

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1162/2015

CATCHWORDS

Domestic building; defective building work; what were the terms of the agreement between the owner and the builder; was demolition and reconstruction appropriate in lieu of rectification.

APPLICANT	Irene Antczak
RESPONDENT	Tara Roach Pty Ltd (ACN 128 839 690)
WHERE HELD	Melbourne
BEFORE	B Thomas, Member
HEARING TYPE	Hearing
DATE OF HEARING	9 March 2016
DATE OF ORDER & REASONS	31 May 2016
CITATION	Antczak v Tara Roach Pty Ltd (Building and Property) [2016] VCAT 879

ORDER

1. The Respondent must pay the Applicant the sum of \$20,108.00.
2. Costs, including any claim for reimbursement of the application filing fee and hearing fees, are reserved with liberty to apply. Such liberty is to be exercised within 14 days of these orders by advising the Principal Registrar in writing to further list the proceeding for a costs hearing before Member B Thomas.

B Thomas, Member

APPEARANCES:

For the Applicant	Mr N Gallina of Counsel
For the Respondent	Mr R Sinha, Director

REASONS

BACKGROUND

1. The Applicant, Ms Antczak owns a residence in Ardeer. On 16 January 2013 she entered into a contract with the Respondent, Tara Roach Pty Ltd (Tara Roach) for the demolition and re-construction of an enclosed verandah at the front of the residence (the works) for \$4,800.00 (the contract sum).
2. Ms Antczak alleges the building works are defective and claims \$20,108.00 from Tara Roach as the cost of rectification.
3. Tara Roach, whilst admitting part of the works are defective, says that \$20,108.00 as the cost of rectification is excessive.
4. The hearing took place on 9 March 2013. Mr Gallina of Counsel appeared for Ms Antczak and Mr Sinha, a director, appeared for the Respondent.
5. Ms Antczak gave evidence and Mr George Cross of Bayside Building Services gave expert evidence on her behalf. Mr Sinha gave evidence and Mr Arvinder Lamba of Arvind Services gave expert evidence on behalf of Tara Roach.

THE ISSUES

What was the agreement between the parties?

6. Tara Roach trades as A.R.T. Pergolas (ART). Ms Antczak said that in January 2013 she saw an advertisement for ART in the local newspaper. The advertisement stated that ART provided 'Plans & Permits'.
7. She contacted Mr Sinha, a director of Tara Roach and told him that she wished to reconstruct the enclosed verandah at the front of her residence as there were cracks in the brickwork. Mr Sinha inspected the verandah and said that the existing strip footings could serve as the foundations for the re-constructed verandah.
8. On 16 January 2013, Mr Sinha provided a one page written quotation to Ms Antczak for \$4,800.00 broken up as follows:
 - Material \$3,200.00
 - Delivery \$ 200.00
 - Installation \$1,400.00

The works were described in the quotation as 'Structure Type: Support wall replacement'. A plan of the existing verandah was shown with a door at one end and Elevations A and B of the proposed replacement. The height was shown as 2.40 metres. The notes at the bottom of the quotation state:

Quote includes Removal of existing 2 walls and replacing with timber stud wall with cement sheet cladding both sides. Quote does not include.

1. Plumbing or electrical works if required.
2. Strip Footing or slab if required.
3.
4.

.... The proposed work is to be carried out on an unstable structure that has a risk of collapsing during construction.

9. Ms Antczak said that she explained to Mr Sinha that the enclosed verandah would continue to be used as a sick room for relatives. Mr Sinha said to make sure everything was removed from the room before the works commenced.
10. Ms Antczak said that Mr Sinha requested payment of his quotation before works commenced but she refused. He agreed to accept an initial payment of \$3,000.00 which Ms Antczak paid by cheque that day.
11. Ms Antczak said that the works commenced towards the end of January 2013 and were carried out by Mr Martin Pearce and his son who were engaged by Mr Sinha. Half way through construction Mr Sinha advised Ms Antczak that the existing concrete strip footings were unstable and the new wall would have to be placed on another foundation, but he did not say what that foundation would be.
12. Ms Antczak said she recalled seeing Mr Pearce cutting some of the floorboards and nailing the new walls directly onto the existing floorboards. She said to him that she was worried that the floorboards would not support the walls and roof. He replied that reinforced concrete would be placed underneath the floorboards and the bearers guided in. Mr Sinha also told her that the roof would hold the walls up. I accept Ms Antczak's evidence on these points.
13. On 6 February 2013, at Mr Sinha's insistence, she paid the balance of \$1,800.00. However the works had not been completed as the concrete foundations had not been poured. She made a number of telephone calls to Mr Sinha and Mr Pearce but both maintained that the works were complete, although Mr Sinha said he would put stumps under the walls. This never occurred.
14. On 22 March 2013, Ms Antczak lodged a written complaint with the Building Practitioners Board (the BPB) against Mr Sinha. On 19 September 2013, she received a letter from the BPB advising that following an inquiry, six allegations against Mr Sinha of breaching the *Building Act 1993* were found proved and his registration as a building practitioner was suspended for three months.

15. In cross-examination Ms Antczak said the verandah was a front room and, although Mr Sinha did not inspect the room, she explained its use to him. She said that it was not until the walls had been demolished that Mr Pearce told her that dry rot was present in the remaining timber. The Council has since told her that if it is required to do an inspection of the works, it will issue a demolition order.
16. Mr Sinha said in his evidence that he was a registered building practitioner in the category Domestic Builder-Limited (to garage and carport). On 16 January 2013, Ms Antczak requested by telephone a quotation to repair an existing enclosed verandah. Ms Antczak said she wanted the brickwork to be replaced with a timber wall clad with cement sheeting, using the existing windows and door.
17. Mr Sinha inspected the verandah later that day. The structure appeared unstable and was at risk of collapsing. He said that he told Ms Antczak that a building permit may be required. She said that as the intended use was simply to provide shelter for the front door, a permit was not required. Given the need to stabilise the wall as soon as possible, he agreed to carry out the works without a permit. He provided a verbal quotation of \$4,800.00 not including the hire of a skip.
18. On 22 January 2013, he met Ms Antczak on site to take measurements and collect a deposit. He provided a written quotation dated 16 January 2013 which Ms Antczak signed. He requested to inspect the interior of the verandah but Ms Antczak said that a locksmith was needed to open the door. She requested that work commence as soon as possible.
19. Mr Sinha said his quotation was for the repair of an existing hallway and the structure was a Class 1A building, not a Class 1. It was never his intention to work on a Class 1 building because that was outside his registration. He said his quotation was incomplete because it did not have details of the other rooms and therefore it could not be used as a detailed plan for any construction work.
20. Mr Sinha said that the reference to *Structure Type: Support wall replacement* in his quotation meant that he was to simply remove the brick wall and install a stud frame to two sides of the verandah and reinstall the existing door and windows.
21. In cross-examination, Mr Sinha said he had worked in the residential building industry for 18 years and had been a registered building practitioner for 10 or 11 years. He said he was aware of the laws and regulations governing the building industry and the warranties under section 8 of the *Domestic Building Contracts Act 1995*. He said at the time he inspected the verandah he was not aware that a building permit was required; he accepted Ms Antczak's assurance that it was not. He also said that it was only after the works were completed that he realised that they were outside the category of his registration as a Domestic

Builder-Limited. However, he denied that the works were beyond his expertise or that he failed to manage the works properly.

22. I found Ms Antczak to be an impressive witness. She had a clear recollection of her discussions with Mr Sinha leading to her acceptance of his quotation and the carrying out of the works. In contrast, I found Mr Sinha evasive and, with the advantage of hindsight, concerned to justify his actions; for example, I do not accept that a building practitioner of his experience would not have known that a building permit was required and that he was entitled to simply rely on a statement by Ms Antczak, a person clearly without any knowledge of the statutory requirements of domestic building, that a permit was not required. Also, his failure to insist on inspecting the verandah internally before submitting his quotation and therefore appreciating that the works were beyond his category of registration, casts doubt on his credibility as a witness.
23. I therefore find that the terms of the agreement between the parties were as alleged by Ms Antczak – demolition and construction of existing enclosed verandah requiring the removal of two existing walls and the construction of a new verandah with timber stud walls, cement sheeting cladding on the existing footing system and the installation of a door and windows for the sum of \$4,800.00.

Were the works defective or non-compliant?

24. Mr Cross is a registered engineer, a building surveyor, a Domestic Builder-Unlimited and draft person. He is the principal of Bayside Building Services and has provided expert reports to the Tribunal and courts in relation to defective construction, rectification and cost since 1994. I consider him to be well qualified to give an expert opinion in this proceeding.
25. Mr Cross inspected the works on 6 July 2015 and provided a report dated 12 July 2015. His findings were that the work carried out by Tara Roach was sub-standard and required removal and reconstruction.
26. He listed the defects as:
 - The floor bearers are on or near the ground on half of the new building work;
 - The floor bearers removed from existing brickwork support have been placed on the ground on blocks, bricks and wedges;
 - Bearer ends are exposed to the weather;
 - The floor is substantially out of level by varying degrees both longitudinally and laterally;
 - There are gaps between new walls and existing house walls;

- Wall intersections are not connected to the framing members and prohibit removal of weatherboards in the future;
 - Fibre cement claddings are incorrectly installed;
 - There are unflashed windows and a door;
 - The new door is not square and will not open;
 - The new walls sit on the flooring and not joists, so floorboards cannot be replaced in the future;
 - The ceiling height does not comply with the Building Code of Australia (the BCA);
 - The windows are not installed horizontally; and
 - The width of the room is undersize by 400mm and the length by 200mm.
27. Mr Cross also considered that the cladding connections, the frame connections, the unflashed wall openings, the wall to floor intersections and the gapped and disconnected eave linings are not compliant with the BCA.
28. Mr Cross elaborated on his report and photographs in his evidence to the Tribunal. In cross-examination by Mr Sinha, he conceded that if the verandah was a hallway and not a habitable room, a ceiling height of 2.1 metres would comply with the BCA. However, he maintained that the verandah was a habitable room. He rejected the suggestion by Mr Sinha that the 2.4 metres shown on the quotation was to natural ground level and not to floor level.
29. Mr Lamba is registered as a Domestic Builder-Unlimited with seven years' experience in development and building. He inspected the works on 16 July 2016 and provided a report dated 17 July 2016. In that report Mr Lamba says that the works he inspected:
- ... presented as a non-habitable access to the front door of an existing dwelling.
- The room is enclosed with walls, doors and windows but clearly is a corridor, hallway, or access way to the main entrance to the dwelling. This makes the structure non-habitable as per exclusions in the Building Code of Australia definition of "Habitable Room and Legal Ceiling Heights".
- The building works appear to be limited to replacing support walls on two sides and re-instating existing doors and windows. This was evident from the quote I sighted.
- I am to believe that the rebuilding of the walls was urgent as there was a risk of wall collapse.
30. Mr Lamba agrees with Mr Cross that:

- The floor is out of level with a lean towards the north between 20 and 24mm;
- The floor bearers are unsupported or temporarily supported and need to be permanently supported; and
- The verandah is not weatherproof.

He also said that:

- The quotation he sighted shows the roof height from natural ground of 2.40 metres;
- The ceiling height measured internally is 2290mm;
- Weatherproofing the verandah was not part of the scope of works.

31. In cross-examination Mr Lamba said he inspected the works in the company of Mr Sinha which took only 15 minutes. He did not see the brick wall in the photograph on page 4 of his report. He conceded there was no reference to a ceiling height in the ART quotation and if the works were carried out as shown in the diagram in the quotation, the ceiling height could not be 2.4 metres.
32. Mr Lamba did not impress me as a witness. He was provided with a copy of Mr Cross's report before he inspected the works. His inspection was in the company of Mr Sinha and only took fifteen minutes. Other than the photographs provided by Tara Roach's lawyers, his report did not include a diagram of the verandah or photographs taken when he inspected the completed works. His report does not fully comply with VCAT Practice Note PNVCAT2, particularly paragraphs 11 and 12, and therefore is of limited evidentiary value to the Tribunal. In stating that the room is simply a hallway to the main entrance of the dwelling and therefore not a habitable room subject to a 2.4 metre ceiling height, he fails to refer to the relevant clauses of the BCA. In saying that weatherproofing was not part of the scope of works, I formed the view that despite the fact he concedes that the works are defective and rectification is therefore required, he was being an advocate for Mr Sinha seeking to be appointed the builder to carry out rectification works. I therefore find he is not independent in his assessment of the extent of rectification required.
33. In contrast, Mr Cross analyses the defective works by reference the relevant clauses of the BCA or the Building Commission Guide to Standards and Tolerances. I therefore accept the opinion Mr Cross as to the extent of the defective and non-compliant works in preference to Mr Lamba.

What is the reasonable cost of rectification?

34. Mr Cross considers that without removing the works carried out by ART, it is not possible to achieve a BCA compliant internal ceiling height of 2.4 metres. He says that demolition of the existing structure and reconstruction is the only practical option. He calculates the cost of doing so at \$20,108.00. On the other hand, Mr Lamba as part of his report, includes a quotation for \$5,200.00 for himself to undertake the rectification works he considers are required.

35. Appendix 3 to Mr Cross's report is his Costing Calculation. The work items are listed as:

1. Removals;
2. Stump Footings;
3. Floor Framing;
4. Wall Framing, Cladding etc.;
5. Roof and Ceiling;
6. Insulation; and
7. Building Permit etc.

Each item is broken up into:

- Material;
- Labour; and
- Total Cost

36. The work items in Mr Lamba's quotation are listed as:

1. Preliminaries;
2. Site Preparation;
3. Concrete;
4. Frames;
5. Windows;
6. External Doors; and
7. Internal Fixing.

37. The scope of rectification works of Mr Cross is extensive and the costs detailed. Mr Lamba's quotation is simply a lump sum and no detail of materials, labour and cost for each item are provided. I consider that in view of the lack of detail, Mr Lamba's assessment of the cost of rectification cannot be considered independent.

38. Mr Sinha failed to carry out an internal inspection of the verandah. Had he done so, as a competent builder, he would have appreciated the extent of the works involved to meet Ms Antczak's requirements, before

advising Ms Antczak his price for the works. If an inspection could not have identified the state of the existing foundations, once the walls were demolished and the foundations became visible, Mr Sinha could have requested Ms Antczak's agreement to a variation of the contract price to include replacing the original foundations. He did not do so, and simply advised Ms Antczak that the original foundations could not be used. Therefore, I find that Mr Cross's scope of works is giving Ms Antczak what she bargained for and not something better.

39. In view of my findings above as to the extent of rectification necessary, I accept the detailed costing of Mr Cross of \$20,108.00 in preference to Mr Lamba's lump sum quotation of \$5,200.00.

CONCLUSION

40. I will therefore order that the Respondent must pay the Applicant the sum of \$20,108.00. Costs are reserved.

B Thomas, Member