VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D764/2009

DOMESTIC BUILDING LIST

CATCHWORDS

Domestic building dispute – provisional sum allowance – whether inclusive of GST – allowance of margin on excess expenditure – no allowance of margin on GST component

APPLICANT	Buzzbee Homes Pty Ltd (ABN: 76 116 637 536)
RESPONDENTS	David Gerry Beattie, Cheryl Beattie
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Small Claim Hearing
DATE OF HEARING	25 March 2010
DATE OF ORDER	30 April 2010
CITATION	Buzzbee Homes Pty Ltd v Beattie (Domestic Building) [2010] VCAT 511

ORDER

1. In regard to the complaint of defective workmanship I order the Respondent to pay to the Applicants $250.00.
2. The matters in dispute are resolved as follows:
   (a) I find that the Respondent is entitled to be paid $1,833.97 with respect to the excess of the cost of providing the drainage retention system over the provisional sum in the contract;
   (b) I find that the Respondent is entitled to be paid $722.70 with respect to moving the gas meter;
   (c) I find that the Respondent is entitled to be paid $126.03 interest on late payment of the deposit, $63.01 for late payment of the base stage, $320.80 for late payment of the lock up stage and $286.43 for late payment of the fixing stage but not to interest on the final payment or provisional sum claims.
   (d) I find that the Applicants are entitled to liquidated damages of $1,770.00 for late completion.

3. The Applicants' claims for loss of rent, the cost of excavation, the cost of a survey, engineering fees and the cost of obtaining replacement keys and remote controllers are dismissed.
4. The Applicants' application for costs, being for the cost of obtaining an expert's report, is refused.
5. Liberty to either party to apply, upon written notice to the other, for a further hearing to obtain any further orders to enforce these findings.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	Miss Brown, Mr Beltrami and Mrs Busby
For the Respondent	In person

REASONS

The Application

1 In this application the Applicant ("the Builder") seeks an order for $8,963.56. At the hearing this was amended to $8,908.86. The sum claimed is said to be due under a building contract that the Builder entered into with its former employee, Mr David Beattie and his wife ("the Owners"). The Builder also seeks an order for what it claims are its administration expenses in preparing the case, which it says are $1,050.00.

2 A number of the amounts that go to make up the claim were not disputed but in their counterclaim the Owners sought declaratory relief as to the correct amounts due in regard to some items and also made a number of claims of their own.

3 The matter came before me for hearing on 25 March 2010 with a full day allocated. I heard evidence from Miss Brown, Mr Beltrami and Mrs Busby for the Applicant and from Mr and Mrs Beattie in person. I was also given a brief report as to some of the matters by Mr Coghlan, a well known building expert. The case involved a number of quite complicated calculations and also an interesting interpretation point. I told the parties that I would consider the matter and provide them with a written decision.

Resolving the respective claims

4 Some of the items the Builder claims are not disputed but the parties have been unable to finalise the accounting between themselves because they

could not agree about their conflicting claims. I am uncertain what has been done concerning the undisputed items and so I propose to determine each of the disputes raised and make an order setting out what is due in regard to each disputed claim. It will then be for the parties to make the appropriate payments between themselves. I will reserve liberty to apply so that they can come back and seek a monetary order for any unpaid balance although that should not be necessary.

The stormwater retention system

5. There was a provisional amount allowed in the contract of $11,500.00. As was pointed out in the report of Mr Coghlan, a provisional sum allowance in a contract would generally be interpreted as being exclusive of GST. However, in this case on page 12 of the specifications where the provisional sums are set out, the provisional sums are all said to be inclusive of GST. Quite obviously because the Builder will be able to claim back an input credit on the charge of the supplier the actual cost to the Builder does not include the GST, nor is the Builder entitled to claim any margin on the GST. That was the interesting interpretation point argued. In this case the parties have agreed, albeit in the specifications rather than in the contract document itself, that the provisional sum of $11,500 includes GST and so the calculation must be on that basis. However care must be taken to ensure that the Builder does not receive two lots of GST or a margin on the GST.

6. The actual cost incurred by the Builder was made up of the drainer's bill and the cost of soil removal related to the retention system. The drainer's bill was for $15,125.00 but that was for all of the work that he did on the site. The quotation for the drainage was $13,365.00 which would include GST and drainage unrelated to the stormwater retention. There is a figure of $830.00 written in the handwriting of an employee of the Builder on this quotation which Mr Beattie said was what the drainage would have cost on a normal site. With GST this becomes $935.00. If we take that from the quote, the balance of the drainer's bill relative to this site would be $12,430.00 inclusive of GST.

7. The Trade order from the Builder to the drainer has slightly different figures. This purports to follow the drainer's quote and the standard drainage figure deducted is said to be $700 before GST. When that is deducted from the $12,150 for the two systems the pre GST figure becomes $11,45.00. The closeness of this figure to the provisional sum figure leads me to suspect that perhaps the words "(inc GST)" in the specification might have been a mistake. Nevertheless, the parties have signed the relevant page and there is insufficient for me to order rectification of the contract. When GST is added, the drainer's figure becomes $12,595.00. Since this is based upon the purchase order this is the figure that I think should be used.

8. The Builder spent $3,774.10 (including GST) excavating the site and taking the soil away. That included many items including the hire of machinery and transporting it to and from the site. Of that sum, the Builder claims

$2,212.00 as being referable to the removal of soil excavated for the drainage system. Despite the Builder's evidence I do not believe that such a high proportion of soil removed from the site related to the drainage system. The photographs tendered show extensive excavation of the site and although I am satisfied that there was some fill under the slab I think that it is likely that the great bulk of the soil removed related to the Builder's own work for the site cut and the underground plumbing and not to the stormwater retention system. In the absence of more reliable evidence I accept the assessment of Mr Coghlan in his report that an appropriate allowance to make for the soil related to the stormwater retention system would be $300.00 plus GST, which means $330.00.

9. The calculation then becomes as follows:

Construction of the system including excavation (incl GST)	$12,595.00
Add removal of soil (incl GST)	$330.00
	$12,925.00
Less provisional sum allowance (incl GST)	$11,500.00
Extra spent (inclusive of GST)	$1,425.00
Less GST	$142.50
Extra spent without GST	$1,282.50
Plus 30% margin on that	$384.75
	$1,667.25
Plus GST	$166.72
Extra to be charged by the Builder	$1,833.97

10. I deducted the GST from the extra before calculating the margin because a Builder is not entitled to charge a margin on GST. He can only charge a margin on the work and labour supplied.

Moving the gas meter

11. The contract provided that moving the gas meter was the Owners' responsibility. There were two things to be done in regard to moving the gas meter. The first was to move the meter itself which was to be done by the gas supplier. This was done and the Owners paid for it. The second task was to reconnect the gas meter from its new location to the existing house. Mr Beattie, whilst employed by the Builder, arranged for the Builder's plumber to do this second stage. The Builder paid the plumber and now seeks to claim this as a variation to the contract.

12. I agree with the Builder that the connection of the gas meter to the existing house from its new position was part of moving the gas meter and so was the Owners' responsibility. The money that the Builder has incurred is recoverable back from the Owners. However it was not a variation. There was no agreement between the parties to vary the contract. What has

happened was that Mr Beattie caused the Builder to pay this money in the mistaken belief that it was the Builder's responsibility. It was also not a sum spent in excess of a provisional allowance. There was no provisional sum in respect to the gas meter. It was the Owners' responsibility. What the Owners have done has caused the Builder to pay for it when it ought not to have done so. It is really a common law claim for money he had and received. It therefore does not attract a margin under the contract. The amount the Builder spent was $722.70 and this must be repaid by the Owners.

The Builders' claim for interest

13. The Builder claims interest on late payments. In regard to the claim with respect to the deposit, work commenced on the project on 31 October 2008. The deposit was claimed by the Builder on 6 November 2008 and it was not paid until 5 December, which was 22 days beyond the time allowed by the contract. The Builder claims interest of $126.03 under the contract for that period.

14. The Owners object that, under the terms of the contract, the Builder ought not to have commenced construction until after the deposit was paid. I think that is a spurious argument. The question is not whether the Builder ought to have commenced work. Although it did not have to commence the work before payment of the deposit it was entitled to do so. The question is therefore whether the time for payment of the deposit had fallen due and whether the deposit was paid within the time allowed by the contract. The Builder is therefore entitled to the interest claimed.

15. Payment is also claimed in regard to delay upon payment of completion. In this regard I note that there were delays in moving the meter box and the supply of the garage door. In regard to the door this was said to be due to a fire in the factory of the supplier and in regard to the meter box difficulties in obtaining two trucks to attend the site. The evidence was quite inadequate in regard to these and I am not satisfied that it is has been established that the delay in moving the meter box was something over which the Builder had no control. It seems rather to have been poor co-ordination and poor organisation. In any event, the meter box was not relocated until 1 September and the final payment was made on 4 September. That being so, there is no basis for the Builder to charge interest.

16. Interest is also claimed on the moneys which are the subject of these proceedings. I find that the overall amount claimed was quite excessive and so therefore not due. The other claims for interest were not disputed and so will be allowed as claimed.

The Owners' claim liquidated damages

17. Before being able to determine the Owners' claim for liquidated damages I need to deal with the claims by the Builder for an extension of time. The

first was with respect to the Christmas close down with respect to which 28 days is claimed. In most contracts the building period takes account of the Christmas close down and an extension of time is never claimed with respect to it in my experience. It is open to the parties to agree to such an allowance if they wish to do so but it is more usual to take it into account in calculating the building period. It seems strange to say in one part of the contract that the work must be completed by a particular date and then say in another part that that date is automatically extended by 28 days. As the Owners pointed out, there is no such allowance in the contract.

18. The Builder relies upon the following passage on page 12 of the Specifications:

> "Projects still under completion at the 19th December will automatically be provided with an extension of time of 28 days due to the holiday break period."

The page is signed by the parties.

19. In assessing the building period in the contract, the Builder was required by s. 32 of the *Domestic Building Contracts Act* 1995 to take into account any foreseeable break in the work. It is an offence not to do so. There can be no doubt that this was a foreseeable break in the work because the Builder inserted the above provision in the specifications. Nevertheless I have to read the contract as a whole and the contract includes the specifications which contain the allowance in clear terms. That being so, the 28 days sought is an amount the parties have specifically agreed to allow. The page agreeing to this bears the signature of the Respondents.

20. The second claim of 30 days relates to the supply of the garage door and the electrical meter box. As stated above, the evidence about this was quite unsatisfactory and I am not satisfied that that claim is established.

21. The third claim relates to the late payments. The Builder claims that, because it would have been entitled to suspend works each time a payment was not made on time it is therefore allowed an extension of time equivalent to the total of the periods of the late payments. That might have been the case if the Builder had actually suspended works but it did not do so. It is not entitled to any extension on that account.

22. As a result of these findings, the Builder is not 95 days over time, but rather 67 days over time. At the contract rate of $185.00 this amounts to $1,770.00 and the Owners are entitled to liquidated damages in that sum.

The Owners' claim for loss of rent

23. The Owners also claim damages for loss of rent of $660.00, being rental they say they would have earned had the project been finished on time.

24. The purpose of having a liquidated damages clause in a contract is to fix the amount of damages to which the owner is entitled in the event that the builder does not complete in time. It binds owners as well as builders. The Owners are not entitled to any further allowance.

The Owners' claim for cost of excavation

25. Before the construction commenced the Owners incurred expense of approximately $1,000.00 in excavating the driveway to the building site. I accept that may be the case but one cannot impose upon another party an obligation to pay for work done without that party's agreement. There is no evidence that the Builder agreed to the Owners undertaking this work on its behalf. The Builder might have benefited from the work but no allowance in favour of the Owners can be made.

The Owners' claim for the cost of Mr Coghlan's report

26. When the parties failed to agree the Owners consulted Mr John Coghlan who provided a report at a cost of $1,584.00. I was greatly assisted by Mr Coghlan's report but a claim for the recovery of the cost of it, which the Owners now make, is equivalent to a claim for costs. That is because it was not incurred in order to rectify anything wrong with the building or prepare a scope of works or do anything of that nature but rather, to provide evidence for this hearing.

27. The starting point for any application for costs before this Tribunal is s109(1) of the *Victorian Civil and Administrative Tribunal Act* 1998 which provides that all parties pay their own costs. Sub-section (2) provides that orders for costs can be made where it is fair to do so, having regard to certain matters including those set out in sub-section (3). In this case the overriding consideration is that this is a small claim and if orders for costs are readily made it may deter the parties from coming to the Tribunal and having these matters adjudicated upon. For that reason it is not the practice of this Tribunal to make orders for costs in small claims.

28. Further, in regard to the matters as to which Mr Coghlan's opinion was sought, the Owners were not wholly successful. I will not make any order with respect to Mr Coghlan's fees.

The Owners' claim for the costs of a boundary re-establishment survey

29. The Owners engaged a surveyor to survey the property and they seek to recover the costs of this from the Builder. Again, this was done without the consent of the Builder but the Owners suggested that it was part of the Builder's duty to get such a survey done. It was not suggested that there was anything in the contract to that effect and there is certainly no principle of law that requires a builder to engage a surveyor. If an owner wishes to have the property surveyed that may be a wise course, but it is not a cost which can be passed onto the builder.

Costs of engineering $110.00

30. Mr Beattie conceived of the idea of pouring the garage slab together with the house slab instead of pouring it as an infill slab. He says that this saved the Builder money and it would be fair for the Builder to pay him the $110.00 in engineer's fees in having the slab redesigned. It may well be

fair but there is no legal obligation on the part of the Builder to pay such a sum and I cannot make such an order.

Costs of keys and garage remotes

31. The Owners took possession of the property before payment of the amounts claimed by the Builder and against the Builder's wishes. In the course of doing so, they had fresh keys cut for the property and fresh remote controls for the garage door at a cost of $370.00. I am satisfied that at the time this expense was incurred there were amounts due to the Builder. This was a voluntary payment by the Owners and there is no basis to justify an order for payment of it by the Builder.

Bath repairs

32. According to the Owners there is a leak in the hob of the bath. They have complained to the Builder but the Builder refused to attend to it on the basis that it had not been paid all of the money due to it. It claimed and still claims that until this matter is resolved it is only liable to attend to structural repairs. There is no legal basis for that opinion. The Builder is bound by the contractual warranties including the implied warranties set out in s.8 of the *Domestic Building Contracts Act* 1995. It is responsible for the cost of rectifying any defective materials or workmanship.

33. There is no evidence as to the precise nature of the defect but a bath hob should not leak. The Builder has been given an opportunity to rectify it and has refused to do so. The Owners claim a modest $250.00 in damages with respect to the defect on the basis that Mr Beattie, a tradesman, will fix it himself. I cannot see that any professional quantification of the cost of any rectification work would be as little as that and so I will order that the Builder pay the Owners that sum. Such an order will of course be compensation for the damage described in the evidence namely, a leaking bath hob. If the defect should turn out to be more serious than the Owners think then that is their risk. They have been compensated for that defect.

34. Finally, the Owners sought to raise a complaint about defective sliding doors. I refused to allow this to be raised because it was not part of the application and the Respondent had not had notice of it. Clearly, if the doors are defective the Builder is responsible but I cannot deal with it now. Unless that can be sorted out between the parties it will have to be the subject of another claim.

SENIOR MEMBER R. WALKER