VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. BP367/2018

BUILDING AND PROPERTY LIST

CATCHWORDS

Defective concreting work – section 184 of the *Australian Consumer Law and Fair Trading Act* 2012 *Australian Consumer Law* guarantees – *Domestic Building Contracts Act* 1995 warranties – non-appearance by respondent – no reasonable excuse

APPLICANT	Bruno Galgano
RESPONDENT	Michael Perry t/as Michael Perry Concreting (ABN: 27 915 082 979)
WHERE HELD	Melbourne
BEFORE	Senior Member S. Kirton
HEARING TYPE	Small Claim Hearing
DATE OF HEARING	1 May 2018
DATE OF ORDER	7 May 2018
CITATION	Galgano v Perry (Building and Property) [2018] VCAT 687

ORDERS

1. The respondent must pay to the applicant damages in the sum of $13,420.

2. The respondent must, in addition, reimburse to the applicant the filing fee paid by the applicant of $209.

Note:

The total amount to be paid by the respondent to the applicant under these orders is $13,629.

SENIOR MEMBER S. KIRTON

APPEARANCES:

For the Applicant	Mr B. Galgano in person
For the Respondent	No appearance

REASONS

Background

1. On 17 January 2017, the applicant engaged the respondent to pour a concrete driveway and build a sleeper retaining wall at his beach house in Rye (among other things). The applicant was not satisfied with the work that was done and made an application to Domestic Building Dispute Resolution Victoria (DBDRV) in May. This is the body established to provide a mandatory conciliation process for domestic building disputes in Victoria in accordance with Part 4 of the *Domestic Building Contracts Act* 1995 ("the DBC Act"). The parties attended a conciliation conference in November and reached an agreement whereby the respondent was to carry out certain rectification works by 27 January 2018[1].

2. The respondent failed to carry out any works pursuant to the agreement (or at all) and DBDRV issued the applicant with a "Notice of Decision – Non-Compliance With Record Of Agreement"[2] on 21 February 2018 and a "Certificate of Conciliation – Dispute Not Resolved"[3] on 14 March 2018.

3. This proceeding was brought by the applicant following the DBDRV process to seek an order that the respondent compensate him for the defective works. The proceeding was issued in VCAT on 15 March 2018 and was heard and determined on 1 May 2018. These reasons are being provided for the benefit of the respondent.

The hearing

4. There was no appearance by the respondent at the hearing. At 3:01pm on 30 April 2018 he sent the Tribunal by email a Request for Adjournment. The grounds given were "medical reason (feeling very unwell due cold/flue) & not wishing to spread it to others". He said that he had attached a medical certificate but none was attached. The Tribunal Registry telephoned the applicant who advised that he did not consent to the adjournment. On my instructions, the Tribunal then sent an email to the respondent at 4:27pm advising that the adjournment was not granted and the matter remained listed for hearing at 10am on 1 May 2018.

5. The respondent sent a further email on 30 April at 6:37pm in which he said "I will not be attending tomorrow as I am unwell and am not fit for this appointment". He attached a medical certificate which stated "Mr Michael Perry has a medical condition and will be unfit for work from 30/04/18 to 03/05/18 inclusive". This email made it to the Tribunal's file at about 10:20am on 1 May, while the hearing was underway.

[1] Record of Agreement issued pursuant to section 46F DBC Act dated 10 November 2017
[2] Issued pursuant to section 46H of the DBC Act
[3] Issued pursuant to section 46E of the DBC Act

6. I reviewed the respondent's request but refused the adjournment. This was because of the history of this matter, the lateness of the request and the lack of information from the respondent as to why he could not attend. The respondent is already in breach of the agreement that he made through DBDRV and despite having so been since 27 January 2018, has made no attempts to remedy the breach. He then waited until late on the afternoon before the hearing to apply for an adjournment, and even later to provide a medical certificate. He made no effort to obtain the applicant's consent. The medical certificate itself is not specific as to the nature of the illness and while it says he is not fit for work, it does not say he is not fit to attend the Tribunal.

7. I proceeded to hear the applicant's claim. He gave evidence and provided documents to support his claim.

The claim

8. The applicant and the respondent entered into a contract ("**the Contract**") when the applicant accepted the respondent's quote No. 10201 dated 17 January 2017 ("**the Quote**").

9. The Contract was for the sum of $17,000 and the works were set out in the Quote, as follows:

- exposed agg (eastern beach)
- 100mm thick
- F62 mesh
- Saw cuts
- Acid wash
- Excavation & remove spoil
- crossing
- sleeper wall
- rough in power cable for two gates
- extra 20.7m3 charcoal concrete to side of house
- galvanised HBC beams for wall
- remove old retaining wall

10. The applicant says that because the property was his beach house he did not view the works in progress. He knew the respondent from a previous job and trusted him. The respondent showed him photos of the completed works at the time he asked for final payment. The applicant has paid the full amount of $17,000.

11. The applicant says that what was installed did not match the works specified and was defective. He obtained an independent report from A. Gladman of CRL Pty Ltd dated 30 April 2017 which itemised the issues. The complaints are as follows:

    a. Crossover – has been constructed in plain grey concrete, not exposed aggregate Eastern Beach as required

    b. Concrete driveway - is defective, with

        i. exposed aggregate wash inconsistent and patchy;

        ii. concrete not 100mm thick in many places, most significantly along the edges;

        iii. edges not straight.

    c. Retaining wall construction –

        i. black lining plastic not adequately installed behind retaining wall;

        ii. upright H beam posts not cut to correct length;

        iii. sleepers cut on incorrect angles.

12. The applicant said that the respondent's main defence to the claim was that the Contract did not require the crossover to be exposed aggregate. He told the applicant that the Council would not allow it and so he provided plain concrete. The applicant disputed this and phoned the Council officer, who told him that there is no such restriction. In fact, many of the other properties in the street have crossovers of exposed aggregate or asphalt.

13. The applicant said that in any event, he had told the respondent at the time of asking for the Quote that the crossover was to be in exposed aggregate, like the driveway. He relies on the wording of the Quote, which singles out one area to be in charcoal concrete (the side of the house) but does not differentiate between the finishes of driveway and the crossover.

14. As for the defective items, the applicant relied on the CRL report and colour photographs which he provided to the Tribunal.

15. Based on the evidence of the applicant, especially the wording of the Quote, I am satisfied that the Contract required the crossover to be constructed in exposed aggregate Eastern Beach. Similarly, based on the expert report of CRL and the photographs I was shown, I am satisfied that the defects complained of exist and were caused by the respondent.

16. The applicant has obtained two quotations from other contractors to rectify the defective and incomplete works. He seeks an order for the payment of money, rather than allowing the respondent to carry out the works. He said the relationship between them has broken down since he gave him the opportunity to rectify at DBDRV, when the respondent walked away from that agreement and has since sent abusive text messages.

17. Although this matter was the subject of an agreement at DBDRV, that agreement is not binding nor enforceable. In fact, section 46H of the DBC Act provides that if an agreement is not complied with, then it ceases to have effect. As a result, the remedies available to the applicant include those provided:

    a. in section 184 of the *Australian Consumer Law and Fair Trading Act* 2012 ("the ACLFTA"), since this is a dispute or claim arising between a purchaser of goods or services and a supplier of goods or services in relation to a supply of goods or services within the meaning of section 182 ACLFTA;

    b. in sections 259 and 267 of the *Australian Consumer Law* ("the ACL") as the respondent was supplying to the applicant as a consumer, services in trade or commerce, the applicant was entitled to the benefit of a guarantee under sections 54 and 60 of the ACL that the goods supplied would be of acceptable quality, fit for purpose and the services supplied would be rendered with due care and skill; and

    c. section 53 of the *Domestic Building Contracts Act 1995* ("the DBCA") as the respondent has breached the implied warranty created by s 8(a) of the DBCA that the work would be carried out in a proper and workmanlike manner[4].

18. In performing the work under the Contract defectively and not in accordance with the Quote, the respondent has breached the Contract, breached the guarantees created by the ACL and (arguably) the implied warranty created by the DBCA.

Findings regarding damages

19. The two quotations obtained by the applicant from other contractors are to rectify the defective and incomplete works. One is from AGW Concreting dated 10 April 2017 for $13,420 and one is from R-Con dated 24 April 2018 for $14,355.

[4] I note that DBDRV accepted that this dispute arose from "domestic building work" within the meaning of the DBCA. I make no findings one way or the other, but note the definitions of landscaping in section 5.

20. Based on the respondent's breaches of contract and warranties, the applicant is entitled to damages for the breaches. I accept that the sum of $13,420 is a reasonable amount for the rectification of defective work, based on the lower of the two quotations.

Finding regarding reimbursement of filing fee

21. As the applicant has been substantially successful in his claim, he is entitled under s 115B of the *Victorian Civil and Administrative Tribunal Act* 1998 to an order that he be reimbursed by the respondent the filing fee he paid, in the sum of $209.

22. The applicant advised that although he had incurred other costs in this proceeding, he would make no claim for them at this time. However he reserved his position if the matter is reopened.

Orders

23. The orders I will make are as follows:

    1) The respondent must pay to the applicant damages in the sum of $13,420.

    2) The respondent must, in addition, reimburse to the applicant filing fee paid by the applicant of $209.

    Note:

    The total amount to be paid by the respondent to the applicant under these orders is $13,629.

SENIOR MEMBER S. KIRTON