VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL & HUMAN RIGHTS DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D334/2004

CATCHWORDS

Domestic building – informal contract – scope of works – claim to set off variations – requirements of Domestic Building Contracts Act 1995 not complied with

[2005] VCAT 649

APPLICANT	Bao Ho
RESPONDENT	Hau Nguyen
WHERE HELD	Melbourne
BEFORE	Senior Member R Walker
HEARING TYPE	Hearing
DATE OF HEARING	7 April 2005
DATE OF ORDER	18 April 2005

ORDER

1. Order the Respondent to pay to the Applicant the sum of $9,643.00.

2. Costs reserved.

SENIOR MEMBER R WALKER

APPEARANCES:

For Applicant	Mr F Caleandro,Solicitor
For Respondent	Mr H Nguyen, In person

REASONS FOR DECISION

Background

1. The Applicant Ms Ho ("the Owner") is the owner of a weatherboard house at 229A Somerville Road, Yarraville.

2. The Respondent Mr Nguyen ("the Builder") is a registered builder. He studied building construction at the Royal Melbourne Institute of Technology and has worked as a framer. He has been building as a sub-contractor since 2001.

3. The Owner had plans drawn for an extension at the rear of the house and a second floor addition. The work was extensive and entailed the demolition of the rear of the building, the construction of a new bathroom, laundry and kitchen downstairst and the construction of three rooms and a bathroom upstairs.

The agreement

4. In April 2003 the Builder quoted a price of $101,700.00 to carry out the extension upon the terms set out in the written quotation. The document containing the quote is signed by both parties and stood as the only contractual document between them until a later document was signed. As a written contract it is deficient in many respects. Not only does it not deal with many matters such as default, extension of time, variations and so forth that a properly drawn contract would make provision for, it also does not contain many of the matters required by the ***Domestic Building Contracts Act.*** Most importantly, there is nothing in it about the Builder obtaining domestic building insurance. It is common ground that no such insurance was obtained by the Builder. When questioned about this, he said that the Applicant wanted a cheap price and that domestic building insurance would have cost extra. He made the remarkable statement: "We work differently from Australians". Since the Builder has studied building construction recently and holds registration as a domestic builder, this attitude is astonishing.

5. Early during construction, Ms Ho obtained a photocopy of the January 2003 edition of the Victorian Alteration, Additions & Renovations Contract published

by the Housing Industry Association. She gave it to Mr Nguyen who filled it in and they both signed it. Not all the particulars were completed. Many parts, such as those dealing with insurance, were deleted and it has no scope of works. Nevertheless it does provide for such matters as default, extension of time, variations that were missing from the earlier document, although that earlier document contains all the detail as to what has to be done. The Owner said she obtained this copy of the contract and had it signed because she was concerned with the rate of progress and wanted their relationship to be better regulated. I find that it was the intention of the parties that the two documents were to be read together. In this way, the two documents make sense.

The work

6. The permits were obtained by the Owner and she paid a 10% deposit on 1 April 2003. Section 11 of the Act provides that a builder must not demand a deposit of more than 5% where, as here, the contract price is $20,000 or more. Work started shortly afterwards. The Owner paid a further 10% at what the contract describes as "basement stage" which seems to have been intended to refer to the construction of the waffle pod slab at the rear of the house where the extension was to be built. A further 30% was paid at frame stage and a further 30% at lock up stage. This arrangement for progress payments infringes s. 40 of the Act.

Lock up stage

7. There is some dispute as to the lock up stage payment. The Owner said initially in her evidence that lock up stage had not been reached because little work had been done inside, he had only done the outside. It seems clear that she misunderstood what "lock up" means. The Builder then locked the premises and went for a short holiday. Following his return, on about 11 November, he was paid the lock up stage payment.

The "plaster stage"

8. There is then a substantial divergence as to what occurred. The Owner was concerned about the stage the work had reached and the amount she had paid. She says that the Builder asked her for the rest of the money on about the 14th or 15th November. The Builder denies this and says that all he wanted was for the

"plaster stage" – another stage peculiar to this contract - which he said had then been reached. This is not, as far as I am aware, a recognized stage in building construction. Presumably it means when the plaster is all hung, stopped and sanded, ready for painting. It is argued on behalf of the Owner that this was not reached for two reasons. First, in the wet areas stopping plaster had not been used but rather plaster adhesive had been used instead. The Builder denies this and says that it was a special water proof preparation which he used on the walls in the wet areas. Since there is no evidence that the material in question has been subjected to any sort of analysis and since it was the Builder who applied it and would presumably know what it was, I accept his evidence that it was a recognized preparation sold by Boral for the purpose. I am not satisfied on the balance of probabilities that the Owner has established her claim in regard to the improper use of this material.

9. The other respect in which it was said that the plaster stage had not been reached was that the front bedroom in the existing house had not been plastered. The Builder responded to this by pointing to the list of items "not included" referred to on page 2 of the informal contract. One of these is:

"Any parts or members of the existing house".

The description of the plaster work to be done on the first page of the informal contract states:

"10mm plaster boards to extend at ground floor, and first floor."

10. There is nothing in the contract to say that the existing house was to be replastered. The Builder asserted, and I did not understand the Owner to deny, that she had requested him to replaster the existing house and that he had done so. In a letter of 2 April 2004 that is, after he had left the site, he made a claim for an extra for this amongst other things but no notice of variation or anything in writing has been provided to support the claim. I deal with the claim for these variations below but it is sufficient to say that I am not satisfied that the "plaster stage" was not reached at the relevant time.

Termination

11. On 18 November 2003 the Owner served on the Builder what purports to be a notice of default. The default alleged in the notice is expressed as follows:

> *"There has been no agreement for the building works to finish on November 30th, 2003. The builder has defaulted by not working from November 1st, 2003 and clocked the house without to give the keys to the owner."* (sic.)

The notice specified an "interest rate" of $250.00 a week and legal costs of $400.00. The notice concludes with the following paragraphs:

> *"TAKE FURTHER NOTICE that the owner intends to exercise the builder's contractual and other rights unless within SEVEN (7) days of service of this notice upon you*
>
> - *The default specified in item 7 of the schedule is remedied; and*
> - *The legal costs specified in item 9 of the schedule are paid, and*
> - *Interest on the amount due under the contract of building works at the rate specified in item 8 of the schedule is paid.*
>
> *AND TAKE FURTHER NOTICE that unless the default is remedied and legal costs and interest are paid in accordance with this notice the contract of building works will be rescinded pursuant to General Condition 6(3) of Table B of the Seventh Schedule of the Domestic Building Contracts Act 1995."* (sic.)

12. There is no Seventh Schedule to the Act. It would seem likely that the form of notice the Owner has used was adapted from a conveyancing recision notice.

13. Under the printed form which forms part of the contract between the parties the Owner's right to end the contract is regulated by Clause 46 which is as follows:

> *"46.0 If the Builder breached [including repudiates] this Contract, nothing in this Clause prejudices the right of the Owner to recover damages or exercise any other right or remedy.*
>
> *46.1 The Builder is in substantial breach of this Contract if the Builder:*
>
> - *suspends the carrying out of the Building Works, otherwise than in accordance with Clause 38;*
> - *has the Builder's licence cancelled or suspended; or*
> - *is otherwise in substantial breach of this Contract.*
>
> *46.2 If the Builder is in substantial breach of this Contract the Owner may give the Builder a written notice to remedy the breach;*
>
> - *specifying the substantial breach;*

- *requiring the substantial breach to be remedied within 10 Days after the notice is received by this Builder; and*
- *stating that if the substantial breach is not remedied as required, the Owner intends to end the Contract.*

46.3 If the Builder does not remedy the substantial breach stated in the notice to remedy breach within 10 Days of receiving that notice, the Owner may end this Contract by giving a further written notice to that effect.

46.4 The Owner is not entitled to end this Contract under this Clause when the Owner is in substantial breach of this Contract.

14. The first sentence of the particulars of default does not specify a default at all. It simply specifies what the agreement does not provide, that is, that there has been no agreement for the building works to finish on 30 November 2003. The second sentence alleges as a default that the Builder has not worked from 1 November 2003 and locked the house up without giving keys to the Owner. Neither of these 'defaults' is established on the evidence. In the first place the Builder cannot be said to have been in default simply because he did not work on a particular day. It is for the Builder to determine when he carries out the work, subject to his contractual obligation to complete on time. Since the house had reached lock up, it was not only the Builder's right but also his responsibility to lock the house up and he was under no obligation to give keys to the Owner because the work was still in progress. It is unnecessary to go further and consider whether the claim for "interest" which is, on a fair reading of the notice, a claim for liquidated damages at the rate specified in the contract, or legal costs, (which from the quality of the notice would not seem to have been incurred) would otherwise have invalidated the notice.

15. A number of conversations then took place between the owner and the builder. The Owner insists that the Builder refused to return to the site unless he was paid the whole of the balance of the purchase money. I do not accept this evidence. I prefer the evidence of the Builder when he says that he was refusing to return to the site unless he was paid the amount outstanding to him for the "plaster stage".

16. Under s.19 of the Act a builder is required to permit the builder owner to have reasonable access to the building site and to view any part of the building works but there is insufficient evidence to demonstrate that he has failed to comply with this requirement. In any event, this is not the breach alleged.

Repudiation by the Builder

17. By s.40(2) of the Act a builder must not demand or recover from an owner more than the percentage of the contract price listed in the table in that section. The table provides that, that for a contract to build all stages of the work, the maximum of the contract price that could be demanded up to the end of lock up stage is, together with the deposit on all earlier stages, 65% of the contract price. Before the fixing stage can be claimed it must be completed and by s.40(1) that means the stage when all internal cladding, architraves, skirting, doors, built-in shelves, baths, basins, troughs, sinks, cabinets and cupboards of the home are fitted and fixed in position. Clearly, at the time the Owner's notice was served, fixing stage had not been reached. The Builder's demand for an extra 10% of the contract price to bring the total paid by the Owner to 90% of the contract price was therefore unlawful and his refusal to return to the site until this amount was paid evinced an intention not to be bound by the contract and so amounted to a repudiation of the contract. This was accepted by the Owner taking possession of the premises and changing the locks.

The stage of building reached by the Builder

18. The Owner engaged a locksmith to change the locks and took possession of the house in "early February". She was not able to provide a precise date. A number of photographs have been taken by both sides to show the state of the work at that time. These show the work to have been part of the way through fixing that is, the plaster work was complete but the architraves and skirtings were not all installed and the cabinets had not been fitted, nor had any plumbing fixtures been installed. Fitting off of the electrical work had not been done. Some areas had been painted internally but not all. The Owner complains that one of the front bedrooms had not been plastered but this was outside the scope of the work.

Rectification and completion

19. The Owner subsequently engaged tradesmen to complete the work at a total cost to her of $40,761.00. The various invoices for this work have been perused by her expert, Mr Tambasco who is a qualified engineer, carpenter and former director of the Housing Industry Association. He has had extensive experience over a great many years in both residential and commercial construction and I accept that he is qualified to give expert evidence. He has also inspected the house.

20. Mr Tambasco set out the various categories of work in his report which I do not proposed to repeat. However, in the course of cross-examination it became apparent that some of this work went beyond the scope of the contract.

Electrical work

21. The electrical work was carried out at a cost of $2,977.00. The contract provided for one light per room and a double power point per room. The wording is somewhat deficient but I think that this is a fair reading. There were no plans for the electrical work to show that anything further was required. On my counting from the plans there are five rooms in the extension on the ground floor, treating the laundry, family and kitchen areas as separate rooms, although it is open plan, and four rooms upstairs. This would require the Builder to provide nine lights and nine double power points plus a further light for the stairs. No light fittings are included in the contract.

22. Looking at the list of works provided by the Owner's contractor, much of the work relates to the old part of the house which is not included in the contract and extra lights and power points have been provided to the extension. The rooms are numbered in the electrician's invoice but it is not known what room each number refers to. Downlights are also claimed which were not in the contract. The coach light to the front of the house is not included in the contract. Power for the cook top, dishwasher and other appliances are obviously included in the contract price, but electrical work done for a bungalow at the rear of the property is not, nor is wiring for an air conditioner.

Deleting all these items and adding up what is left, one arrives at a figure for $1,903.00.

Plasterer

23. The next claim is for an amount of $2,500.00 that the Owner paid to the Builder's plasterer. This seems to have been acknowledged and in any event, it has been proved. A further claim for $1,400.00 for additional work by the plasterer is not allowed. I am satisfied that the plastering work within the scope of the contract was completed.

Other matters

24. The plumbing cost the Owner $1,600.00 and the kitchen and appliances cost $9,300.00. There is a claim for $2,500.00 for a fence and carport. The Builder claims that any damages to the carport and the fence were not included. There is no mention of the carport or the fence in the contract and since it is existing I must assume that the claim relates to having it replaced or repaired in some way. There is insufficient evidence to justify the claim against the Builder for this.

25. The carpentry fixing cost the Owner $3,300.00 and the cost of the balustrade was $1,677.00. The floor installation cost $6,800.00, the fixing components cost $266.00 and the timber windows cost $845.00.

26. The bricks and brick materials together cost $1,928.00, the material and labour for the tiles cost $5,142.00. The plumbing fittings cost a total of $3,483.00 and the painting cost $2,530.00.

27. Mr Tambasco says that all these figures were reasonable. He has also allowed $850.00 that the Owner said she had to pay for a site clean. The invoices are unable to be located. The contract provides that the site was to be cleared and Mr Tambasco considers that $850.00 is a reasonable sum for this so that amount must be allowed.

28. Mr Tambasco said that the preparation and painting of the external weatherboards was inadequate. He said that it was missing an extra coat of paint and some areas had to be filled. He said that a reasonable cost for this work would be $550.00.

29. Mr Tambasco said that he had no invoice for bricklaying but that a fair and reasonable price for laying the bricks at the time was $850.00 a thousand which would result in a cost of $2,570.00.

30. The Builder used a cheaper door for the front door instead of a solid hardwood door. Mr Tambasco has assessed the saving to the Builder at $300 which should be a credit to the Owner.

Amounts not allowed

31. In additional to these figures Mr Tambasco also allowed $1,500.00 for stripping out and re-stopping the plaster. As stated above, I am not satisfied with this claim. He also allowed $4,000.00 to remove and reinstall the staircase. The reason for this is that the bottom riser is only 170mm and the top riser is 200mm. The other risers are 185mm. It was clear from the evidence that the reason for this is that no floor coverings have been put on the stairs whereas they have been on the floor on both levels. If the stairs and the floors were covered in the same material or if neither the stairs nor the floors were covered, the risers would all have been uniform. It was the Owner's decision not to cover the stairs. I am not satisfied that there is any defect in this regard.

Credits

32. The amounts that I have allowed in favour of the Owner total $34,389.00. Against this sum, according to Mr Tambasco, there are some credits due to the Builder. There is a credit on the appliances of $1,496.00. That is because the amount allowed in the above figures exceeds the prime cost sum for these items in the contract. There is also a credit on the flooring of $1,270.00, because the Owner used a timber floor at the first level in the gallery area instead of a carpet, which would have been cheaper. The cost of the flooring is already counted in the above figures.

33. Some of the money spent on brickwork related to pavers which were not included in the contract. There is therefore an additional credit of $1,640.00 to the Builder because the cost of these is included in the brickwork figures given above.

34. The credits to the Builder total $4,406.00 and when this amount is subtracted from the cost of completion that I have allowed, the result is $9,643.00, which I think fairly reflects the loss suffered by the Owner as a result of the repudiation of the contract. The calculation of this figure is as follows:

Electrical	1,903.00	
Paid to plasterer	2,500.00	
Plumbing	1,600.00	
Kitchen and appliances	9,300.00	
Carpentry fixing	3,300.00	
Balustrade	1,677.00	
Floor	6,800.00	
Fixing components	266.00	
Timber windows	845.00	
Bricks and brick materials	1,928.00	
Site Clear	850.00	
Paintwork to weatherboards	550.00	
Bricklaying	2,570.00	
Credit for cheaper front door	300.00	
Total		34,389.00
Less credits to Builder		
Appliances	1,496.00	
Credit for flooring	1,270.00	
Credit on brickwork (for pavers)	1,640.00	4,406.00
Net cost of completion		$29,983.00
Less: Balance of contract price		$20,340.00
Loss suffered		$9,643.00

35. Mr Tambasco went on the calculate project management fees and the margins that would have been charged by a Builder had the Owner engaged a builder to complete the work. I do not believe that I can allow these that since they were not incurred.

The Builder's claim for extras

36. There was no counterclaim but the Builder has claimed for renovation work that he did to the existing house at the request of the Owner. In the absence of a counterclaim I can treat this only as a set off. I accept that most of this additional work was not within the scope of the contract although I do not accept the Builder's evidence that the construction of the linen cupboard in the existing house was outside the scope of the contract because it is shown in the plans. The extras claimed are as follows:

Plastering	$5,400.00
Electrical work	$1,200.00
Painting	$5,400.00
Fixing	$2,000.00
Polishing of timber floors	$2,000.00
Single gate	$ 500.00
Bottom rail of sliding gate	$ 300.00
Pavement for bottom rail	$ 500.00

37. He also claims a 20% margin in each of these items. The work with respect to the front gate was because the Owner wanted a sliding gate and this is not specified on the plans.

38. Section 38(6) provides that a Builder is not entitled to recover any monies in respect of a variation asked for by a building owner unless the Builder has complied with that section. The section requires a builder to give to an owner requesting a variation a notice stating what effect the variation will have on the work as a whole, what delays, if any, will result and what the cost will be. The builder is not to give effect to a variation that adds more than 2% to the contract price or causes delay to the building unless such a notice is given.

39. There is power in the Tribunal under s.386(b) to allow a builder to recover money in respect to the variation notwithstanding the section if the Tribunal is satisfied that there are exceptional circumstances or that the builder would suffer a significant or exceptional hardship and that it would not be unfair to the building owner for the builder to recover the money. It is for the Builder to

prove these matters and he has not done so. I cannot assume that it would not be unfair to the Owner to allow the claim. I am satisfied that there was considerable confusion in her mind as to what the contract included.

40. Apart from the problem with the Act, there is no evidence to justify the figures claimed. No material about the claims was served before the hearing. The Owner has not been able to make her own enquiries as to the reasonableness of the amounts sought to be set off or cross-examine any witnesses. The Builder has not produced any receipts from any of the tradesmen who carried out the work. The tradesmen would have been on site in any event to carry out work of a similar nature within the scope of the contract and there is no evidence of how much extra the Builder was charged for this additional work to the existing house. There is really insufficient evidence either to substantiate the amounts claimed or to satisfy me that I ought to allow the variation pursuant to the power in s.386(b). I accept that the photographs clearly show a great deal of work to the old part of the house which I find was not within the scope of the contract but the Builder still has to prove his case and he has not done so.

Liquidated damages

41. There is also a claim for liquidated damages for delay. There are two problems with this claim. The first is that I am satisfied that the Builder has done a considerable amount of additional work at the Owner's request which I have not allowed him to set off for the reasons given above. The time taken to do this work must have caused some delay. At the time the Builder walked off the job I cannot be sure that he was running behind time. In considering whether he has failed to complete on time I think I must in fairness take into account the time taken to do the extra work the Owner had requested him to do.

Conclusion

42. There will be an order that the Builder pay to the Applicant the sum of $9,643.00. The solicitor for the owner, Mr Caleandro, informed me at the conclusion of the evidence that he proposed to apply for costs. I said that I would not be able to consider such an application until the outcome of the case was known. I will reserve the question of costs because I have not heard

argument. However, it is less than $10,000.00 and therefore a small claim. Orders for costs in small claims are not commonly made but Mr Caleandro must have an opportunity to make submissions if he wishes to do so.

SENIOR MEMBER R WALKER