

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D50/2010

CATCHWORDS

Work and labour – order that builder return and rectify defective work – order not complied with - evidence – application for monetary order in lieu – nature of such an order - assessment of likely cost to be incurred by owners to have work done by another person - reasonable cost assessed in part by experts – other matters not assessed – difficulty of lay persons in obtaining workmen – uncertainty of cost of rectification – contingency sum allowed in calculation – costs - conduct of builder – whether reasonable to award costs

APPLICANT	Burbank Australia Pty Ltd trading as Burbank Homes (ACN 007 099 872)
RESPONDENTS	Nalini Haynes, Edward Haynes
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Application for orders enforcing earlier order and application for costs
DATE OF HEARING	30 June 2011
DATE OF ORDER	26 July 2011
CITATION	Burbank Australia Pty Ltd trading as Burbank Homes (ACN 007 099 872) v Haynes (Domestic Building) [2011] VCAT 1405

ORDER

1. Order that in lieu of the work ordered to be done pursuant to paragraph 1 of the Tribunal's order of 28 February 2011 the Applicant pay to the Respondents the sum of \$15,537.00.
2. Order the Applicant to pay the Respondents' costs of this proceeding fixed at \$13,457.47.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr Cogley of Counsel
For the Respondents	Ms N. Haynes and Mr E. Haynes in person

REASONS

Background

- 1 On 28 February 2011 I made an order that the Applicant (“the Builder”) pay to the Respondents (“the Owners”) the sum of \$7,273.62 and carry out certain items of work specified in the reasons for decision.
- 2 The matter now comes back to me on the liberty to apply reserved with a complainant by the Owners that the work has not been done.

Hearing

- 3 The hearing of this application took place on 30 June 2011. Mr Cogley of Counsel represented the Builder and the Owners represented themselves. There was little dispute as to the facts. The Builder had made some attempt to comply with the orders but not all of the work was done.

The work

- 4 There are two principal items now to be done. The first relates to the construction of a concrete slab to support the water tank at the rear of the house and the installation of the tank and associated stormwater plumbing. The other item is to repair the defective windows, if possible.

The tank and slab

- 5 There was an engineer’s design for the tank slab that was referred to during the earlier hearing. The need for a slab arose from the fact that the tank was to be situated adjacent to a drainage and sewerage easement and so the consent of South East Water and the local council was required. Also, since the weight of the tank will be slightly in excess of 5 metric tonnes the engineer designed the tank slab so that it would be supported at the rear by two piers at least 1400 mm long and founded at least 300 mm into stiff natural clay. The Builder constructed a slab but it sloped towards the house and so it had to be removed.
- 6 Pursuant to the Tribunal’s order the Builder sent workmen along to remove the old slab and construct the new slab. They broke up the old slab and piled the rubble in a heap on the other side of the backyard. They then began excavating the site for the new slab. It had been thought that the old slab had been founded on the two piers, as the engineer had designed it, but when the old slab was removed, no piers were found. When the workmen

pointed this out to Mrs Haynes she contacted the Builder. Some discussion thereafter appears to have occurred between the Builder and the workmen and shortly afterwards the workmen began positioning the reinforcing steel mesh for the slab without excavating holes for any piers. Mrs Haynes became concerned that the engineer's design was being ignored and asked them to stop work.

- 7 Thereafter, some more meetings took place and it would seem from these that it was not the intention of the Builder to construct the slab in accordance with the engineer's design.
- 8 Finally, as a result of the Owners' persistence in demanding that the slab be correctly constructed in accordance with the plans and with the necessary permits, the Builder obtained another engineering design which also required piers. Consent of the council was obtained on 19 April 2011 and a permit was issued on 2 May 201. On 28 April 2011 it obtained the necessary consent for South East Water to construct the slab.
- 9 It appears that, at last, the Builder is now in a position to lay the slab but in the meantime a number of altercations have taken place between the Owners and the Builder's staff.
- 10 This work was ordered to have been done by 26 April 2011. It seems extraordinary, in the light of all the previous difficulties between these parties that the Builder should have taken such a casual and careless attitude to carrying out its obligations under the Tribunal's order. There is little doubt that, had the Owners not persisted, the slab would have been poured without piers, without a building permit and without the required consents. That is not what the order required.

The windows

- 11 In regard to the windows, I ordered those to be rectified and specifically did not specify the method of rectification. I pointed out in the reasons for decision that it was a substantial defect and I did not direct who the Builder was to engage to carry out the necessary work although I noted that it was the intention of the Builder to engage the manufacturer of the windows, Mr Stelling.
- 12 The Builder sent Mr Stelling out to the house to inspect the windows and what occurred is set out in a chain of emails between Mr Stelling, the Owners and the Builder. On this visit it appears that Mr Stelling expressed misgivings as to what could be done and whether there was sufficient adjustment on one window to rectify the problem. He pointed out that part of the problem was to do with lack of support for the mullions which was a carpentry problem and not something that he could address.
- 13 Notwithstanding this communication the Builder has not sent anybody out to address the problem concerning the support of the mullions, having left the window issue entirely to Mr Stelling. Further emails between the

parties show a complete breakdown of their relationship resulting in the Owners' refusal to allow Mr Stelling to return.

What to do

- 14 The question now becomes what I should do about the fact that the orders have not been complied with. The Owners are anxious that I order the Builder to go back and carry out the work. They point out that it would be extremely difficult for them to get anyone to do it, that they have been unable to obtain any tradesmen to pour the slab and that since the windows are manufactured by Mr Stelling's company, no other glazier will touch them.
- 15 Mr Cogley of counsel for the Builder points out, I think correctly, that the relationship between the parties has completely broken down. He says that if I order the Builder back the same or similar problems will be experienced and the parties will be back before me for a further hearing to enforce the further order.
- 16 There is a great deal of force in what the Owners say concerning their ability to get this work done. It was for that reason that I ordered the work done and that is stated in the reasons.
- 17 Although the Builder blames Mrs Haynes for interference and refusal of access, I think that her intervention in regard to the tank slab, although not strictly justified by the order, was understandable. It was also fortunate. Had she not intervened the slab would have been poured without a permit, without proper support and without the consents of South East Water and the council. Had the slab failed it would have been back before me and she might have been criticised for not having acted sooner.
- 18 In regard to the windows the Builder has abdicated any responsibility, having sent Mr Stelling out and done nothing to address the problem with the mullions that he identified.
- 19 It was the Builder's responsibility to comply with the order and the Builder has not done so. I do not accept that it is the Owners' fault that the order has not been complied with. It lies very ill in the mouth of the Builder to say now that if I order it to go back and do the work it will not do so. Nevertheless, I think that the parties have reached the end of their relationship and all I can do sensibly is to make a monetary order.
- 20 A monetary order in this context is, in effect, an award of damages for breach of the original building contract. Contractual damages are generally assessed on the basis of what would be required to put the innocent party into the position he would have been in if the contract had not been broken (see *Tabcorp v. Bowen Investments Pty Ltd* [2009] HCA 8).
- 21 In terms of the cost to be allowed, these amounts were largely quantified by the two experts' reports. I shall start with the costing of Mr Mackie, the

Owners' expert. There will also need to be some additions. Some time has now passed and it is likely that costs will have increased somewhat. In regard to the tank slab, the costing appears to have been on the basis that the piers to support the rear of the slab were already in position whereas in fact they are not. In regard to the windows, no allowance was made for work to the mullions.

22 Apart from the cost there is also the problem of the Owners as lay people having to find someone to do the work for the assessed costs. It is one thing for the Builder to source tradesmen. It employs tradesmen all the time and can obtain them readily and at competitive rates. It is quite another thing for the Owners to find someone. They are lay people with a defective house that they claim no tradesman will touch.

23 I do not accept that it would not be possible to obtain another tradesman to construct the tank slab, reinstall the tank and the associated stormwater plumbing and do the other bits and pieces that have to be done in connection with that. The windows may be more difficult and if indeed they are unable to get anyone to fix the windows by this manufacturer it may be that one or more of the windows will need to be replaced. That is no more than a possibility but it should be considered. One way or another, I do not accept that it is not possible to get anybody to fix the problems but I think that I should add a substantial contingency figure to the assessment the experts have given.

24 I will allow the following amounts:

Tank slab and associated work	\$10,000.00
Rubble in roof gutter	\$260.00
Window rubbers	\$27.00
Window sashes	\$2,000.00
Reinstallation of termite system	\$250.00
Contingency	\$3,000.00
Total:	\$15,537.00

COSTS

25 Both parties have applied for costs of the proceeding. The Owners apply for the following costs:

Mr Mackie's reports	
- October 2009	\$660.00
- March 2010	\$4,734.95
- December 2010	\$3,238.40
	\$8,633.35
Slidders Lawyers	\$4,454.12

AIF Lucas & Co.	\$5,232.00
VCAT lodgement fee	\$370.00

- 26 There is also a claim for lost income from Mr Haynes for attending, conciliation, mediation and the hearing, but those are not, as a matter of law, allowed. Having further considered the matter I think Mr Cogley is correct in this regard.
- 27 The Builder also applies for costs. The application is supported by an affidavit of its solicitor, Mr Czapnik sworn 21 June 2011. There are a number of bases of this application:
- a As a result of a mediation held in August last year, Terms of Settlement were entered into to the effect that the Builder would pay to the Owners \$4,000.00, construct the concrete slab for the water tank and then reinstall the tank. Since the Owners were unrepresented they had a two day cooling off period which they exercised. It is apparent that the order that I made at the hearing is much more favourable to the Owners than these terms of settlement.
 - b On 3 September 2010 the Builder submitted an offer of compromise pursuant to s112 of the *Victorian Civil and Administrative Tribunal Act 1998*. The offer was to pay the Owners the sum of \$15,000.00 plus costs in full settlement of all claims. When one adds the monetary amount that I have awarded to the value of the work I ordered to be done, the value of the order that I made is more valuable to the Owners than this offer of compromise unless I accept as the value of the work to be done the cost that the Builder would have incurred in doing it itself. I do not think that is an appropriate way of assessing the order. Mr Cogley pointed to the agreement to pay costs and while I agree that this is something I must take into account in assessing the value of the order I must also consider whether, had the matter been determined on that day I would have made an order for costs. As to that, I consider the conduct of the parties below.
- 28 Although it is correct to say that contractual liability is strict, building construction is not a perfect science. Things will be overlooked and mistakes will be made. An imperfection is not necessarily a defect. Some defects are of a nature that they are normally categorised as maintenance items to be repaired by the Builder during the maintenance period as they are noticed by the Owners.
- 29 This case goes well beyond that. Some of the defects were startlingly obvious. In some respects it was a badly built house and the attitude of the Builder in not attending to the problems was overbearing and wholly unreasonable. That is a strange thing to say of a major Builder in the market place but the construction of any house will normally only be as

good as the people who work on it and the supervisor who watches over them.

- 30 Throughout this dispute, culminating in the Builder failing to comply with the Tribunal's order, the Builder has shown an intention to pressure the Owners into accepting something that is well short of what they have paid for.
- 31 The Owners should not have been put to these expenses. Although the Builder asserts that Mrs Haynes has been particularly difficult, what is important is not personalities but substance. The Owners were entitled to receive what they had contracted for and consistently demanded throughout and had they not pursued the matter in the way they have done they would not have received it.
- 32 I will therefore make an order for the Owners' costs but I do not believe that I should allow both sets of solicitors' fees. It is not the Builder's fault that the Owners were so dissatisfied with their solicitors that they went to two separate firms.
- 33 The order will therefore be as follows:
1. Order that in lieu of the work ordered to be done pursuant to paragraph 1 of the Tribunal's order of 28 February 2011 the Applicant pay to the Respondents the sum of \$15,537.00.
 2. Order the Applicant to pay the Respondents' costs of this proceeding fixed at \$13,457.47.

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