

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**CIVIL CLAIMS LIST**

VCAT REFERENCE NO. BP1492/2015

**CATCHWORDS**

DOMESTIC BUILDING: major domestic building contract; not in writing; enforceability; quantum meruit; assessment.

<b>APPLICANT</b>	Mr Marcin Jacek Nicinski t/as Marcin Nicinski (ABN: 808 501 21100)
<b>RESPONDENT</b>	Mrs Jasbir Chemay
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Member C Edquist
<b>HEARING TYPE</b>	Small Claim Hearing
<b>DATE OF HEARING</b>	18 January 2016 and 8 April 2016
<b>DATE OF ORDER</b>	18 April 2016
<b>DATE OF REASONS</b>	27 April 2016
<b>CITATION</b>	Nicinski v Chemay (Building and Property) [2016] VCAT 649

**ORDERS**

1. The Respondent must pay to the Applicant the sum of \$1,010.
2. The Respondent must reimburse to the Applicant the filing fee paid by him of \$174.10.
3. The Respondent's counterclaim is dismissed.

  
**MEMBER C EDQUIST**



**APPEARANCES:**

For Applicant

In person, on both days

For Respondent

In person, on both days

## REASONS

### INTRODUCTION

- 1 Mr Marcin Nicinski is a painter. He carried out work for Mrs Jasbir Chemay at her house in Wheelers Hill in December 2014. He has come to the Tribunal seeking the sum which he says is outstanding under his contract with Mrs Chemay, together with damages in respect of a ladder retained by Mrs Chemay.
- 2 The proceeding came for hearing on 18 January 2016. When the matter was called at the scheduled time, Mrs Chemay was not present. After a short delay, the hearing started in her absence.
- 3 Mr Nicinski gave evidence about the contract and the payments made against it.
- 4 Mrs Chemay then arrived. She explained that she had not paid the last account in full because she was not happy with the quality of Mr Nicinski's work, and the work was not completed. She indicated that she did not want Mr Nicinski to return to the site, and that she wished to recover damages in respect of the defective and incomplete work.
- 5 There was insufficient time in which to conclude the case on 18 January 2016. In circumstances where Mrs Chemay said she was not going to allow Mr Nicinski back onto the site to do any further work, it was agreed that there should be a site inspection so that the extent of the defective and incomplete work might be assessed.
- 6 Between the first day of the hearing, and its recommencement on 8 April 2016, Mrs Chemay issued a counterclaim seeking damages for defective and incomplete work.
- 7 Prior to the commencement of the second day of the hearing, a site inspection was held at Mrs Chemay's house. It was due to start at 12.00 noon but Mr Nicinski was not present. After being contacted by the Tribunal, he attended at 1.00pm. This meant that the hearing in the afternoon had to be truncated. Although evidence was completed on that day, there was insufficient time for me to formulate my decision, and I reserved it. I now publish my decision.

### The contract

- 8 Mr Nicinski says that the contract was made with Mrs Chemay in November 2014. It involved painting and renovating. He said that he had rendered three accounts. The first, dated 24 November 2014 was for \$5,000 ('invoice 5'). It was paid on 26 November 2014. The second account, also for \$5,000, issued on 4 December 2014 and was paid on 5 December 2015 ('invoice 8'). A third account for \$4,570, the balance of the value of the contract, was rendered on 18 December 2014 ('invoice 9'). \$1,500 was paid against this invoice, leaving a balance due of \$3,070.

- 9 Mrs Chemay agrees the contract was formed in November 2014. Her position regarding the contract sum is that the works were to cost not more than \$12,000. Mr Nicinski was to provide paint, but she had or was to purchase the toilets, taps, wash basin and tiles. The works were to be completed within three weeks, because she had to move in by the end of November 2014 in order to comply with insurance requirements. She says she wanted a written contract, but Mr Nicinski did not provide one, despite requests from her.
- 10 Mr Nicinski says there were variations which brought the total amount to be paid up to \$14,570. Even at this price, he says he will lose money because most of the contract sum has gone to pay tradesmen and for materials.

### **The scope of the work undertaken**

- 11 At the inspection at Mrs Chemay's house it became clear that the scope of work carried out, or at least attempted by Mr Nicinski, covered the scope of work asserted by Mrs Chemay in her counterclaim. The work included painting of the whole house including wardrobes and doors, installation of a new toilet at the back of the house, repair of a shower door, repair of a leak at the outside base of the shower in the main bathroom, and the complete renovation of the ensuite bathroom in the master bedroom. The trades involved included painting, tiling, carpentry, plumbing and electrical.

### **IS A MAJOR DOMESTIC BUILDING CONTRACT REQUIRED?**

- 12 The situation which the parties in this proceeding find themselves is similar to that which existed in a case very recently decided by the Tribunal, *Tozoulis v Hughes* (Building and Property) [2016] VCAT 512 (5 April 2016). In that case the works agreed to be carried out by the applicant included cabinetry, carpentry, plastering and floor polishing. Senior Member Farrelly found it necessary to examine the relevant provisions of the *Domestic Building Contracts Act 1995* to establish whether the works fell within the ambit of the Act. I must undertake the same task.
- 13 Section 3 of the *Domestic Building Contracts Act* defines terms including the following:
- builder* means a person who, or a partnership which—
    - carries out domestic building work; or
    - manages or arranges the carrying out of domestic building work; or
    - intends to carry out, or to manage or arrange the carrying out of, domestic building work;
  - domestic building contract* means a contract to carry out, or to arrange or manage the carrying out of, domestic building work other than a contract between a builder and a sub-contractor;
  - domestic building work* means any work referred to in section 5 that is not excluded from the operation of this Act by section 6;

*major domestic building contract* means a domestic building contract in which the contract price for the carrying out of domestic building work is more than \$5,000 (or any higher amount fixed by the regulations);

- 14 Section 5 *Domestic Building Contracts Act* sets out the work to which the Act applies. Such work includes:

the renovation, alteration, extension, improvement or repair of a home.

[Section 5(1)(b)]

- 15 Section 6 of the *Domestic Building Contracts Act* prescribes building work to which the Act does not apply. The excluded categories of work include work in relation to a farm building, a building intended only for business purposes, a building only intended to accommodate animals, design work, work involved in obtaining foundations data, and transporting a building. Those categories are clearly not applicable in this case.

- 16 However, the remaining category of excluded work, set out in s 6(a), is as follows:

any work that the regulations state is not building work to which this Act applies;

...

- 17 Section 6 of the *Domestic Building Contracts Regulations 2007* provides:

For the purpose of section 6(a) of the [the Domestic Building Contracts] Act, work is not building work to which the Act applies if the work is to be carried out under a contract **in relation to one only** of the following types of work—

- (a) attaching external fixtures (including awnings, security screens, insect screens and balustrades);
- (b) electrical work;
- (c) glazing;
- (d) installing floor coverings;
- (e) insulating;
- (d) painting;
- (d) plastering;
- (h) plumbing work as defined in section 221C of the Building Act 1993;
- (i) tiling (wall and floor);
- (j) erecting a chain wire fence to enclose a tennis court;
- (k) erecting a mast, pole, antenna, aerial or similar structure.

[Emphasis added]

- 18 Having regard to the facts that the work agreed to be carried out by Mr Nicinski included painting, tiling, carpentry, plumbing and electrical work and that they were priced at more than \$5,000, I find that the work constitutes *domestic building work* under the *Domestic Building Contracts Act*, and that the agreement between the Mr Nicinski and Mrs Chemay in respect of the work constituted a *major domestic building contract*.

**CONSEQUENCE OF THERE BEING NO WRITTEN MAJOR DOMESTIC BUILDING CONTRACT.**

- 19 I turn now to examine the consequence of this finding. Section 31 of the *Domestic Building Contracts Act* mandates that a *major domestic building contract* must contain certain provisions. It relevantly provides:

**31 General contents etc. of a contract**

- (1) A builder must not enter into a major domestic building contract unless the contract—
- (a) is in writing; and
  - (b) sets out in full all the terms of the contract; and
  - (c) has a detailed description of the work to be carried out under the contract; and
  - (d) includes the plans and specifications for the work and those plans and specifications contain enough information to enable the obtaining of a building permit; and
  - (e) states the names and addresses of the parties to the contract; and
  - (f) states the registration number (as it appears on the registration certificate under the Building Act 1993) of—
    - (i) the builder, in the case of a natural person;
    - ...
  - (g) states the date when the work is to start, or how that date is to be determined; and
  - (h) if the starting date is not yet known, states that the builder will do everything that it is reasonably possible for the builder to do to ensure that the work will start as soon as possible; and
  - (i) states the date when the work will be finished, or, if the starting date is not yet known, the number of days that will be required to finish the work once it is started; and
  - (j) states the contract price or, in the case of a cost plus contract, how the amount that the builder is to be paid is to be determined; and
  - (k) states the date the contract is made; and

- (l) sets out details of the required insurance under the Building Act 1993 that applies to the work to be carried out under the contract (including any details required by the Director); and
- ...
- (q) sets out the warranties implied into the contract by sections 8 and 20; and
- ...
- (s) complies with any other requirements set out in the regulations.

Penalty: 50 penalty units.

20 Furthermore, s 31(2) of the Act provides that:

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

21 As the total value of the work was more than \$5,000, it was clear that this is a situation where a written major domestic building contract containing all the matters required by s 31(1) of the *Domestic Building Contracts Act 1995* should have been used.

22 The parties agreed at the hearing that no complying *major domestic building contract* was used. The contract was evidenced only by Mr Nicinski's three tax invoices numbered 5, 8 and 9, and by the fact that Mrs Chemay had made payments against those invoices totalling \$11,500.

23 Because s 31(2) of the *Domestic Building Contracts Act* provides that a major domestic building contract is of no effect unless it is signed by the builder and the building owner, I find that Mr Nicinski cannot sue on the contract to recover the balance of the contract sum allegedly due.

24 Although he has no enforceable contract, Mr Nicinski does have an entitlement under the law of restitution to be paid where:

- (a) he performed services and provided materials for the benefit of Mrs Chemay;
- (b) he expected to be paid \$12,000 plus agreed variations;
- (c) Mrs Chemay expected that she would have to pay him at least \$12,000;
- (d) Mrs Chemay received significant benefits by the performance of services and the provision of materials by Mr Nicinski; and
- (e) Mrs Chemay would be unjustly enriched if she were allowed to receive these benefits, without paying an appropriate amount for them.

25 The Tribunal has jurisdiction under s 53(2)(b)(iii) of the *Domestic Building Contracts Act 1995* to order the payment of a sum of money by way of restitution.

## ASSESSMENT OF VALUE OF WORKS

- 26 What Mr Nicinski should be paid is to be assessed on a *quantum meruit*. Derived from Latin, this phrase means Mr Nicinski is entitled to be paid a reasonable amount for the services he performed and the materials he provided. In assessing this reasonable amount, it is appropriate to take into account the reasonable cost of rectifying any defects in the works.
- 27 Mr Nicinski asserts in his invoices 5, 8 and 9 that the total value of the services performed, and the paint provided, is \$14,570.
- 28 Mrs Chemay disputes the works are worth the \$14,570 billed by Mr Nicinski. As noted, she says the works were to cost no more than \$12,000. She disputes there were variations worth \$2,470.
- 29 Mrs Chemay agrees she paid \$11,500 against the 3 invoices rendered by Mr Nicinski, but says that she paid too much because she has identified that there are a number of defects and items of incomplete work in the works undertaken by Mr Nicinski. These are detailed at pages 2, 3 and 4 of her counterclaim.
- 30 The quantification of the value of the works which were to be performed by Mr Nicinski is not easy. Neither party came the hearing anticipating that Mr Nicinski's entitlement would be assessed on a quantum meruit, and neither party brought expert evidence concerning the value of the works. Mr Nicinski produced no primary evidence such as tax invoices from his tradespeople nor receipts for paint purchased. Nor did he tender any work diaries evidencing the hours taken by him or his tradespeople to perform the works.
- 31 Mrs Chemay tendered a quotation in relation to rectification costs. This was from Mr Otto Richter, and was dated 27 July 2016. Mr Richter valued the work required to repair the wiring from the switch to the exhaust fan, and checking wiring that was done by Mr Nicinski's electrician, at \$660. He valued the carpentry work, namely, replacing poorly fitted doors (in the laundry and to the downstairs storeroom), re-hanging double doors (to the living room) and replacing the handle on the sliding cupboard door (in the bedroom) at \$455. The necessary 'plumbing' work - fixing the toilet seat and repairing a leaking shower - was valued at \$220. The painting repair work, itemised as cleaning up and painting all timber work, repairing and painting cracked cornices, painting the front door and varnishing the timber strip in the doorway (to the ensuite bathroom) was costed at \$1,030.
- 32 The works quoted for by Mr Richter are relatively minor compared to the original scope, which included repainting an entire house of at least eight rooms including the kitchen, laundry and main bathroom; completely renovating an ensuite, fixing a shower in the main bathroom; and putting in a new door in the laundry and a new door in the downstairs storeroom. Mr Richter's quotation, which totalled \$2,365, suggests that Mr Nicinski's



costing of \$14,570 for the whole job, which ultimately also included fixing the locks in the wall unit, was a reasonable costing.

- 33 In these circumstances, I find that the sum which Mr Nicinski is entitled to be paid, subject to a deduction being made in respect of the cost of defective or incomplete work, is \$14,570.

#### **Defects and incomplete work**

- 34 During the inspection, I formed the following views regarding the defects and incomplete works identified in Mrs Chemay's counterclaim.

(a) **Ensuite-electrical:**

- (i) The new fan will not work when the heat lamps are on;
- (ii) The old ventilation fan switch is wired in reverse;
- (iii) The new plug needs to be tested;
- (iv) All electrical work needs to be certified.

**Comment:**

Complaints (i), (ii) and (iii) are sustained. Either Mr Nicinski's electrician needs to return to the site to do this work, or Mrs Chemay must procure the services of a new electrician.

(b) **Ensuite-heat lamp frame not installed.**

**Comment:**

It was missing and needs to be installed.

(c) **Ensuite - the paint on the ensuite door has not been finished properly at the edge of the door.**

**Comment:**

The paintwork on the edge of the door was slightly marked and needs to be touched up.

(d) **Ensuite - broken tile.**

**Comment:**

Where a rectangle had been cut out of a tile to fit the edge of the window, a hairline crack had developed. Although the crack is minor, it is visible. I consider affixing a broken tile to be poor workmanship. Mrs Chemay is justified in asking for an allowance so that it can be replaced.

(e) **Master Bedroom - the finish to the panel at top of the sliding door is poor.**

**Comment:**

The panel on top of the new sliding wardrobe door is new, and joins an existing panel over the ensuite door. The new panel is warped, and there is a noticeable mis-alignment of the new panel with the pre-existing panel.

The new panel should be replaced so that it sits flush with the pre-existing panel. The replacement panel will have to be painted to match.

**(f) Master Bedroom - handle to walk in robe does not match.**

**Comment:**

The handle on the sliding door to the new wardrobe does not match the handle on the pre-existing ensuite door. One or other of the handles should be changed so that they match.

**(g) Master Bedroom – paintwork to be finished on walk-in robe door.**

**Comment:**

The complaint about paintwork is not sustained, as it was not highlighted at the inspection, and was not noticeable.

**(h) Master Bedroom - wood strip from bedroom into ensuite is not varnished.**

**Comment:**

Mr Nicinski placed an angled strip of timber in this position to create a very short ramp to facilitate wheelchair access into the ensuite bathroom. It is not varnished, and should be, to match the floor.

**(i) Master Bedroom - paintwork around window is cracking.**

**Comment:**

If the paint was cracking around the window, it was barely noticeable. I do not consider this to be a claimable defect.

**(j) Lounge - the sliding doors have not been re-hung properly after removal for painting.**

**Comment:**

The doors do not shut completely, and should be re-hung.

**(k) Lounge - sliding doors have been left with splatters of paint.**

**Comment:**

One of the doors did have minor paint splatters. I consider they could be easily removed.

**(l) Lounge - the painting on the wall unit is scratched and damaged, allegedly from when the old locks were removed and new locks were installed.**

**Comment:**

Minor marks were visible. Mr Nicinski did not dispute they were his responsibility. I consider the wall unit could be touched up, but it does not need to be completely repainted.

**(m) Lounge - the edge of the wall unit is marked with paint.**

**Comment:**

It appears that the painter did not use masking tape when painting this edge, which is adjacent to the wall. I consider this to be poor workmanship. The affected part should be sanded back, and repainted to match.

- (n) **Front door - painting on the outside of the door is not finished, and a patch of white is visible at the bottom.**

**Comment:**

This defect is palpable.

- (o) **Front door - painting around the frame requires sealing and further painting.**

**Comment:**

It was very difficult, even in broad daylight, to identify this alleged defect. It is not established.

- (p) **Front door - painting on the wall around the front door is cracking.**

**Comment:**

Mrs Chemay pointed to scuff marks on the paintwork at the foot of the door. Although this might have been fair wear and tear in the 14 month period since the painting was done, Mr Nicinski said he would touch it up if he was allowed to.

- (q) **Main bathroom – the gap between the mirror frame and the tiles below has not been sealed properly.**

**Comment:**

This defect was palpable.

- (r) **Main bathroom - joints in the plaster work have, since the completion of the painting, become visible.**

**Comment:**

This is true, but Mr Nicinski points out that the house is an old one and is clearly moving. He says his workmanship was satisfactory. I consider that Mr Nicinski cannot be held responsible, as he cannot be taken to have guaranteed the stability of the pre-existing walls in a room he was tasked with painting.

- (s) **Main bathroom - 2 weeks after she moved in, Mrs Chemay says a leak re-appeared outside the shower, and the adjacent architrave is rotten.**

**Comment:**

It is clear that the architrave is rotten. Mrs Chemay said that the architrave had been replaced by Mr Nicinski, and had rotted again within two weeks. I think this is an inherently unlikely scenario, and that it is highly probable

that the pre-existing, rotten, architrave was not replaced. In any event, it clearly needs to be replaced now. Mrs Chemay was reluctant to test whether the base of the shower door still leaks, because she did not want to exacerbate the existing damage. It seemed clear to me that if the base area still leaked, it could be simply sealed with silicon.

(t) **Rear toilet seat – requires to be installed properly, as it moves.**

**Comment:**

On inspection, the toilet seat was slightly askew. I accept that it needs to be re-affixed.

(u) **Kitchen - cracked paint at base of ceiling and at top of kitchen cabinets.**

**Comment:**

Even in daylight, these alleged defects were hard to see.

(v) **Kitchen - paint has been accidentally applied to neighbouring areas. For example, the paint from the ceiling has been applied to part of the kitchen skylight frame.**

**Comment:**

Even in broad daylight, this defect could not be identified. Perhaps this was because of the glare from the skylight. Even if it is present to a degree, it certainly is not visible in daylight. I do not think this defect has been established.

(w) **Kitchen - the point where the kitchen canopy is fixed to the wall is unsightly.**

**Comment:**

No problem was readily detectable. A close inspection revealed that there was a very small gap between the canopy and the wall. This has been filled and painted, and is not unsightly. I do not consider it to be a defect.

(x) **Dining and family room - the skylight frame has not been varnished.**

**Comment:**

It was apparent that the skylight frame had been varnished at some stage, perhaps years ago, but the varnish certainly did not match the adjoining ceiling area. This item of incomplete work is established.

(y) **Dining and family room - two light switch covers have not been replaced after painting.**

**Comment:**

This complaint is established.

(z) **Dining and family room - new plug not tested and certified.**

**Comment:**

The plug was not visible. There is no clear evidence that it had not been tested because neither Mr Nicinski nor Mrs Chemay had any first hand knowledge about this, and Mr Nicinski's electrician was not available to give evidence.

- (aa) **Wardrobe in the fourth room – cannot be shut properly because the latch was removed during painting and has not been re-installed.**

**Comment:**

This complaint is sustained.

- (bb) **Wardrobe in the fourth room - top shelf not painted.**

**Comment:**

This complaint is also sustained.

- (cc) **Fourth room - cracks have appeared in the wall, near wardrobe.**

**Comment:**

Minor cracks were visible. They would appear to be related to slight movement of the frame in this old house, and as such are not Mr Nicinski's responsibility.

- (dd) **Laundry - the external door needs to be replaced because it was not trimmed correctly before installation, and does not fit the door frame.**

**Comment:**

It is clear the door does not fit the door frame. Either the door frame is warped, or the edge of the door is not straight. It was not possible at the inspection to establish which explanation was the correct one, in the absence of a straightedge. However, it is clear that the door needs to be replaced with a door that fits the door opening.

- (ee) **Downstairs - the external door was not painted on the inside, nor sealed at the bottom after being cut to size to fit the door frame.**

**Comment:**

It is clear that the door has not been painted on the inside.

It is not clear that the bottom of the door has not been sealed. Mr Nicinski said that it had been. I do not think this aspect of the complaint is made out.

- (ff) **Downstairs - the door frame has not been cemented properly.**

**Comment:**

This complaint is sustained. The door frame needs to be cemented on both sides so that the lower, concreted, portion is consistent with the existing doorframe, and that the adjacent walls are even.

**(gg) Miscellaneous - touch up of the paintwork throughout the house is required, including on the architraves. Paint drops on the floor need to be removed.**

**Comment:**

Some touching up of the paintwork needs to be done, and cleaning of paint splatter is required in places.

**Summary of defective work**

35 My findings regarding defects need to be taken into account in assessing the value of the work carried out by Mr Nicinski. Mrs Chemay will have to engage relevant trades to fix the following defects:

- (a) Ensuite - electrical.
  - (i) make the new fan work when the heat lamps are on;
  - (ii) reverse the wiring in the old ventilation fan switch;
- (b) Install ensuite - heat lamp frame.
- (c) Touch-up the paint on the ensuite door.
- (d) Fix broken tile in ensuite.
- (e) Replace and paint the new panel in the master bedroom so that it sits flush with the pre-existing panel.
- (g) Varnish the wood strip from master bedroom into ensuite.
- (f) Fix the handle to the walk-in robe.
- (h) Re-hang the sliding doors to the lounge.
- (i) Remove splatters of paint from lounge-sliding doors.
- (j) Touch up the painting on the wall unit in the lounge.
- (k) Sand back, and repaint to match the edge of the wall unit in the lounge.
- (l) The painting of the front door on the outside must be completed to cover the patch of white visible at the bottom.
- (m) The painting on the wall around the front door should be touched up.
- (n) In the second bathroom, the gap between the mirror frame and the tiles below should be sealed properly.
- (o) In the second bathroom, the architrave is to be replaced.
- (p) In the second bathroom, re-seal front of shower at bottom with silicon.
- (r) Varnish the skylight frame in the family room.

- (q) Install rear toilet seat properly.
- (s) Replace two light switch covers in dining and family room.
- (t) Replace latch in wardrobe in the fourth room.
- (u) Paint shelf in wardrobe in the fourth room.
- (v) Replace the external door in the laundry.
- (w) Paint the inside of the downstairs external door.
- (x) Cement properly the downstairs doorframe.
- (y) Touch up of the paintwork throughout the house, and remove paint drops on the floor.

### **Summary of incomplete work**

36 Items of work which remain incomplete are:

- (a) test and certify electrical work;
- (b) varnish the wood strip leading from the master bedroom into the ensuite;
- (c) varnish the skylight frame in the family room.

### **Quantification**

- 37 As noted, Mrs Chemay tendered a quotation from Mr Otto Richter expressed to total \$3,265 plus GST to carry out the necessary rectification work. The work quoted for by Mr Richter included electrical work / repairs - \$660, carpentry - \$455, plumbing - \$220 and painting - \$1,030.
- 38 The first point to be made about Mr Richter's quotation is that the subtotals add up to \$2,365, not \$3,265. Mrs Chemay conceded this when it was pointed out at the hearing. She said that the quotation was prepared by Mr Richter in a hurry on-site. I comment that this explanation hardly inspires confidence regarding the accuracy of the quotation generally.
- 39 Mr Nicinski's raised some issues regarding the quotation. Regarding GST, he said that there was no evidence that Mr Richter was registered for GST. The quotation gave no indication that Mr Richter had an ABN. He said the electrical work quoted could be done in a day, and an allowance of \$300 was appropriate. And he pointed out that fixing the shower did not require a plumber.
- 40 Mr Nicinski's main contention, however, was that in December 2014 he wanted to return to the site. He agrees that some of the paintwork needs touching up. He said it was always his intention to come back and finish the works. He said that he had a day or a day and a half's work to do. He had several conversations with Mrs Chemay, but she would not agree a date for him to return. They did not speak after Easter 2015. He said that, had he been allowed to return, he could have got his electrician to rectify the

electrical problems in the ensuite and to check and certify the electrical work, at no charge. He said the plumbing work was complete, and he could have got his plumber to certify the plumbing work had Mrs Chemay paid him.

- 41 I accept Mr Nicinski's evidence that he was prepared, in December 2014 and for a period afterwards, to return to the site to complete his work. This is an important point, because it is relevant to the issue of whether the cost of rectification or completion of the work is to be assessed on the basis of what it would then have cost Mr Nicinski, or what it will now cost Mrs Chemay.
- 42 Mrs Chemay says that she refused to allow Mr Nicinski to return to the site because she had lost confidence in him. The works were meant to be completed in three weeks, but, far from being finished by the end of November 2014 as intended, Mr Nicinski and his people were still on-site well into December.
- 43 Having inspected the works, I gained a clear impression that almost all of the painting was carried out to an acceptable standard. The skylight surround and an interior shelf in a cupboard needed to be completed, and some touch-up work was required, and the clean-up needed to be completed in places. The new tiling in the ensuite bathroom was of a good standard, save for one cracked tile. The plumbing was complete, but the back toilet seat needed to be fixed so that it did not move, and some silicon work was perhaps required in the main bathroom shower. There were two substantive issues with the electrical works in the ensuite, but Mr Nicinski thought they could be fixed quickly, and the quotation from Mr Richter supports the view that the electrical works could be fixed in less than a day.
- 44 Looking at the job globally, I find that this is not situation where, had there been an enforceable contract, Mrs Chemay would have been justified in unilaterally terminating it and locking Mr Nicinski off the site without giving him a chance to complete. I consider that Mrs Chemay acted unreasonably in refusing to allow Mr Nicinski back on the site to complete his work.
- 45 For this reason, I find that the cost of rectification and completion should be assessed on the basis of what it would have cost Mr Nicinski or his relevant tradespeople in December 2014 had they been allowed back, rather than what it is now likely to cost Mrs Chemay using another contractor, or contractors, to rectify the works.
- 46 Approaching the assessment of the cost of rectification of Mr Nicinski's works on this basis, I allow the following figures:
  - (a) Electrical works: I adopt Mr Richter's figure of \$660 because Mr Nicinski estimated that there was about one day's work for an electrician. He said \$300 was an appropriate allowance. I think \$300



is a manifestly inadequate, as an electrician is likely to charge at least \$85 an hour.

- (b) Carpentry: Mr Richter has put a price of \$455 on the replacement of the poorly fitted doors, and the adjustment of the double doors, and the replacement of the cupboard handles. He has not allowed for the latch in the cupboard in the fourth bedroom, nor has he allowed for the replacement of the rotten architrave in the main bathroom. I will allow \$500.
- (c) Plumbing: I consider Mr Richter's quoted price of \$220 for fixing the toilet seat and the repair of the leaking shower to be excessive. These items do not require the attention of a qualified plumber. I will allow \$100.
- (d) Painting: I have assessed this on the basis that Mr Nicinski conceded that there was a day to a day and a half's work required. In order to be conservative, I think two day's work by a painter should be allowed. Mr Nicinski did not say what his hourly rate was, but I adopt an hourly rate of \$50, which yields a daily rate of \$400. \$800 is allowed in total.

47 The total allowance to be made in respect of defective and incomplete works is accordingly:  $\$660 + \$500 + \$100 + \$800 = \$2,060$ . On the basis that Mr Nicinski would have been entitled to be paid \$14,570 in respect of his full scope of work had he completed the job without defects, my assessment of the value of the work performed by him is reduced to \$12,510.

### **Mrs Chemay's claim for cleaning costs**

- 48 In addition to recovering a sum to cover the work of Mr Richter, Mrs Chemay also seeks the cost of cleaning the whole house professionally after the work has been carried out. She bases this assessment on what she says was the cost of having the house cleaned before she moved in, after Mr Nicinski had carried out his work.
- 49 I consider that Mrs Chemay has two separate problems with this particular claim. The first relates to quantification. Mr Nicinski expressly challenged the figure of \$500. He said at the hearing that he had spoken to the cleaner, Mr Marcin Praszniak, and had been told that Mr Praszniak had charged Mrs Chemay \$80 cash for cleaning the house.
- 50 Mrs Chemay said that she paid Mr Praszniak close to \$500 for two jobs. One was cleaning the townhouse where she had been living. She said she had also paid Mr Praszniak for cleaning the house where Mr Nicinski had carried out his work. She now recalled the figure to be \$460. When pressed, she could not produce an invoice. The claim for \$500 would, in my view, have failed on this basis.

- 51 However, a second and more fundamental problem exists, and this is that the claim is a claim for damages. Such a claim can only be made if there was an enforceable contract. There was not.
- 52 The cost of cleaning can only be brought into the equation if it can be regarded as part of the scope of Mr Nicinski's work which has not been performed. Cleaning was not part of Mr Nicinski's scope of work. It was for this reason that Mrs Chemay was prepared to pay for the cleaning when Mr Nicinski left the site in December 2014.

### **The claim for \$297**

- 53 In her counterclaim, Mrs Chemay put forward a claim for \$297, but did not say what it was for. At the hearing, she clarified that she thought it was for GST. She did not identify the base figure upon which that GST was calculated. I accordingly dismiss this particular claim.

### **The claim for alternative accommodation**

- 54 Mrs Chemay also seeks damages in respect of alternative accommodation 'because of hazards, dust and debris while work is being carried out'. She says the estimated time to complete the required repairs is 7 to 10 days. She says she will need appropriate accommodation in a serviced apartment or hotel, with disability facilities for her mother. The estimated cost of this, for 10 days, is \$2,500. She justified this figure by producing a quotation from Quest Apartments, Glen Waverley, which indicated a nightly rate for a one bedroom apartment of \$240 for the first 6 nights, or \$215 if the stay was between 7 and 27 nights.
- 55 I am sympathetic, to an extent, to Mrs Chemay's claim for accommodation while rectification work is being carried out. The nature of Mr Nicinski's work was such that it was carried out when she was not in the house. It follows that it would not be unreasonable for her to move out if hazardous, noisy and dusty work now needed to be carried out.
- 56 However, the claim faces a factual problem, which is that the only parts of the house where new painting is to be carried out are the family room, where the timber surround to the skylight is to be varnished, and the fourth bedroom, where a shelf in the cupboard has to be painted. The rest of the painting is in the nature of touch up work. The house is large, and it seems to me realistic to expect Mrs Chemay and her mother to move around the house and occupy different rooms, depending on where painting is being carried out.
- 57 Furthermore, this claim for alternative accommodation is a claim for damages for breach of contract. As I have found there is no enforceable contract between Mrs Chemay and Mr Nicinski, the claim must fail on this basis also.

### Mr Nicinski's claim for damages in connection with the purchase of a new ladder

- 58 When Mr Nicinski issued his application, he included a claim for damages in connection with the purchase of a new ladder. He said that because Mrs Chemay had retained his old ladder, he had to buy a new one for work.
- 59 Following the site inspection on 8 April 2016 at Mrs Chemay's house, Mr Nicinski was able to pick up his old ladder. At the hearing that afternoon he withdrew this particular claim for damages.

### Summary

- 60 The upshot, having regard to my assessment of the value of Mr Nicinski's works had they been completed without defects, and my assessment of the total cost of rectification and completion, is that I find that the payment due to Mr Nicinski is \$12,510 (calculated on the basis set out in paragraph 47 above), less the sum of \$11,500 already paid by Mrs Chemay. The balance due to Mr Nicinski accordingly is \$1,010.

### Filing fees

- 61 Pursuant to s 115 B of the *Victorian Civil and Administrative Tribunal Act 1998* an applicant is entitled to be reimbursed their filing fee, in a case such as this, when they have been substantially successful. I consider that Mr Nicinski has been substantially successful because he has received an award of \$1,010. I acknowledge that this was less than a third of the \$3,070 he contended was due to him from Mrs Chemay in his application. Nonetheless it is a significant figure, and not a trivial or insubstantial award. I consider that Mr Nicinski is entitled to be reimbursed the filing fee of \$174.10 which he paid.
- 62 I turn to Mrs Chemay's counterclaim. She issued a counterclaim on 7 March 2016, and also paid a filing fee of \$174.10. Her counterclaim failed, in part because it was a claim for damages, and she was not entitled to damages because there was no enforceable contract between her and Mr Nicinski. Her complaints regarding defective and incomplete work were partially successful, and were brought into the equation when it came time to assess the value of Mr Nicinski's claim. However, those defective and incomplete works were not as extensive as Mrs Chemay had contended. At the end of the day, she has to pay a further \$1,010 to Mr Nicinski for his work. Mrs Chemay has not been successful in her counterclaim. Indeed, it will be formally dismissed. In the circumstances, I will not be making an order that Mr Nicinski reimburse her for the filing fee she paid.

  
MEMBER C EDQUIST

