

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D1183/2013

CATCHWORDS

Domestic building contract – defective works alleged – assessment of damages, including damages for loss of amenity.

APPLICANT: Mrs Cathy Jacqueline Sylvie Clearwater

RESPONDENT: Wilson McDowell Property Group Pty Ltd (ACN: 091 641 011) t/as Sandhurst Housing and Design

WHERE HELD: Melbourne

BEFORE: Member A Kincaid

HEARING TYPE: Hearing

DATE OF HEARING: 29 April 2014

DATE OF ORDER: 29 April 2014

DATE OF WRITTEN REASONS 11 June 2014

CITATION Clearwater v Wilson McDowell Property Group Pty Ltd (Domestic Building) [2014] VCAT 685

ORDER

For the reasons given orally, the Respondent must pay the Applicant \$3,358.

MEMBER A KINCAID

APPEARANCES:

For Applicant Mrs C. Clearwater in person

For Respondent Mrs A. Oliver of the Respondent

REASONS

- 1 I heard this proceeding on 29 April 2014 and made my decision, giving reasons orally. By email dated 8 May 2014 lawyers for the applicant sought written reasons, and so I publish those reasons. They are essentially a transcript of the oral reasons, with some minor corrections to syntax.
- 2 Mrs Cathy Clearwater (the “**applicant**”) and her husband are the owners of a property at 22 Stephenson Road, Huntly, Victoria. Wilson McDowell Property Group Pty Ltd trading as Sandhurst Housing and Design (the “**respondent**”) constructed the house on the property. The occupancy permit was issued on 23 November 2012.
- 3 In response to certain defect claims by the applicant, on 24 May 2013 a Mr Sambrook, an inspector appointed by the Building Commission, undertook an inspection. Mr Sambrook identified various defects in his report dated 12 June 2013 (the “**BC report**”).
- 4 By an application dated 30 October 2013 filed with the Tribunal, the applicant claims the total sum of \$9,828.30 from the respondent. This is the total of various quotations that she has obtained for the rectification of items 4, 6, 12, 14, 19, 20, 22, 24 and 27 described in the BC report.
- 5 Included in the total sum claimed is a claim for \$3,500 for “compensation” for those matters described in Items 17 and 18 of the BC report.
- 6 The claims are further described in the applicant’s letter to the Tribunal dated 30 October 2013.

AGREED ITEMS

- 7 Item 14 is a claim for the cost of cleaning splashes of red paint from the front Colorbond fence of the property. The parties agreed during the hearing that the respondent would pay \$50 to the applicant for these works.
- 8 Item 19 is a claim for the cost of the applicant installing another black façade coach-light. The applicant submitted that this was necessary to compensate for the specified front coach-light being installed “too far to the right”. The parties agreed during the hearing that the respondent would pay \$250 to the applicant for these works.

ITEMS REMAINING IN DISPUTE

Fly Screen

- 9 Item 24 is a claim for the cost of re-meshing a fly-screen at \$108.00. The applicant says that she agreed with Mr John Oliver of the respondent that she should include a claim for this amount in her List of Defects, which was tendered by her during the hearing. I note that it was included by her in the List of Defects. The BC report concludes that it cannot be determined whether this was damage for which the builder was responsible, or whether it is damage subsequently caused. Given its inclusion in the List of Defects,

and the evidence of the applicant, I accept that it existed at the time of the applicant first occupying the house. I award \$108.00 for this item.

Loss of Amenity

- 10 Items 17 and 18 are claims for compensation in the amount of \$3,550.00 for:
 - (a) the meter box being installed on the west side of the house rather than the east side as shown on the plans (plan 01/08); and
 - (b) the downpipe being installed on the front of the house rather than the west side as shown on the plans (plan 01/08).
- 11 Mrs Oliver of the respondent gave evidence that the meter box was installed on the west side of the house because the electrical pit for the electricity connection is located at the north-west corner of the property (see site layout plan 04/08).
- 12 She said that rather than laying electrical trenches and cabling under the front garden, to the eastern side of the house to where the meter box was required by the plans to be located, it was obviously more practical to place the meter board on the west side of the house. She gave evidence that Mr Oliver of the respondent expressly raised with the applicant this proposal to relocate the meter box. When he did so, she alleges the applicant agreed with the proposal.
- 13 Mrs Oliver also gave evidence that as a consequence of the meter board being placed on the west side it became necessary to move the downpipe. This was because it is not safe to locate a downpipe in such proximity to a meter box.
- 14 The applicant denies that such a conversation occurred but, even if it did, she would not have done so had she also been informed that a necessary consequence would be that a downpipe, required by the plans to be located on the west side of the house, would need to be relocated to the front façade of the house.
- 15 It cannot be reasonably expected that the applicant will change the current locations of the meter board and the downpipe, and she did not contend otherwise.
- 16 There is no documentation as would support the claim of the respondent concerning the alleged agreement of the applicant to the proposal by which the meter box would be moved, and the downpipe as a consequence.
- 17 It is open to this Tribunal to award a sum of damages for loss of amenity where there has been a technical breach of contract, but which has not resulted in damages being incurred by the owner (whether by way of cost of rectification or diminution in value). Even if the applicant had claimed the cost of rectification, I would have rejected it, in reliance on the decision of

*Bellgrove v Eldridge*¹. That decision is authority for the proposition that although the cost of rectification is the *prima facie* measure of damages, the work proposed to be undertaken must be necessary to produce conformity with the contract, but that also, it must be a reasonable course to adopt. I would not consider that awarding the cost of rectification in respect of such a technical breach would have been a reasonable course to adopt in the circumstances.

- 18 Awards of damages for loss of amenity are typically modest. This case will be no exception. I shall award the sum of \$350.00 in respect of the claim for \$3,500.00.
- 19 This leaves for decision the balance of claims numbers 4, 6, 12, 20, 22 and 27.

Doors

- 20 The applicant has provided a quote from Bendigo Taskmaster dated 17 October 2013 for \$1,423.00 including GST in respect of items 6 and 20.
- 21 Item 6 is a claim for the replacement of a french door between the playroom and the kitchen which has a gap, when closed, which is allegedly outside acceptable tolerances. The BC report also states that the door is out of alignment, having regard to Section 8.05 of the *Guide to Standards and Tolerances*.
- 22 Mr Jones, a builder engaged by the respondent, states in his report that the gap is only a millimetre, at the top of the right-hand door. His view is that the gap is due to a 'whine' in the jamb which, he contends, is a typical outcome from using natural products, and that it is not a defect.
- 23 I have reviewed the photograph of the door provided to me by the applicant. I am satisfied that there appears to be an 8 mm gap at the top of the right-hand door. I am satisfied that this is a defect and the door will need to be replaced. I make an order for \$470.00 in regard to this door, being one third of the Bendigo Taskmaster quote.
- 24 The other three doors the subject of the Bendigo Taskmaster quote are the front door, the garage door and the replacement of the striker latch on the laundry door. These are all described in item 20 of the letter from the applicant dated 30 October 2013.
- 25 In regard to the front door and the garage door, evidence given on behalf of the respondent suggests that the doors can simply be packed out at the hinges and/or have foam strips installed in the jamb. The applicant says that the front door measures 820 millimetres at the top and 815 millimetres at the bottom. I have reviewed the photographs of the front door provided by the applicant. I am satisfied that there is a defect here and that I should award a further \$470.00 for the replacement of the door, being one third of the Bendigo Taskmaster quote.

¹ (1954) 90 CLR 613 at 617 (per Dixon CJ, Webb and Taylor JJ)

- 26 The garage door is the third door covered by the Bendigo Taskmaster quote. I am not satisfied that the only remedy for this door is to replace it. I consider that packing out the door's hinges, and possibly installing foam, should produce an acceptable outcome.
- 27 I also accept the applicant's evidence that the laundry door does still not close. In the circumstances, I award \$200 in respect of packing out the garage door, and the cost of re-setting the striker latch in the laundry door.

Kitchen

- 28 Item 4 of the claim arises from there being no ceiling above the fridge recess. Mrs Oliver gave evidence that the respondent filled the gap in the ceiling with a melamine insert, but the applicant wishes to replace it with a plasterboard ceiling and cornicing. The applicant relies on a quotation of Bendigo Central Plastering dated 23 October 2013 for \$375 including GST (which also includes an amount for rectification of the defect claimed in item 12). I am not satisfied that the applicant is entitled, in all the circumstances, to damages in respect of this item. I therefore disallow the sum of \$275.00 of the \$375.00 contained in the quotation.
- 29 This leaves a balance of \$100 of the Bendigo Central Plastering quote relating to the cost of rectifying the patio cornice. Apparently there is a gap between two lengths of cornice which is still visible. This is referred to in item 12 of the BC report. The respondent agrees that the cost of rectifying this work would be in the order of \$100.00 for labour and materials, and so I award \$100.00 of the total quote of \$375.00.

Architraves

- 30 Item 22 of the claim relates to split architraves in both the windows and the doors, arising from where nails have been inserted too close to where the mitre occurs.
- 31 The applicant says that 32 architraves are affected. The respondent submitted that a Mr Watson was first engaged to patch and make good these splits. Subsequently, a Mr Burchmore was engaged by the applicant to do the same. The applicant says that the defects remain. There is disagreement on whether the respondent has in fact rectified all the affected areas claimed by the applicant. She says that she simply told the respondent that "all architraves should be attended to", and they simply were not. The respondent says that filling all the cracks and making good with a white silicone product will take about three hours at about \$60.00 an hour. I accept that evidence. I award \$180.00 for item 22.
- 32 Item 27 relates to the rectification of nail holes in the quads between the floating floor and the skirting. The photos provided by the applicant indicate that these gaps have largely been filled, but not sanded. This could be done by a painter at the same time as he attends to do the patio cornice

(see above). I also award therefore damages of \$180.00 for this item, comprising three hours work at about \$60.00 an hour.

Painting

- 33 The applicant also relies on a quote dated 25 October 2013 for \$4,172.30 provided by John Nalder & Sons, in relation to painting and associated work. This relates to the painting of the front and back doors; the new door in the lounge and the garage door. It also includes varnishing around the around the quads, painting the alfresco ceiling (on the basis that a complete match up could not otherwise be obtained with the cornice) and painting consequent upon the repair of cracks around the timber architraves.
- 34 I have already determined that the garage door does not need replacing, nor do the quads need varnishing. I have dealt above with the claim for the split architraves and I have awarded \$180.00 in regard to that aspect.
- 35 This leaves painting to the front door, the laundry doors and the new french door, to which the quote remains relevant. I was hoping to hear short evidence from the respondent about this aspect on the resumption of the hearing, following the short adjournment taken for the purpose of my considering my decision. The representatives of the respondent are no longer in attendance, so it is no longer possible to do so. Doing the best I can, of the total quote of \$4,172.30, I determine that the applicant is entitled to \$1,000.00.
- 36 I therefore make an order that the respondent pay the applicant the sum of \$3,358.00.

MEMBER A KINCAID