VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D329/2010

CATCHWORDS

Section 31 (2) *Domestic Building Contracts Act* 1995 – whether quantum meruit claim prohibited Measure of quantum meruit – whether costs of rectifying work to be deducted from quantum meruit claim

APPLICANT	Kathryn Emma Bagust
RESPONDENT	Joseph Wilson
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Small Claim Hearing
DATE OF HEARING	29 June 2010
DATE OF ORDER	10 August 2010
CITATION	Bagust v Wilson (Domestic Building) [2010] VCAT 1315

ORDER

1. The Applicant is to pay the respondent $1,624.58

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	Kathryn Bagust (in person)
For the Respondent	Joseph Wilson (in person)

REASONS

1. This proceeding concerns a claim by Kathryn Bagust against Joseph Wilson for the cost of rectifying works said to be defective and a counterclaim made by Mr Wilson against Mr Bagust for money said to be owing in respect of building work undertaken by him at a property owned by Ms Bagust.

THE EVIDENCE

2. Ms Bagust is the owner of a residential dwelling located in Warrnambool Victoria (**'the Property'**). In late 2009, Ms Bagust entered into an agreement with Mr Wilson for the construction of a bull nose verandah, timber decking and other associated work to the Property.

3. According to Ms Bagust, Mr Wilson gave her a verbal quotation to undertake the works for $9,000. Mr Wilson disputes this. He contends that he did not provide a verbal quotation but rather provided Ms Wilson with a written quotation dated 21 November 2009 for $13,000. He said that he could not have provided Ms Wilson with a quotation in October 2009 because he did measure the works until 31 October 2009. He produced a copy of that written quotation, which stated, in part:

   (a) Labour $4,840

   (b) Materials $8,160

4. Mr Wilson gave evidence that he discussed the quotation with Ms Bagust over the telephone. By contrast, Ms Bagust said that she had never seen the quotation prior to the commencement of this proceeding and that she had not discussed the quotation over the phone with Mr Wilson.

5. Ms Bagust contends that the building works commenced based on the $9,000 verbal quotation. She said that shortly after the building works had commenced, Mr Wilson told her that the price had increased to $10,000, although it was not made clear to me why this was so. Nevertheless, she conceded that she had agreed to pay Mr Wilson $10,000 for the building works following that discussion. She further confirmed this in her letter dated 18 April 2010 to Mendelsons, the debt collectors engaged by Mr Wilson.

6. Ms Bagust gave evidence that the building works included construction of the verandah, installation of barge boards to the front of the verandah and a step down from the verandah deck to the ground. Mr Wilson said that the supply and installation of barge boards was a variation to the scope of the works, which he valued at $200. He said further that there was no requirement to construct a step because there was minimal distance from the verandah deck to natural ground at the time when he completed the works. He also said that there was a variation agreed to by the parties which comprised the installation of eaves lining to the existing house above the verandah, which he valued at $650. He said

that this work was required to be undertaken because access to the eaves would have been impossible after the bull nose verandah had been constructed.

7. The building works commenced in December 2009 and were completed, or at least substantially completed, by the end of that month.

THE CLAIMS

Ms Bagust's claim

8. Ms Bagust claims that the building works undertaken by Mr Wilson are defective and incomplete. In particular, she says that the turned verandah posts have been installed upside down with the effect that there is insufficient length of square post remaining at the top of the post in order to secure lacework to the post and fascia board. She says further that Mr Wilson failed to supply and fit barge boards to the front of the verandah or construct a step down from the verandah. In support of her claim for the cost to make good defective and incomplete work, Ms Bagust relies upon two quotations. The first is from Paul Kingston, building practitioner, for $4,430. This quotation includes an amount for the purchase of 14 turned verandah posts for $1,640. The second quotation is from BA Building for $1,534. This second quotation does not include the cost of supplying new verandah post, although it does include the labour cost of replacing the existing verandah posts.

9. Ms Bagust also claims for the cost of boarding her dogs at a kennel during a period of time that she did not occupy the Property as a consequence of a dispute between herself and Mr Wilson. She gave evidence that because of the animosity between her and Mr Wilson, she was fearful living alone at the premises. Consequently, she moved to alternate accommodation for a period of time but had to arrange for her dogs to be kennelled during that period. Initially Ms Bagust claimed $1,654 from Mr Wilson made up as follows:

(a)	Original quotation:	$9,000
(b)	Less paid:	$6,000
(c)	Amount outstanding:	$3,000
(d)	Less cost to repair:	$4,430
(e)	Less cost of boarding dogs at kennel:	$224
(f)	Total due:	$1,654

10. During the course of the hearing Ms Bagust conceded that the revised contract price was $10,000 up from $9,000. Consequently, her claim is reduced to $654.

Mr Wilson's claim

11. By way of counterclaim, Mr Wilson claims what he says is the balance of the contract price plus interest totalling $8,635 made up as follows:

(a)	Original contract price:	$13,000
(b)	Less paid:	$6,000
(c)	Extras:	$850
(d)	Interest on overdue amount:	$785
(e)	Total:	$8,635

12. Mr Wilson contended that if I did not find that the contract price was $13,000, then as an alternative, he sought payment for the cost of materials supplied by him and an amount representing the time that he and his workers spent in undertaking the works, calculated by reference to an hourly rate. In that respect, Mr Wilson said that his hourly rate was $40 per hour and that his workers' hourly rates were $20 per hour. He said that the total cost of materials was $7,368 and the cost of labour was $4,400, making his claim under this alternative head of damage $11,768, less the $6,000 already paid by Ms Bagust, leaving a balance of $5,768.

WHAT IS THE CONTRACT PRICE?

13. Mr Wilson contends that the adjusted contract price is $13,850 of which $6,000 has been paid.

14. In my view, the building work undertaken by Mr Wilson constitutes *domestic building work* within the meaning of that term as defined in s 3 and s 5 of the *Domestic Building Contracts Act* 1995 (**'the Act'**). In particular, s 5 states, in part:

> **5 Building work to which this Act applies**
>
> (1) This Act applies to the following work—
>
> (a) the erection or construction of a home, including—
>
> (i) any associated work including, but not limited to, landscaping, paving and the erection or construction of any building or fixture associated with the home (such as retaining structures, driveways, fencing, garages, carports, workshops, swimming pools or spas); and
>
> (ii) the provision of lighting, heating, ventilation, air conditioning, water supply, sewerage or drainage to the home or the property on which the home is, or is to be;
>
> (b) the renovation, alteration, extension, improvement or repair of a home;

> (2) A reference to a home in subsection (1) includes a reference to any part of a home.

15. A major domestic building contract is defined in s3 of the Act as a domestic building contract in which the contract price for the carrying out of *domestic building work* is more than $5,000. Given that the agreed contract price exceeds that amount, the contract between the parties falls within that definition.

16. Both the Act and the *Building Act* 1993 impose certain requirements on builders when entering into certain *major domestic building contracts*, which include:

    (a) a requirement that a building permit be in place;[1]

    (b) a requirement that warranty insurance be in place;[2] and

    (c) a requirement that there be a written contract signed by the parties.[3]

17. Both parties confirmed that warranty insurance had not been procured, no building permit had been obtained and there was no written or signed building contract between the parties covering the work undertaken by Mr Wilson.

18. Section 31(1)(2) of the *Domestic Building Contracts Act* 1995 states:

> (2) A major domestic building contract is of no effect unless it is signed by the builder and the building owner (or their authorised agents).

19. In the present circumstances, the effect of that section is to deem the contract between the parties to be *of no effect*. The question arises what that expression means.

20. In my view, a contract deemed to be of no effect means that it is ineffective, in the sense that it is unenforceable. Neither party can enforce its provisions. In other words, Mr Wilson has no contractual right to claim for the balance of the agreed price, be it $10,000 or $13,000. Similarly, Ms Bagust is under no contractual obligation to pay the balance of the agreed price, even if the finished work was without complaint.

21. Clearly, the effect of s 31(1)(2) of the Act could result in an unfair outcome, especially in circumstances where the parties have genuinely agreed that a sum was to be paid for work completed and there is no complaint as to the finished work. A similar situation was considered by

[1] Section 16 of the *Building Act* 1993
[2] Section 136 (2) *Building Act* 1993, where the cost of the building work is more than $12,000.
[3] Section 31(1)(a) of the Act

the High Court of Australia in the case of *Pavey & Mathews Pty Ltd v Paul* [4] in relation to s 45 of the *Builders Licensing Act* 1971 [NSW]. That provision stated, in part:

> A contract. . . under which the holder of a licence undertakes to carry out, by himself or others, any building work or to vary any building work or the manner of carrying out any building work, specified in a building contract is not enforceable against the other party to the contract unless the contract is in writing and signed by each of the parties. . .

22. In *Pavey & Mathews*, the builder had not complied with s 45 of the *Builders Licensing Act* 1971 but sought to recover a fair and reasonable sum for the work completed by it. The majority of the court held that s 45 did not prevent a builder from bringing an action upon a quantum meruit for the value of work done and the materials supplied under an oral building contract deemed unenforceable by statute. Their Honours Mason, Wilson and Deane JJ held that the right to recover on a quantum meruit was based on the fact that it would be unjust for one party to receive a benefit where the benefit was actually or constructively accepted by the other party. In the judgement of Deane J, His Honour summarised the principle as follows:

> Section 45 of the Act relevantly provides that a contract under which a licensed builder "undertakes to carry out ... any building work ... is not enforceable against the other party to the contract" unless it "is in writing signed by each of the parties or his agent in that behalf and sufficiently describes the building work the subject of the contract". Plainly enough, the oral contract between the builder and Mrs. Paul was of the kind described in the section and failed to satisfy its requirements . . . [5]
>
> That is not to deny the importance of the concept of unjust enrichment in the law of this country. It constitutes a unifying legal concept which explains why the law recognizes, in a variety of distinct categories of case, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff . . . [6]
>
> There is no apparent reason in justice why a builder who is precluded from enforcing an agreement should also be deprived of the ordinary common law right to bring proceedings on a common indebitatus count to recover fair and reasonable remuneration for work which he has actually done and which has been accepted by the building owner. . .[7]

[4] (1987) 162 CLR 221
[5] Ibid at page 245
[6] Ibid at page 256
[7] Ibid at page 262

23. In *Pavey & Mathews*, Deane J noted that s 45 of the *Builders Licensing Act* 1971 did not purport to prohibit recovery of a fair and reasonable sum for the works performed, albeit that the section deprived the builder of being able to enforce the contract provisions.

24. In *Dover Beach Pty Ltd v Geftine Pty Ltd* [8] the Victorian Supreme Court of Appeal considered the effect of a builder breaching s31(1) of the Act. That subsection required that every major domestic building contract was to incorporate certain details, such as the registration number of the builder and details of warranty insurance. A failure to incorporate those details rendered the builder liable to a penalty. A question arose in that case as to whether a breach of that sub-section also rendered the contract void. Ultimately, the court held that the sub-section did not render the contract void. Nevertheless, Ashley JA made the following points relevant to the matters presently under consideration:

> I have said several times that if I was wrong in concluding that the contract was not void, then I was of opinion that the builder would not have been disentitled to restitutionary relief. I should shortly say why this is so. It all depends upon the language of the legislation. To my mind, none of the provisions which Geftine called in aid could be read to deny a disentitlement to any remedy for work done. The provisions may be sharply contrasted with the provisions considered by the Queensland Court of Appeal in *Zullo Enterprises Pty Ltd v Sutton* and by this court in *Equuscorp Pty Ltd v Wilmoth Field Warne (a firm)*. In each of those cases, the legislature's intent to deny a breaching party any remedy was made crystal clear.[9]

25. In *Zullo Enterprises Pty Ltd v Sutton* [10] the Queensland Supreme Court of Appeal did not allow a claim based on unjust enrichment because s 42 of the *Queensland Building Services Authority Act* 1991 not only made the contract unenforceable but also expressly prohibited its making and any work purported to be done under it. McPherson JA stated:

> It is perhaps not necessary here to reach a final conclusion about the question. This is not an instance in which the legislation has left to implication the question whether the contract, if performed in breach of the statutory prohibition, is unenforceable by the person performing or carrying it out. Section 42(3) expressly provides:
>
> > "A person who carries out building work in contravention of this section is not entitled to any monetary or other consideration for doing so".
>
> Quite plainly, the prohibition in s.42(3) prevents a person so carrying out the building work from recovering the contract price or any part of it.

[8] (2008) 21 VR 442.
[9] Ibid at 463, paragraph 101 per Ashley J.
[10] [2000] 2 Qd R 196

> Considered either alone or in combination with s.42(1), I would regard it as also preventing such a person from recovering damages for breach of the contract. The only question here is whether, in addition, it precludes the party carrying out the work from recovering restitution, or what was formerly called a quantum meruit, for the work done.
>
> As to that question, I continue to adhere to what I said in *Marshall v. Marshall* (Appeal No. 9365 of 1996, 28 October 1997). Perhaps no one will be surprised at that. However, for the reasons given on that occasion, I consider that what the respondent is seeking to recover in this action is "any monetary consideration" to which, because of his contravention of s.42(1), he is "not entitled". He is not entitled to it under the contract, and that is so whether his claim is laid in debt, or damages, or to recover the market value of his services under an agreement to pay him whatever his work was and is worth. Equally, however, and for the reasons given in more detail in *Marshall v. Marshall*, he is not entitled to recover it outside the contract as a restitutionary compensation for the work he has done. In whatever form the claim is framed, the amount in question is a "monetary consideration for" his doing or having done the work, and so falls within the exclusion in s.42(3) as being something to which a person carrying out building work in contravention of s.42(1) is "not entitled" in the sense of his having in law no right or title to it. Monetary "consideration" is what a person receives, or is entitled to receive, in return for his or her doing work in the expectation of being paid for it.

26. Similarly, in *Cook's Construction Pty Ltd v SFS 007.298.633 Pty Ltd* [11] the Queensland Supreme Court of Appeal re-affirmed that the effect of the words used in s 42 of the *Queensland Building Services Authority Act* 1991 prohibited a quantum meruit claim. Keane JA stated:

> Section 42 of the Act exhibits a clear intention to render illegal both the making and the performance of a contract by an unlicensed builder insofar as building work is concerned. Section 42(3) makes it clear that the consequence of a contravention of s 42(1) by an unlicensed builder is that the builder is unable to recover payment for unlicensed building work. Those consequences include the recovery of payments made to the builder by the other party to a contract for unlicensed building work.

27. In the present case, s 31(2) does not expressly provide that an unsigned *major domestic building contract* is illegal. There is no express statement in the provision that a *person who carries out building work in contravention of this section is not entitled to any monetary or other consideration for doing so*, as was the case in *Zullo* and *Cook's Construction*. Similarly, there is no provision expressly prohibiting the carrying out of building work in contravention of s 31 (1) or (2) of the Act, as was the case in *Zullo* and *Cook's Construction*.

[11] (2010) 26 BCL 172

28. In my view, the effect of 31 (2) is that the contract is deemed unenforceable but that fact alone does not shut out a builder's right to claim on a quantum meruit for the reasonable value of work and labour done. I do not consider that s 31 (1) or (2) have the same effect as s 42 of the *Queensland Building Services Authority Act* 1991. In my view, the operation of s 31 (2) does not prohibit recovery of a fair and reasonable sum based on equitable grounds.

29. Consequently, I find that s 31 (2) of the Act prohibits Mr Wilson from claiming the balance of the contract price, be it $10,000 as asserted by Ms Bagust or $13,000 as contended by Mr Wilson. However, he is not shut out from claiming under the alternative head of damage, namely, for the reasonable value of work and labour performed by him – at least to the extent that such work and labour has bestowed a benefit on Ms Bagust.

Quantum meruit claim

30. The evidence of Mr Wilson is that he himself performed 86 hours of labour. He says that his charge out rate was $40 inclusive of GST, which then totals $3,440. He gave further evidence that his labourers spent 48 hours in undertaking the works and that their charge out rate was $20 per hour inclusive of GST. That amounts to $960, making a total labour cost of $4,400.

31. The hours claimed by Mr Wilson are consistent with his evidence as to the days that he and his workers were on site. In addition, the amount claimed is consistent with the labour component of the quotation prepared by Paul Kingston to replace the verandah posts. There is no evidence to suggest that the rates claimed by Mr Wilson were not reasonable. I therefore accept that a fair price for the labour component is $4,400, assuming that the work completed was undertaken in a professional and workmanlike manner.

32. Mr Wilson gave evidence that the materials supplied by him amounted to $7,368. A number of invoices and a *Customer Activity* statement from Ponting Bros Pty Ltd were produced to verify that amount. The *Customer Activity* statement included amounts that related to other work performed by Mr Wilson during the relevant period. It was not made clear to me which of the amounts described in the *Customer Activity* statement related to the works in question. Mr Wilson did, however, say that the individual invoices all related to the works performed for Ms Bagust. Those invoices totalled $6,399.08 as follows:

Invoice	**Description**	**Amount**
Hanson	Concrete	298.91
Hanson	Concrete	$410.52
NC and AG Marr	Excavation	$211.75
Dahlsens	Timber	$625.59
Ponting Bros.	Sundries	$22.95

Ponting Bros.	Sundries	$203.91
Ponting Bros.	Timber deck	$193.52
Ponting Bros.	Sundries	$51.75
Ponting Bros.	Rafters	$1,899.48
Ponting Bros.	Decking	$969.76
Ponting Bros.	Sundries	$99.01
Ponting Bros	Timber and stumps	$1,079.25
Ponting Bros.	Sundries	$51.75
Ponting Bros.	Sundries	$140.76
Ponting Bros.	Stirrups	$140.17
Total		**$6,399.08**

33. Based on the invoices provided to me, I find that the materials expended by Mr Wilson amount to $6,399.08. I further accept that the labour component amounts to $4,400 making the total value of work and labour $10,799.08, of which Ms Bagust has paid $6,000. Accordingly, and subject to any deduction for loss and damage proved to be suffered by Ms Bagust, I allow $4,799.08 on Mr Wilson's counterclaim based on his quantum meruit claim.

VERANDAH POSTS

34. Ms Bagust says that Mr Wilson installed the turned verandah posts upside down. The verandah posts have two square end sections and a middle section that is a turned circular shape. According to the manufacturer's brochure, the bottom square section of the post measures 400mm in length and the top square section measures 800mm in length.

35. Mr Wilson gave evidence that the posts delivered to site by Ms Bagust did not accord with those measurements. He said that the bottom square section measured approximately 330mm in length and the top square section measured approximately 1,040mm in length. According to the post manufacturer's brochure produced to the Tribunal, the middle turned section of the post was 1,350mm long.

36. Mr Wilson said that he had positioned the stirrups, into which the posts sat, approximately 40mm below the top of the verandah decking and that the sides of the stirrups were approximately 120mm long. That meant that the seat of the stirrup must have been approximately 160mm below the top of the verandah decking.

37. Looking at the photographs provided to me, it is apparent that the height of the verandah fascia was at or above the door head height of the front entrance door. Assuming that the door head height was a standard height of 2,040mm, this would mean that the distance from the timber deck to the bottom edge of the verandah fascia must have been at least 2 metres. That being the case, I see no reason why the post could not have been installed in accordance with the manufacturer's recommendation, so that

the long side of the square section of post was positioned on top against the fascia board. For example, if the seat of stirrup was 160 mm below the verandah decking and the bottom square section was 330mm long (as alleged by Mr Wilson), then the turned circular section of the post would have been 170 mm from the verandah decking (330 mm – 160 mm). As the turned circular section was 1,350 mm in length, the top square section of the post would have been 1,520 mm from the verandah decking (170 mm + 1,350 mm). That would have left 480 mm of square top section of post to the underside of the fascia board. Obviously, this length could have been increased by decreasing the amount of square section of post protruding from the verandah decking. In other words, there would be at least 480mm of top square section below the verandah fascia, as opposed to what appears from the photographs to be approximately 100mm or less. Accordingly, I cannot accept Mr Wilson's evidence that the turned circular part of the post would have been flush with the deck, had he installed the posts the correct way up. I therefore find that there was no sound reason for installing the verandah posts reverse end up.

38. Mr Wilson gave evidence that Ms Bagust instructed him to install the verandah posts reverse end up. Ms Bagust denied this. I accept the evidence of Ms Bagust over that of Mr Wilson in that regard because it seems improbable that she would agree to having the posts installed in such a way that would ultimately prohibit the fixing of lacework at a later stage. I therefore find that this element of the work is defective and that the costs of making good that work constitutes loss and damage suffered by Ms Bagust.

39. In my view, that loss and damage should be deducted from the amount I have assessed as being the fair and reasonable value of work performed by Mr Wilson. This is because the quantum of 'the enrichment' must take into account any resultant damage caused by the acts or omissions on the part of the party that seeks restitution. A claim for restitution represents a claim to restore to a party the benefit that another party has unjustly gained at the first party's expense. In calculating the 'benefit', one must look at the net benefit. That means taking into account any expenses, loss or damage directly caused by the performance of the works performed by the party seeking restitution. Ignoring that fact would ignore the judicial basis behind the doctrine of unjust enrichment, namely; that no-one should be unjustly enriched at the expense of another. In other words, it cannot be said that a party has been enriched in circumstances where the cost to repair the work is commensurate with the value of the work, had it not been defective because there would be no net benefit.

40. Ms Bagust gave evidence that she had obtained two quotations to undertake the rectification work comprising the replacement of verandah posts and fixing of barge boards to the front of the verandah deck. The

cheapest quotation was from BA Building for $1,534.50. That did not, however, include the cost of supplying new verandah posts. I accept that new posts will be required because the existing posts cannot be re-used, as they have been 'checked out' where they were previously fixed to the fascia board. I further accept that the reasonable cost to supply and deliver the 14 turned timber posts is $1,640 as detailed in the second quotation from Paul Kingston. Accordingly, the total loss and damage suffered by Ms Bagust in relation to the replacement of the verandah posts and associated work is $3,174.50.

41. In relation to Ms Bagust's claim for the cost of kennelling for her dogs, I find that there is no causal connection between the breach of contract on the part of Mr Wilson and Ms Bagust having to move out of her dwelling. Accordingly, I dismiss that element of her claim.

42. As to Mr Wilson's claim for interest, there is no contractual entitlement to interest, given that the contract is unenforceable. Further, Mr Wilson did not advance any other basis for claiming interest. Consequently, I dismiss that aspect of his counterclaim.

43. Accordingly, in assessing Ms Bagust's claim as against Mr Wilson's counterclaim, I find that the net value of the unjust enrichment is $4,799.08 less the costs of repair of $3,174.50, making a total of $1,624.58 in favour of Mr Wilson's counterclaim. I therefore order that Ms Bagust pay that amount to Mr Wilson.

SENIOR MEMBER E. RIEGLER