

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. D594/2013

CATCHWORDS

Domestic Building Contracts Act 1995 – s.8 – no term that work be to a particular standard – Guide to Standards and Tolerances – not prescriptive but useful guide – manner in which appearance should be judged acceptable – evidence of loss

APPLICANT	Mr Chad Barnes, Mrs Juanita Barnes
RESPONDENT	Pivot Homes (ACN: 138 737 596)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATES OF HEARING	17 February and 20 April 2015
DATE OF ORDER	30 April 2015
CITATION	Barnes v Pivot Homes (Building and Property) [2015] VCAT 568

ORDER

1. Order the Respondent to provide a further waterproofing certificate that identifies the rooms in the subject house that have been waterproofed.
2. Order the Respondent to pay to the Applicant \$13,105.
3. The counterclaim is dismissed.
4. Costs are reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	In person
For the Respondent	Mr Climpson, Manager

REASONS

Background

- 1 The Applicants (“the Owners”) are the Owners of a House (“the House”) in Inverleigh, which is a small town west of Geelong. The House was built for them by the Respondent Builder (“the Builder”).
- 2 The House was built on a large block in a country setting. There was a large shed at the rear of the allotment where the Owners lived while the House was being constructed.
- 3 A number of disputes arose during construction which had still not been resolved by the time an occupancy permit was issued by the relevant building surveyor in September 2012.

The claims

- 4 The Owners took possession of the House on 3 October 2012 and thereafter made complaints of numerous defects. They commenced this proceeding on 29 May 2013 for defective workmanship and claimed damages of \$10,000.
- 5 On 5 July 2013 the Builder counterclaimed seeking damages for loss of profits it claimed to have suffered from breach by the Owners of an agreement they had entered into for the rental of the House by the Builder as a display home after completion. The damages sought in the counterclaim are \$89,450 which is said to be the profit lost on a minimum of three contracts the Builder claims it would have been likely to secure through the use of the House as a display home.
- 6 The matter came before the Tribunal for mediation on 10 July 2013 and terms of settlement were entered into.

Terms of Settlement

- 7 The terms required the Owners to arrange, at the Builder’s cost, for an inspection by an inspector from the Building Commission and the preparation by the inspector of a comprehensive list of defects. The Builder was then to arrange for the rectification of all defects on the list as soon as possible.
- 8 On completion of the rectification work the Builder was to arrange for the inspector to attend the House and re-inspect to verify that the work had been satisfactorily attended to. It was agreed that the report of the building inspector would be “final and binding on the parties both as to defective works and rectification work”.
- 9 A further dispute concerning some double French doors that were not supplied was resolved upon agreed terms and the Builder was also to give the Owners a voucher to a furniture retailer in the sum of \$2,300.
- 10 It was provided that should the Builder fail to comply with the terms of settlement the Owners may apply to the Tribunal to reinstate the proceedings and obtain orders for a sum determined “as costs of rectifying

any defective works and for VCAT to determine costs of rectification and proceeding”(sic.).

- 11 There was a general release by both parties and it was agreed that the claim and counterclaim would be struck with a right to apply for reinstatement and there would be no order as to costs.

After the settlement

- 12 On 19 July 2013 the proceeding was struck out with a right of reinstatement. No order was made disposing of the counterclaim, which appears to have been ignored. The Builder then exercised its cooling off rights from the settlement agreement and on 10 September 2013 the proceeding was reinstated.
- 13 The Applicants were directed to provide Points of Claim setting out details of incomplete and defective work and any other claims as well as details of the relief and remedies sought.
- 14 A direction was also given for the filing and service of Points of Counterclaim by 25 October 2013. However as no such document was filed and served because, on 19 September 2013 the parties informed the Tribunal that they had again reached a settlement agreement and the proceeding was again struck out with a right to apply for reinstatement. Again, no order was made concerning the counterclaim.
- 15 The further agreement was in the same terms as the original agreement except that, instead of the previously agreed method of settling the dispute concerning the French doors and instead of the voucher to the furniture store the Builder was to pay the Owners \$4,500 by 18 September 2013.

The inspection

- 16 Pursuant to the settlement agreement the premises were inspected by Mr Colin Bellingham who identified a number of defects which he listed and provided to the Builder. Thereafter the Builder returned to the House and carried out extensive works intended to rectify the defects Mr Bellingham had listed.
- 17 The Owners were dissatisfied with what the Builder did in this regard and on 10 July 2014 the proceeding was reinstated on the application of the Owners.
- 18 The Tribunal directed the Owners to set out in a document with numbered paragraphs, details of any incomplete or defective work or any deterioration that had occurred. It was also directed that the Builder may obtain a further Building Commission report by which the Owners would not be bound unless they should choose to do so, in which case they would need to obtain their own report.

The further inspection

- 19 Mr Bellingham returned to the House and provided a report listing his findings in regard to twenty-nine complaints that the Owners were then making.
- 20 From the text of this report it is apparent that most of the items dealt with related to the earlier list but since I have not been provided with the earlier list I do not know whether and to what extent there are additional defects now alleged that were not the subject of the original list prepared by Mr Bellingham. Nevertheless, they are now the dispute between the parties which I shall determine.

The hearing

- 21 The matter came before me for hearing on 17 February 2015 with only half a day allocated. The time allocated proved to be insufficient and many of the assertions and counter-assertions relied upon the view taken by the particular witness as to whether or not whether something was of an acceptable appearance. Accordingly, I adjourned the proceeding part heard to a date and time to fixed by the Registrar on site.
- 22 Pursuant to this direction an on-site hearing was fixed for 20 April 2015 with one day allocated. I met the parties on site and went through the House, dealing with the matters listed by Mr Bellingham in the order as they appear in his report.
- 23 As a general comment, the House appears to be well constructed and of good appearance, apart from the matters referred to by Mr Bellingham which are largely minor. Since neither party has obtained an experts report the most recent report from Mr Bellingham of the inspection that he made after the Builder had done its remedial work is the only evidence that I have of an expert nature, even though he was not called by either side to give evidence.

The required standard of workmanship

- 24 Before proceeding to he individual items I should say something about complaints concerning the appearance of work. Any major domestic building contract is subject to the terms of the building contract, including the implied terms set out in s.8 of the *Domestic Building Contracts Act* 1995. In general terms, the work must be in accordance with the plans and other contract documents and all legal requirements. It must also be carried out in a good and workmanlike manner using good and sufficient materials and be fit for the purpose for which it was intended.
- 25 In the absence of some special provision in the contract, there is no requirement by the Builder to produce a particular standard of finish. If the implied terms are adhered to, the work should be of a reasonable standard. Although perfection may be regarded as an ideal, it is not expected to be achieved. The *Guide to Standards and Tolerances* published by the Building Commission sets out guidelines as to when something is within

tolerance and when it is not. It is the 2007 edition that is relevant. On page 12, under the heading “INSPECTING SURFACES FROM A NORMAL VIEWING POSITION”, the Guide states:

“Generally, variations in the surface, colour texture and finish of wall, ceilings, floors and roofs, and variations in glass and similar transparent materials are to be viewed where possible from a normal viewing position. A normal viewing position is looking at a distance of 1.5m or greater (600 mm for appliances and fixtures) with the surface or material being illuminated by “non-critical light”. Non critical light means the light that strikes the surface is diffused and not glancing or parallel to that surface.”

- 26 The Guide has no prescriptive force but it is a useful yardstick against which to measure any complaint that work is not up to standard. On several occasions Mrs Barnes invited me to get down and examine surfaces very closely but that is not how the Guide says a surface is to be inspected and I cannot conclude from such an inspection that the surface viewed in this way is defectively constructed.
- 27 I now deal with the items of complaint. As will be seen, having looked at the matters complained of I generally accept Mr Bellingham’s opinion. The items are as follows:

Item 1.Laundry walls repainting

25. The Owners complained that, when the grout in the laundry floor was replaced, dust settled on the walls of the laundry and that it was not properly cleaned off by the Builder. The Builder brushed it off but Mrs Barnes thought this was inadequate and cleaned it off further herself with a damp cloth. She then complained that there were streaks on the wall left by the cleaning process and she wants the walls re-painted.
26. Mr Bellingham said that the marks Mrs Barnes complained about were not visible to him when viewed from a normal viewing position at an angle greater than 45 degrees to the wall and a distance of 1.5 metres in normal daylight conditions. My observations were the same. Mr Bellingham noted no defect and I accept his opinion.

Item 2 Ensuite towel rail

27. This is loose and needs tightening. It is a very small job.

Item 3 Toilet seat loose

28. This is also loose and needs tightening. The Owners were concerned that this would require the toilet bowl and cistern to be dismantled but from the on-site inspection it appears that all that is required is to tighten the seat by means of the “Allen key” screws at the rear. Again, it is a very small job.

Item 4.Bar walls not parallel

29. The Owners thought that the two walls were out of alignment. Mr Bellingham measured them with a stringline and found that they were

parallel and there is a photograph of that in his report. From my own observation I could see nothing wrong with them so I accept his opinion that there is no defect.

Item 5. Bar side wall surface not finished properly

30. I could see nothing wrong with the wall from a normal viewing position and nor could Mr Bellingham. Mrs Barnes got down on her hands and knees and advised me to do likewise in order to observe what she said was insufficient paintwork near the skirting board but that is not how one is intended to observe a wall. Even then, I could see nothing wrong with the wall. I accept Mr Bellingham's opinion that there is no defect

Item 6 Waterproofing certificate

31. The waterproofing certificate that the Builder initially provided to the Owners did not refer to the full address of the property and Mr Bellingham said that the Builder should produce a more comprehensive one. A further waterproofing certificate has since been produced which refers to the address of the property but it does not refer to the rooms in which the membranes have been applied. A further certificate needs to be obtained that identifies the rooms and I will make that order.

Item 7 Laminate loose to vanity ensuite

32. This is a metal veneer applied to the kick plate under the vanity unit. It has come loose at the end. It may be that this is due to a cleaning appliance catching on the corner as Mrs Barnes suggested but it should nonetheless not come loose. It has been re-glued once and the Owners suggest that it now needs to be replaced. It does not appear to be bent and I see no need to replace it. It simply needs to be re-adhered and that was the opinion of Mr Bellingham who said that it needed to be secured.

Item 8 Architraves too short

33. In the wet areas the tiler cut the architraves in order to fit tiles underneath. It appears that he cut them too short. This applies to the laundry, main bathroom, toilet, powder room and hallway. Mr Bellingham measured the architraves and found that they were in excess of 2mm and recommended that all the architraves be replaced or the filling be made good so as not to be visible from the normal viewing position. Having looked at them I accept his opinion that that needs to be done.

Item 9 Powder room floor tiles

34. The Owners claim that the floor tiles in the powder room are drummy. Mrs Barnes got down on her hands and knees and tapped them after which I did the same. I could not hear any sign of drummy tiles and nor could Mr Bellingham. I accept Mr Bellingham's opinion that there is no defect

Item 10 Chrome strip power room, bathroom and toilet10

35. The tops of the skirting tiles in the powder room, main bathroom and main toilet are finished with chrome strips. The strips are too short in many instances and the mitres are either non-existent or poorly done in others. Mr Bellingham considered the work to be defective and I accept his opinion. He recommended that the chrome strips be reinstalled to give a similar finish to examples displayed in the laundry.

Item 11 Grout in main bathroom

36. The Owners complained that the grout in the main bathroom was powdery, uneven or discoloured. It appeared to me to be evenly laid and that was also the opinion of Mr Bellingham.

Item 12 Chrome strips

37. This is included in item 10

Item 13 Main bathroom shower screen

38. The Owners considered that there ought to be silicon under the frame of the main bathroom shower screen. Mr Bellingham pointed out that none was required, that the screen has been correctly installed and that the Owners' concerns about sealing were unfounded. I accept that opinion and this matter was not pressed at the hearing.

Item 14 En suite wall tiles

39. The Owners complained that the wall tile grouting was inconsistent in colour, depth and texture. Like Mr Bellingham I was unable to see anything wrong with it. I accept Mr Bellingham's opinion that there is no defect

Item 15 En suite ceiling fan not working properly

40. The Owners complained that, when the Builder replaced all of the tiles in the en suite, a great deal of dust was created which was removed by the ceiling fan. They complain that the ceiling fan has not been working correctly since and does not adequately vent the steam from the shower recess.
41. At my request the shower and the fan were turned on in order to demonstrate its operation. I could not hear or see anything that would suggest that it was not operating correctly. Some steam appeared to be escaping from the shower enclosure that raised a possible concern until it appeared that the water was at maximum temperature. That would not be the case if someone were having a shower. I adjusted the temperature to normal showering temperature and I could not then see any steam escaping into the en suite from the enclosure.
42. Nobody has removed the fan to see if there has been any damage done to it and I am not satisfied that this item has been proven. I note that Mr Bellingham likewise was not able to determine whether there was any defect.

Item 16 Bar - cracking wall plaster above opening

43. This item was withdrawn.

Item 17 Main bedroom window sill

44. The Owners pointed to some breakdown in the paintwork in the corners of the reveals to the window sill and suggested that this indicated that the windows were not weatherproof.
45. Mrs Barnes said that the window supplier came to the House and tested one of the windows with a hose and found it to be leaking. He then carried out repairs. Nothing has been produced from the person who carried out this test to say that any defect in the window was detected.
46. Mr Bellingham said that he felt that the moisture causing the breakdown in the paintwork was condensation. I note that the windows face southwest and are single-glazed. The onus is on the Owners to establish that it is more probable than not that the damage complained of arises as a result of defective workmanship and that onus has not been discharged. On the evidence that I have, I must accept Mr Bellingham's opinion that it is condensation.

Item 18 Gaps under windows

47. There is a gap between the architrave and the wall below the window in bedroom 3 which requires to be sealed. Mr Bellingham identified that as a defect and I accept that it must be sealed.

Item 19 Bedroom 2 window

48. This is a similar complaint to that in item 17 only it relates to bedroom 2. Again, I accept Mr Bellingham's opinion that the likely cause is condensation.

Item 20 En suite taps

49. There is a breakdown of the chrome plating on the spindle covers of two taps above the basin. It has broken down in two small areas, one on each cover and Mr Bellingham identified that as a defect.
50. It appears from the Builder's material that the supplier of the taps, is willing to supply replacement taps at no cost, although this particular design is now discontinued.
51. There are three sets of taps in the en suite and if they are to be replaced with taps of a different style then presumably a further set of taps will need to be purchased and they will have to be fitted. The alternative would be simply to remove the affected spindle covers and have them re-chromed if that is possible but that was not explored during the hearing.

Item 21 Power Room - no privacy latch

52. There are two doors into the power room. One has a privacy latch and the other does not. That is an obvious omission and I accept Mr Bellingham's opinion that a further privacy latch needs to be added.

Item 22 Grout in the main shower and the en-suite

53. The Owners complain that there is a loss of grout in the floor tiles and the edges were sharp on the shower recess floor. I got down on my knees and felt the edges and examined the floor closely. The edges of the tiles were not sharp and there was no loss of grout. In fact, the shower floor in each instance is remarkably well laid.

Item 23 Main toilet door

54. This generally functions satisfactorily although occasionally the handle requires to be operated twice in order to open the latch. The precise reason for this is unclear but it seems likely that the latch needs to be replaced. Mr Bellingham has recommended that the latch be adjusted or replaced. No need to replace the door handle has been proven.

Item 24 Rear brick wall

55. There is a slight stain or discolouration on the rear brick wall under a tap where one of the tradesmen cleaned his equipment. It was not particularly noticeable to me but it can be seen and it is of concern to the Owners. That wall needs to be cleaned.

Item 25 Front of the House column

56. The render on the columns at the front of the House has cracked where the column meets the pedestal in each case. A very thin type of render material has been used, much like a paint mixed with sand. On some of the edges, rust is bleeding through in some places indicating that the materials used for the edge strips is not rust-proof as is recommended.
57. In this instance Mr Bellingham has suggested that the column bases be re-rendered, that flexible jointing between the differing materials be provided and that there be sufficient render cover to prevent rusting. It seems to me that if rust is coming through the metal angles they should be replaced as well.

Item 26 Front verandah soffit lining cracked

58. The soffit lining sheets have been butted together and filled and painted over. Cracks have now appeared where they join. Mr Bellingham noted that the cracks were less than 1mm and not particularly noticeable and found no defect.
59. I raised with the Owners the possibility of joining the sheets with plastic joiners which would be much more noticeable but whether they want to do that or persist with the present arrangement, which Mr Bellingham does not consider to be a defect, is a matter for them.

Item 27 Remote control for the garage door

60. This has been now replaced by the Builder's subcontractor at no cost to the Owners.

Item 28 Garage personal door

61. The architrave has not been effectively flashed at the top nor sufficiently painted to protect it from the weather. Mr Bellingham recommended that the architrave be replaced and be appropriately protected against weathering.

Item 29 Holes and voids in brickwork

62. Numerous voids in the mortar were pointed out to me by the Owners. Many of these were very small but some were more substantial. In some places where the Builder has rectified holes there is mortar smeared on the brickwork. Some allowance should be made for someone to finish the job by filling the remaining holes and cleaning up the brickwork and that was Mr Bellingham's opinion.

Costings

63. Mr Bellingham did not provide any costings for the scopes of work that he recommended.
64. The Builder has obtained a quotation from a carpenter to attend to items 2, 3, 7, 8, 18, 21, 23 and 28 at a cost of \$594. He has obtained a quotation from a tiler to attend to items 10 and 12 at a cost of \$891 and for items 8, 25 and 28 he has obtained a quotation from a painter to repaint the architraves, repair and treat the columns and repaint the garage door at a total of \$1,056. As to items 24 and 29, he has quote from a brick cleaner to clean the brickwork at a total of \$184.
65. The Owners have obtained a quotation from a Builder, Altmann Constructions, to attend to the following items for the following costs:

Item	Details	Amount
2.	Secure tile rail	\$155
3.	Reinstall toilet seat	\$270
7.	Replace the kickboard laminate	\$565
9.	Replace the architraves that are short and repaint them	\$4,950
10.	Reinstall the chrome strip to the powder room, main bathroom, main toilet and laundry	\$6,568
18.	Seal gaps under the window architraves in bedroom	\$398
20.	Replace the chrome covers in the en suite vanity	\$1,250
21.	Fit a privacy latch to the power room door	\$210
23.	Replace and refit door latch to main toilet	\$210

24. Remove paint and grout stains to rear brick wall and driveway brickwork \$330
28. Replace architraves to the garage passenger door and re-point and flash \$1,620
66. They have also obtained quotations from other tradesmen for \$3,850 to re-point the bricks and for \$3,520 to remove the angles and re-render the front columns.
67. In addition, they have also obtained quotations totalling \$7,415 to attend to matters that Mr Bellingham did not accept and which I have not accepted either. I do not need to consider those.

What assessment to make

68. I have difficulty with both sides' figures. There is a vast gulf between them. In regard to the Builder's figures, these prices might well be what it would cost the Builder if the Builder were to do the work itself. Generally, a Builder will have a special relationship with particular tradesmen who will be willing to give a trade price for work to an agreed standard. It is unlikely that these tradesmen would be willing to offer the same terms to a member of the public such as the Owners.
69. On the other hand the Owners have produced quotations that seem not only high, but extraordinarily high, in view of the relatively minor nature of the items complained of. No breakdown of these figures has been provided to show how the amount is calculated.
70. A quotation is not directly an assessment of the reasonable cost of carrying out work. It is a statement by the person providing it of what that person would charge to do the work. In the absence of any other evidence it is some evidence of the cost of carrying out the work but it is by no means the best evidence and where the figures appear unusually high one must wonder whether it reflects the reasonable cost of carrying it out.
71. Ultimately, the Owners are entitled to be put in the position that they would have been in had the contract been complied with (*Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2009] HCA 8). The measure of damages is what it will cost them to carry out the work. As the Applicants, they bear the onus of proving that.
72. I am not persuaded that it would cost them as much as the quotations that they have obtained to attend to the items that I have allowed, although it is likely that it will cost them considerably more than the quotations that the Builder has obtained.
73. It is a pity that the various items were not adequately dealt with by the Builder when it had the opportunity to do so. Then a great deal of money could have been saved. As it is, I am left to fix an amount of damages to award to the Owners on this highly unsatisfactory state of the evidence.

74. I cannot price this work myself. Although I have had a great deal of experience in building cases and seeing the sorts of amounts that are commonly allowed for rectification work of various types I have no pricing expertise.
75. I considered whether to make the order sought by the Owners in their original application, that is, to order the Builder to return and carry out the items of work referred to in paragraphs 64 and 65 of these reasons. However the antipathy between the parties was apparent at the inspection and if I were to make an order for rectification I doubt whether they would ever be able to agree whether or not it had been complied with. I should make a monetary order so that the parties need have no further contact.
76. Doing the best I can I will allow the following figures which are fixed having regard to the quotations tendered, the apparent scope of works and what Mr Bellingham has said in his report.

Item	Details	Amount
2.	Secure towel rail	\$25
3.	Adjust the toilet seat	\$25
7.	Re-glue the kickboard laminate	\$50
9.	Replace the architraves that are short and repaint them	\$2,500
10.	Reinstall the chrome strip to the powder room, main bathroom, main toilet and laundry	\$2,500
18.	Seal gaps under the window architraves in bedroom	\$250
20.	Replace the chrome covers	\$1,250
21.	Fit a privacy latch to the power room door	\$210
23.	Replace and refit the door latch to main toilet	\$75
24.	Remove paint and grout stains to rear brick wall and driveway brickwork	\$330
25.	Replace the metal angles with stainless steel ones and re-render the front columns.	\$3,520
28.	Replace architraves to the garage passenger door and re-point and flash	\$1,620
29.	Re-point missing mortar in brickwork and clean off smears of mortar	<u>\$750</u>
	Total	<u>\$13,105</u>

The counterclaim

73. The counterclaim is for breach of a lease agreement signed by the parties on 8 December 2010. The period of the lease was to be two months from a

commencement date to be confirmed, which as to be within 14 days of the Occupancy Permit. The rental was to be \$900 per week and this was to come off the price of the House.

74. The Owners were to construct a driveway and carry out landscaping and also install curtains and blinds before the term of the lease commenced. Unless that took less than 14 days, this would need to be done during construction of within 14 days after the Occupancy permit. It was not established that they did not do that.
75. As construction proceeded the parties fell out over the Owners' complaints about workmanship. Since they were living in a shed on the property they were able to view the work as it progressed and they did so. The relationship between the parties deteriorated progressively to the point where the Builder withdrew from the lease agreement and required reversal of the credit for the rental. That was reversed and the Owners have now paid the full contract price to the Builder.
76. The Builder blames the Owners for the breakdown of the relationship and the consequent failure of the leasing arrangement. Mr Climpson said that, based upon its sales performance, if it had had the use of the House for the agreed two month period it is reasonable to say that it would have signed a minimum of three contracts from which it would have derived a profit of \$89,450.
77. Given that the agreement appears to have been terminated and the rental returned, this claim is only maintainable if it is established that the Owners repudiated the leasing agreement, that is, that they showed a clear intention not to be bound by it. That is always difficult to establish and I cannot make such a finding on the evidence given.
78. The parties had seriously fallen out over the Owners' complaints. Since there were faults in the work it is not possible for me to say that the Owners' complaints were vexatious or that the breakdown in the relationship was entirely their fault.
79. In any case, even if that breakdown had not occurred, during the period following the issue of the Occupancy permit and into the following year, maintenance works were being undertaken at the House which would have made it impracticable for it to be used as a display home.
80. The counterclaim will therefore be dismissed.

SENIOR MEMBER R. WALKER