

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO BP1219/2015

CATCHWORDS

DOMESTIC BUILDING – Damages – Monies in hand need to be taken into account in assessing the net loss and damage suffered.

APPLICANT	Abi Harrington
RESPONDENT	Chris Hansen
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	In Chambers
LAST DATE FOR WRITTEN SUBMISSIONS	4 December 2015
DATE OF ORDER	10 December 2015
CITATION	Harrington v Hansen (Building and Property) [2015] VCAT 2017

ORDER

1. The Respondent must pay the Applicant \$2,439 on the Applicant's claim.
2. The Respondent must pay the Applicant \$575, being reimbursement of the Tribunal application filing fee.

SENIOR MEMBER E. RIEGLER

REASONS

INTRODUCTION

1. This proceeding relates to a dispute between the Applicant owner of a residential property located in Mount Eliza and the Respondent, who contracted with the Applicant to supply and erect glass panel pool balustrading around a swimming pool located on the Applicant's property. The proceeding was listed for hearing on 25 November 2015. Although both parties were served with a notice of hearing, the Respondent did not appear on that day. Nevertheless, the hearing proceeded and sworn evidence was given by the Applicant in support of her claim. At the conclusion of that hearing, I made findings that the contract between the Applicant and the Respondent had been lawfully determined by the Applicant, following the Respondent's repudiation of that contract. However, the proceeding was unable to be concluded on that day because the Applicant was not in a position to provide evidence as to the quantum of her claim. Consequently, the proceeding was adjourned to allow the parties to file submissions as to the quantum of the loss and damage allegedly suffered by the Applicant. Orders were made to that effect.

APPLICANT'S CLAIM

2. The Applicant has filed written submissions on the question of quantum, together with copies of invoices or quotations supplementing and corroborating her submissions. No written submissions have been filed by the Respondent. Further, my orders of 25 November 2015 also gave liberty to the Respondent to be heard on the question of damages (in lieu of filing and serving written submissions), subject to him exercising that liberty by 4 December 2015. Again, no communication has been received from the Respondent requesting that the matter be relisted for hearing. Accordingly, I will proceed to determine the quantum of the Applicant's alleged loss and damage based on her written submissions and supporting documents filed by her.
3. During the course of the hearing on 25 November 2015, the Applicant gave evidence that she had paid the Respondent a total of \$10,259. The Applicant produced a copy of a revised quotation from the Respondent, which stated that the total contract price was \$11,690. Therefore, the amount that would have been left to pay under that contract, had the work been properly completed by the Respondent, is \$1,431.
4. In the Applicant's written submissions on quantum, the Applicant states that her claim amounts to \$4,445, calculated as follows:

Outstanding repairs	Quotation # 834	\$2,520
Mandatory repairs completed for pool safety	Invoice # 833	\$1,350
Claim for reimbursement of application filing fee		\$575
Total value being claimed for		\$4,445

5. In my view, the Applicant's claim fails to take into account monies that would otherwise have been paid under the contract, had that contract been properly performed. In other words, had that contract been performed without any defects, the Applicant would have been required to pay the full amount of the contract price. Therefore, those 'outstanding' monies should be brought into account in order to calculate the true measure of the Applicant's net loss and damage.
6. The general rule relating to damages for breach of contract, as stated by Park B in *Robinson v Harman*,¹ is:

... that where a party sustained a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.²
7. In circumstances where a contract has not been fully or properly performed, resulting in additional expenses incurred or to be incurred by the one party in order to achieve conformity, those additional expenses represent the amount required to put that party into the same situation, with respect to damages, as if the contract had been fully or properly performed. However, where monies remain left to be paid under such a contract, the net amount of any expenses over and above the original contract price must take into account those unpaid monies.
8. I accept the Applicant's evidence that she has paid the Respondent \$10,259 to date and that she has spent a further \$1,350 in rectifying defects to allow an occupancy permit to be issued in respect of the construction of the pool and associated glass balustrade. I further accept the Applicant's evidence, as corroborated by a quotation from *Krystal Glass Fencing*, that it will cost her a further \$2,520 to rectify the items described in paragraphs A(b), (c) and (f) of my *Findings* set out in my orders dated 25 November 2015.
9. However, as I have already indicated the amount that would have been paid had the contract been properly performed (\$1,431) needs to be taken into account. That amount is to be deducted from the cost of

¹ [1848] 154 ER 363.

² *Ibid* at 365.

rectification, resulting in a net cost over-run of \$2,439. This is the amount over and above the contract price, which the Applicant will be required to pay in order to make good the defects so as to be put into the same situation had the contract been properly performed.

CLAIM FOR REIMBURSEMENT OF FILING FEE

10. The Applicant further claims reimbursement of the Tribunal application fee of \$575.30. Section 115B of the *Victorian Civil And Administrative Tribunal Act 1998* provides that the Tribunal may make an order that one party pay the other's costs of any fee paid by that party in the proceeding, having regard to the matters set out under s 115B(3) of that Act. In my view, it is fair to order that the Respondent reimburse the Applicant for the full amount of the filing fee paid by her, given that her claim was uncontested. In other words, nothing has been raised by the Respondent to say that the Applicant's claim was misconceived or without merit. Nevertheless, despite repeated requests by the Applicant to the Respondent to remedy the defective work, no further communication was received from the Respondent. Therefore, the Applicant had no choice but to issue this proceeding.

SENIOR MEMBER E. RIEGLER