He explained the situation

to the applicant and said that it would take one and a half days to undertake the work that the respondent had identified.

15. The applicant subsequently contacted Mrs Renn and advised that Mr O'Toole would return to the Property on another day to carry out further touch-up work. He said that he recommended to Mrs Renn that it would be better not to sand and fill pre-existing imperfections in the walls because such work may ultimately result in the patchwork being more noticeable than the imperfection. Despite that recommendation, Mrs Renn indicated that she wanted the work done.
16. Mr O'Toole subsequently returned to the Property and undertook approximately 12 hours of remedial work. Regrettably, he was unable to attend the Property prior to the carpet being installed. Nevertheless, he said that he placed drop-sheets under wherever he worked.
17. The respondent does not consider that the remedial work undertaken by Mr O'Toole adequately addressed the defects identified by him. Further, the respondent contends that Mr O'Toole failed to protect the newly laid carpet with the result a paint spot, the size of a ten cent piece, has stained the carpet.

WITH WHOM DID THE APPLICANT CONTRACT?

18. At the commencement of the hearing, Mrs Renn advised that she was the registered proprietor of the Property. However, the applicant's claim is against Mr Renn. Mrs Renn is not a party to this proceeding.
19. Nevertheless, both the applicant and the respondent conceded that although Mrs Renn was the registered proprietor of the Property, and the initial point of contact with the applicant, the respondent was a party to the contract with the applicant. In that regard, the applicant contended that the contract was only with Mr Renn, while the respondent contended that both he and Mrs Renn were parties to the contract.
20. In either case, I am satisfied that there is a contract between the applicant and the respondent and in all likelihood, also Mrs Renn. Nevertheless, for the purpose of prosecuting his claim, I accept that the applicant is able to claim against the respondent, even if Mrs Renn is not a party to this proceeding. In particular, if both Mr and Mrs Renn were parties to the contract, then they are jointly and severally liable under that contract and it is open for the applicant to sue one or both of those parties. There is no obligation or requirement to bring the action against both parties. It is entirely a matter for the applicant if he chooses only to sue one of the parties he contracted with.

ARE THE PAINTING WORKS DEFECTIVE?

21. The respondent does not rely on any expert evidence. His evidence, and that of Mrs Renn, is confined to their own observations of what they consider to be defective painting work, illustrated in a number of

photographs tendered in evidence. The respondent further relies upon an extract of what is said to be a quotation to make good the painting works in the amount of \$4,587. The author of that quotation was not identified, nor called to give evidence in the proceeding. The quotation describes the scope of work as follows:

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| Scope of work | Ceilings, ornate cornices, walls |
| Preparations | Repair and blade fill lumpy and inferior plasterwork, seal repairs, mask skirting boards, gap fill where required, sand walls, erect scaffolding in lounge. |
| Specification | Ceilings (wet area) - Low Sheen Acrylic Ceilings - Matt Acrylic Walls - Low Sheen Acrylic * repair areas - 2 coats Remainder - 1 coat |
| Paint System in Use | Dulux |

22. The difficulty in accepting the extract of the above quotation as proof of defective work is that it does not identify what work is faulty. It assumes that all of the work undertaken by the applicant is so defective that it needs to be completely redone. Further, it contemplates that the plasterwork will be *blade filled*. As far as I can ascertain from the evidence presented, it was never part of the original scope of work to *blade fill* imperfections in the original walls. Further, as I indicated to the respondent during the course of the hearing, the failure to call or at the very least, identify, the author of the quotation results in the quotation having very little probative weight. The opinion expressed in that quotation cannot be tested through cross-examination, nor is there any way of knowing whether the person who prepared that quotation was adequately qualified to give that opinion.
23. Similarly, the observations of the respondent and Mrs Renn as to what they considered to be defective painting work is also of limited probative value. Neither the respondent nor Mrs Renn are qualified painters and their opinion as to whether the painting works have been performed properly is unqualified. Moreover, I am of the view that examining paintwork at night using a torch may not be the most appropriate way to identify defects. In particular, the *Guide to Standards and Tolerances 2015* published by the Victorian Building Authority identifies defective paintwork as follows:

12.02 Surface finish of paintwork

Paintwork is defective if the application has blemishes such as paint runs, paint sags, wrinkling, dust, bare or starved painted areas, colour variations, surface cracks, irregular and course

brush marks, sanding marks, blistering, non-uniformity of gloss level and other irregularities in the surface that are visible from a normal viewing position. [Underling added]

...

12.04 Natural characteristics and mechanical imperfections/damage

Unless the contract specifies otherwise, natural characteristics such as gum pockets, surface splits or sap bleeding are defective if they can be seen from a normal viewing position. [Underling added]

Mechanical imperfections/damage, holes or any other unfilled depressions are defective if they can be seen from a normal viewing position. [Underling added]

24. As stated in the extract of the *Guide to Standards and Tolerances 2015*, defects in painting *are to be seen from a normal viewing position.* I do not regard inspection of painting work at night with a torch as falling within this methodology.
25. Nevertheless, the photographs tendered in evidence by the respondent show some irregularities in the wall surface, cracking and blistering. However, the extent of those defects is difficult to ascertain, given that of the each photographs only shows a very small area. Based on the photographs alone, I cannot determine that the whole of the painting works needs to be redone. Moreover, that degree of rectification work seems to be at odds with evidence given by Mrs Renn, who conceded that the works were generally of good workmanship.
26. Having said that, the applicant concedes that there are some aspects of the painting work that require further work. He gave evidence that he offered the respondent three days of labour to make good painting defects.
27. Doing the best that I can with the evidence before me, I find that this concession represents a fair assessment of what degree of labour is required to make good the painting defects. In forming that view, I am mindful that the Property is not a new residence and the finish of the painting works, even if done in a professional and workmanlike manner, may not mirror what would otherwise be the case if paint were applied to a new surface.
28. As indicated above, the applicant said that the amount he charged for labour was \$45 plus GST making a total of \$49.50, exclusive of material. In my view, \$60 per hour inclusive of GST and materials represents a reasonable amount to be paid to a competent painter to undertake remedial work. Over three days, that would equate to \$1,440. I find this to be the reasonable amount of the cost to undertake remedial work, to be deducted from the final account of the applicant.

REPAIR OF CARPET

29. As indicated above, a paint spot was found on the newly laid carpet after Mr O'Toole completed touch-up work in January 2016. A photograph of the paint spot was produced during the course of the hearing. Although Mrs Renn said that the paint spot was approximately the size of a ten cent piece, it appears from the photograph that the spot may be marginally smaller than that.
30. The applicant gave evidence that he offered to engage a professional cleaning contractor to remove the paint spot. That offer was not accepted by the respondent. Instead, the respondent produced a quotation from *DMK Carpets* dated 27 January 2016, which entailed uplifting a large section of the existing carpet and replacing it with the same type of carpet. The cost of that work was quoted at \$2,970. This is the amount that the respondent says should also be deducted from the applicant's claim.
31. According to Mrs Renn, the quotation was high because the respondent did not wish to have any additional joins in the carpet previously laid. Therefore, a large section of carpet had to be uplifted and replaced.
32. I asked Mrs Renn how she formed the view that the carpet had to be replaced, rather than an attempt made to remove the spot from the existing carpet. She said that she had contacted the supplier of the carpet and spoke with a woman who had told her that no attempt should be made to remove the spot. She said that the woman had consulted with the installer of the original carpet, who had advised her against any attempt to remove the spot. Neither the woman who spoke to Mrs Renn nor the original installer were called to give evidence in the hearing. Moreover, Mrs Renn conceded that neither the supplier nor the installer of the carpet were ever shown a picture of the paint spot or ever inspected the paint spot.
33. Given these factors, I find that the evidence of Mrs Renn on this point is of little probative value. I am not persuaded by the evidence of Mrs Renn that the paint spot cannot be effectively removed at minimal cost by engaging a professional carpet cleaning contractor.
34. Consequently, I find that an amount commensurate with engaging a professional carpet cleaning contractor to remove the paint spot represents a fair assessment of damage suffered by the respondent as a result of work carried out by the applicant's subcontractor. Although there is no evidence before me as to what that cost is, I will allow \$200, which I consider to be a reasonable amount in the circumstances.
35. Accordingly, a further \$200 is to be deducted from the applicant's claim to compensate the respondent in respect of the paint spot left on his carpet.
36. In forming that view, I have had regard to Mrs Renn's contention that the applicant had agreed to replace the carpet at his cost. That evidence was contested by the applicant who conceded that he discussed the possibility of replacing a section of carpet, but did so at a time when he was unaware

of what had actually occurred. He said that from his initial discussions with Mrs Renn, he assumed that a full tin of paint had been spilt over the carpet rendering it irreparable. He said that once he saw a photograph of the paint spot, he offered to fix the carpet himself or alternatively engage a professional cleaner to remove the paint spot.

37. In my view, no concluded agreement was ever reached that the whole or a large section of the carpet was to be removed at the cost of the applicant, notwithstanding that there may have been some discussion of such an offer materialising if the applicant considered that that was appropriate.

CONCLUSION

38. Given that the quantum of the amount claimed by the Applicant is not in dispute, save and except for any deductions to be made by reason of damage suffered by the respondent, I assess the applicant's claim as follows:

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| Amount remaining to be paid under the contract | \$5,570 |
| Less reasonable cost to make good the painting works | (\$1,440) |
| Less reasonable cost to repair carpet | (\$200) |
| Total payable | \$3,930 |

39. Consequently, I shall order that the respondent pay the applicant \$3,930.

SENIOR MEMBER E. RIEGLER