

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP587/2015

CATCHWORDS

Contract for painting works. Contract terminated prior to completion. Termination justified. Assessment of damages.

APPLICANTS	Helen Papadopolous, Paul Papadopoulos
RESPONDENT	Hands Free Painting Pty Ltd (ACN: 146 647 458)
WHERE HELD	Melbourne
BEFORE	Senior Member M. Farrelly
HEARING TYPE	Small Claim Hearing
DATE OF HEARING	25 June 2015 and 27 July 2015
DATE OF ORDER	31 August 2015
CITATION	Papadopoulos v Hands Free Painting Pty Ltd (Building and Property) [2015] VCAT 1366

ORDERS

1. The Respondent, Hands Free Painting Pty Ltd, must pay the Applicants \$2,993.
2. In addition, the Respondent must pay the Applicants \$525.60 as reimbursement of the application fee paid by the Applicants.
3. The Respondent's counterclaim is dismissed.

SENIOR MEMBER M. FARRELLY

APPEARANCES:

For the Applicants	Mrs H. and Mr P. Papadopoulos in person
For the Respondent	Mr Rabiee, director, in person

REASONS

- 1 On 31 October 2013, the Applicants, Mr and Mrs Papadopoulos, engaged the Respondent to carry out painting works to their home in Seddon, Victoria (“the home” and “the contract”). The Applicants say the painting works carried out were of very poor quality. Following a heated dispute with the Respondent’s director, Mr Rabiee, on 2 December 2013, Mrs Papadopolous terminated the contract before the works were fully completed.
- 2 In this proceeding, the Applicants claim damages in respect of the cost they say they will incur to complete the painting works, including rectifying the defects, and associated damage to the home, in the painting works. The Respondent brings a counterclaim seeking payment for the works it carried out.

THE HEARING

- 3 The proceeding was listed for a half day hearing on 25 June 2015. On that day, Mr and Mrs Papadopoulos each gave evidence. They also produced and relied upon an inspection report prepared by a consultant Mr McKinnon. Mr McKinnon did not attend the hearing that day to give evidence.
- 4 For the Respondent, Mr Rabiee gave evidence. Mr Pareasty, an employee of the Respondent, also gave evidence.
- 5 At the conclusion of evidence on 25 June 2015, I advised the parties that I wished to conduct a view of the home. The view was conducted on 27 July 2015. Mr and Mrs Papadopoulos and Mr McKinnon were present at the view. Mr Rabiee also attended the view with his friend, Mr Shahverdi.

CLAIMS AND EVIDENCE

- 6 Mrs Papadopoulos, on the recommendation of an extended family member, contacted the Respondent to quote on the painting works to the home. Mr Rabiee attended the Applicants’ home on a couple of occasions in October 2013 to inspect the home and to discuss the proposed painting works with Mrs Papadopoulos. Mr Rabiee subsequently provided a written quotation to Mrs Papadopoulos dated 25 October 2013 (“the quotation”) which sets out the proposed scope of works to be carried out for a price of \$6,500 plus GST. Mrs Papadopoulos, for herself and on behalf of her husband, accepted and signed the quotation on 31 October 2013, thereby creating the contract with the Respondent.
- 7 Because much of the interior of the home was to be painted, Mr and Mrs Papadopoulos moved out of their home while the works were being carried out. The works also included some exterior painting to the front door, some fascias, eaves and gutters.
- 8 The works commenced on around 15 November 2013. On about 19 November, the Applicants paid a “deposit” of \$2,000 to the Respondent.

From the outset, Mrs Papadopoulos attended the home on a daily basis and kept a close eye on the works. She frequently gave directions to the Respondent's employees.

- 9 Shortly after the works commenced, Mrs Papadopoulos reached the view that the paint and tools being used by the Respondent's workers were unsatisfactory. She promptly went and purchased, and provided to the Respondent's workers, a substantial quantity of new Dulux paint and some new brushes and rollers. She took this action entirely of her own volition. There was no discussion or agreement with Mr Rabiee or anyone else on behalf of the Respondent as to whether the Respondent should reimburse Mrs Papadopoulos for the cost of the paint and goods she purchased.
- 10 Mr Rabiee says that Mrs Papadopoulos constantly interfered with the progress of the painting works and refused to allow him reasonable access the home to supervise the work of his [the Respondent's] employees.
- 11 Having heard evidence from both Mr Rabiee and Mrs Papadopoulos, I am satisfied that Mrs Papadopoulos was present every day at the home during the course of the painting works and that she often provided uninvited directions to the Respondent's employees. The relationship between Mrs Papadopoulos and Mr Rabiee deteriorated to the extent that Mr Rabiee was permitted only limited access to the home as permitted by Mrs Papadopoulos.
- 12 The tension between Mrs Papadopoulos and Mr Rabiee came to a head on 2 December 2013 when the painting works were nearing completion. Mr Rabiee spoke to Mrs Papadopoulos by phone in the middle of the day. He advised her that the painting works were expected to be completed by around 7:00 p.m. later that day. He said that he would attend the home that evening and that he expected to be paid the full contract balance owing. He says that Mrs Papadopoulos told him that she would pay the balance owing.
- 13 Mrs Papadopoulos agrees that there was a phone call and that Mr Rabiee advised of his intention to attend the home and that he expected to be paid the full balance of the contract sum. She denies that she agreed to pay the full contractual balance.
- 14 Mr Rabiee did attend the home on the evening of 2 December 2013. Some of the Respondent's employees were still completing the painting works. Mr Rabiee carried out a short inspection of the works before he was approached by Mrs Papadopoulos and an argument ensued. Mr Rabiee says that he asked for his [the Respondent's] money, however Mrs Papadopoulos refused to pay the full contractual balance and instead paid him only \$1,000. He says that Mrs Papadopoulos promised to attend his shop the following week to pay the full balance. He says also that Mrs Papadopoulos terminated the Respondent's engagement by demanding that Mr Rabiee and all of the Respondent's workers immediately leave the home.
- 15 Mrs Papadopoulos agrees that she made a payment of \$1,000 to Mr Rabiee, however she denies making any promise to pay the contractual balance the following week. Ms Papadopoulos also agrees that she brought the contract

to an end by requiring Mr Rabiee and all of the Respondent's workers to immediately leave the home on 2 December 2013 before the painting works were completed. She says that her action was justified in circumstances where Mr Raibee was demanding full payment for the job when it was apparent to her that the painting works carried out were of very poor quality and that the Respondent had neither the skill nor the will to complete the works satisfactorily.

- 16 Mr Rabiee says the termination of the contract was not justified and that the Respondent was unfairly denied a reasonable opportunity to complete the works, including final touch up and cleaning.
- 17 Some time after 2 December 2013, the exact date being unknown, the Respondent sent to the Applicants an invoice dated 2 December 2013. The invoice identifies the quotation sum, \$6,500, an additional sum of \$2,200 for "*supplementary*" works, and GST on both sums for a total of \$9,570. The Applicants say they first sighted the invoice after the commencement of these proceedings. Mr Rabiee is unsure as to when the invoice was actually sent to the Applicants. In this proceeding, the Respondent claims \$6,570, being the invoice sum less the \$3,000 already paid by the Applicants.
- 18 The Applicants say that the painting works carried out by the Respondent are of such poor quality that rectification will require wholesale sanding and repainting of all areas. She says further that there are extra costs to be incurred to clean paint marks and splatter. The Applicants claim damages in the total sum of \$29,905, calculated as follows:

(a)	Cost to sand and re-paint all areas (per quotation obtained form an alternative painter)	\$17,490
(b)	Cost of alternative accommodation for 14 nights while Mr and Mrs Papadopoulos move out of their home to allow rectification works to proceed	\$8,327
(c)	Furniture storage	\$450
(d)	Cost to rectify paint splatter on tinted living room windows	\$1,943
(e)	Cost to remove paint splatter from granite bench tops and re-seal bench tops	\$880
(f)	Cost of Mr McKinnon's inspection report	\$770
	Total	\$29,905

- 19 As I understand it, the Applicants do not make, or they no longer pursue, any claim for the cost of the paint and equipment purchased by Mrs Papadopolous and provided to the Respondent's workers shortly after they commenced the painting works. If I have misunderstood the Applicants in this regard, I would in any event make no allowance for such cost as it was incurred by Mrs Papadopolous entirely of her own volition and there is no

evidence, nor is it suggested, that the Respondent agreed to bear any of such cost.

QUALITY OF THE PAINTING WORKS AND REQUIRED RECTIFICATIONS

20 Having viewed the home on 27 July 2015, I make the following findings in respect of the painting works:

- (a) Throughout the home there are numerous relatively minor areas of paint over-run where wall or ceiling paint has over run onto cupboards, windows, door strikers and other fittings. All of these areas will need to be cleaned.
- (b) The living room has high vaulted cedar timber ceilings. I was shown a couple of areas where the Respondent's attempt to clean paint over-runs off the ceiling boards had left cleaning marks on the ceiling. Although the marks are relatively minor, I accept that it will be necessary to re-stain a few boards in the ceiling, or at worst replace a few ceiling boards, to rectify the problem.
- (c) The paint coverage appears to be a little thin in a few areas, notably the ceiling in the kitchen/dining area. A further coat of paint is required to these areas.
- (d) There are small paint splatter spots on the granite bench top in the kitchen. As I was able to easily remove one spot with my finger nail, I consider that it will not be difficult to remove the spots and I am not satisfied that the bench tops will need to be professionally cleaned and re-sealed as is claimed by the Applicants.
- (e) The tinted windows in the living area have some paint splatter spots on them. The Applicants say that it will not be possible to remove the paint spots without damaging the tint, and accordingly the windows will need to be re-tinted after the removal of the paint spots. They have obtained several quotations to re-tint the windows, the lowest of which is \$1,943, the sum they are now claiming. As the Respondent led no evidence to challenge the claim, and having viewed the windows, I am satisfied that the Applicant's claim is justified and that \$1,943 is the reasonable cost to re-tint the windows.
- (f) There are some areas where the "cutting in" painting adjacent to skirtings, cornices and architraves is noticeable and some touch up painting is required.
- (g) Many, if not most, of the plaster walls have what Mrs Papadopoulos considers to be a rough textured finish, rather than a smooth finish. On very close inspection, it is apparent that the "texture" complained of is the natural finish of a paint roller. It is not as smooth as a finish that might be achieved with a paint brush. In his report, Mr McKinnon simply says that the walls have texture roller finish that is "excessive". I do not agree. In my view,

the texture of the finish does not constitute “defective” works. The texture is readily noticeable only upon very close inspection. From an ordinary viewing distance, the texture appears reasonable to me.

- (h) Some of the skirtings and window sills have inconsistent paint finish. A further coat of paint is required.
 - (i) Some of the skirtings and window sills have small amounts of grit in the finished paint work. The areas of concern are noticeable only upon very close inspection and, in my view, the blemishes are so minor and so few that they do not constitute “defective” works.
 - (j) There are a number of areas of painted woodwork, the edges of some doors and windows, where paint drips are noticeable. It will be necessary to sand and re-paint these areas.
 - (k) There are several small gouges or holes in a few areas of the painted plasterwork which will need to be filled, sanded and re-painted.
 - (l) Externally, there are some areas of paint over-run from the eaves lining soffit to the fascia boards. There is also some paint splatter and paint over-run on some areas of brickwork. Some gutters have not yet been painted. The finish to the exterior of the front door is uneven and some sanding and re-painting will be required.
- 21 In my view, Mrs Papadopoulos expectation as to the quality of finish for all the painting works was unreasonably high, particularly having regard to the contract price for the works. That is not to say, however, that the painting works are acceptable. I am satisfied that rectifications, as generally described above, are required. I do not accept, however, that wholesale sanding and re-painting of all areas is required.

CONTRACT TERMINATION

- 22 It is clear on the evidence of both Mrs Papadopolous and Mr Rabiee that when Mr Rabiee telephoned Mrs Papadopoulos on 2 December 2013, and when he subsequently attended the home on 2 December 2013, he demanded full payment for the contract works. That is, payment of the full contract price, \$6,500 plus GST, less the deposit of \$2,000 previously paid.
- 23 The quotation specifies the payment terms:
- a first payment of \$1,500 plus GST “*on acceptance of the contract*”
 - a second payment of \$2,500 plus GST “*on half completion*”
 - a final payment of \$2,500 plus GST “*on full job completion*”
- 24 There is no doubt that when Mr Rabiee attended the home on the evening of 2 December 2013, the painting works were not fully completed. Some areas, such as downpipes, had not been painted at all. Some areas were yet to receive a final coat. Generally, the Respondent had yet to carry out the final cleaning up and removal of paint over runs and splatter spots.

- 25 I am satisfied that Mrs Papadopoulos' decision to terminate the contract was partly driven by her dissatisfaction with the quality of the painting works, and that her decision was also made in a moment of heated disputation with Mr Rabiee. However, I am also satisfied that the termination of the contract was justified in circumstances where the Respondent, through Mr Rabiee, had wrongly demanded payment of the full contract balance before the works were completed.
- 26 Mr Rabiee may have been concerned with Mrs Papadopolous' interfering conduct. He may also have harboured a suspicion or concern that the Applicants might not make full payment when the works were completed. However, such concerns do not justify the wrongful demand for full payment before the works were completed.
- 27 The payment of \$1,000 made by Mrs Papadopoulos on 2 December 2013 does not support the proposition that the Respondent was entitled to full payment. On the contrary, it sits more comfortably with the terms of the contract as to part payment during the progress of the works, with full payment upon completion of the works
- 28 For the above reasons, I find that on 2 December 2013 the Respondent, through Mr Rabiee, made wrongful demand for full payment of the contract price, and in so doing the Respondent repudiated the contract. That is, the Respondent evinced an intention to be no longer bound by essential terms of the contract as to payment for the works. I find also that, in response to the Respondent's repudiation, the Applicants were entitled to terminate the contract as Mrs Papadopolous did.

DAMAGES

- 29 It is apparent from the conduct of the parties during the course of the hearing that the relationship between the Applicants and Mr Rabiee has deteriorated to such a degree that it would be unreasonable to order the Respondent to return to the home to rectify and complete the painting works.
- 30 In my view it is appropriate that the Applicants' be awarded a sum of money assessed as the reasonable "extra" cost they will incur (if any) to put them in the position they would have been in had the contract been fully performed. By "extra" cost, I mean the sum over and above the contract price.
- 31 It is first necessary to determine that contract price, having regard to the extra charge for "*supplementary jobs*" identified in the Respondent's invoice dated 2 December 2013.

"Supplementary" works

- 32 The "supplementary" works are described in the invoice as:

Sunroom rendering on the brick walls in 2 coats, changing Antique white USA colour to vivid and as it affects the number of coats to 4 times which is required for adequate coverage.

4 coats oil base semi gloss enamel instead of acrylic one as requested by the client.

- 33 In respect of any varied or extra works not specified within the quotation, the quotation itself provides that the Respondent is “*not authorized to complete work beyond the detailed specifications above without a written and signed change order*”.
- 34 In my view, any changes or additions to the works, particularly those that would add to the cost of the works, ought to have been confirmed in a written and signed “change order”. There is no such change order in respect of any of the alleged supplementary works.

Render to brick walls

- 35 In respect of brick walls in the sunroom, the quotation provides for “*full cover texture*”. Mr Rabiee says that, after works commenced, it became apparent to him that just painting the brick walls would not achieve the desired textured finish, and that to achieve the desired finish, he decided to render the walls.
- 36 While Mrs Papodopolous recalls discussing the render, she says that she believed the Respondent had simply chosen an alternative method to achieve the “textured” finish. She says there was no discussion as to any extra cost. The Respondent does not dispute that there was no discussion as to any extra cost.
- 37 In my view, the Respondent has simply carried out works to achieve the “textured finish” as specified in the contract. There being no “change order” and no discussion with the Applicants as to extra cost, I find that the Respondent was not entitled to charge extra for the render.

Change to paint colour

- 38 It is not disputed that the colour of paint for the walls was, at Mrs Papadopolous’ request, changed from antique USA white to “vivid” white. However, as there was no discussion as to any extra charge for the change, and as there is no “change order” confirming any extra cost, I am satisfied that the Respondent has no entitlement to charge extra for the change of paint colour.

Oil based paint

- 39 The final item of “supplementary” work is the alleged change to “*4 coats of oil base semi gloss enamel instead of one acrylic one.*” As I understand it, the item relates to the oil based paint used on architraves and window frames.
- 40 I am not satisfied that the use of oil based paint was a variation to the works set out in the quotation. Under the heading “Colours”, the quotation states “*oil base semi gloss enamel on the frames*”.

- 41 Further, there is no evidence of any discussion between the parties as to an increase in price in respect of any changes to enamel paint. There is no “change order” reflecting any agreed increase in the price.
- 42 On all the evidence, I find that the Respondent was not entitled to charge extra for the alleged change to enamel paint.

Contract price

- 43 For the above reasons, I find that the Respondent had no entitlement to charge for any of the alleged “supplementary” works. Accordingly, I find that the contract price did not change from the price specified in the quotation, namely \$6,500 plus GST, or \$7,150 inclusive of GST.

Completion and Rectification Cost

- 44 I have discussed above the works which I consider are now necessary to satisfactorily complete the contract works, including the rectification of defects. I turn now to assessing the reasonable cost of such works.
- 45 The Applicants claim \$17,490, the sum of a quotation they have obtained from another contractor, “the Paintman”, as the cost they say they will incur to rectify and complete the painting works. The quotation allows for “a full repaint” of the interior of the home. As discussed above, I do not accept that wholesale sanding and re-painting is required.
- 46 Doing the best I can, I consider it reasonable to allow one qualified painter one week (40 hours) to attend to the works which I consider are now necessary, not including the re-tinting the living room windows. I consider an hourly rate of \$65 to be fair. Having regard to the nature of the works, I also consider it fair to allow an additional 30% margin for overheads and profit of the contractor engaged to carry out the works. I also allow \$200 for the cost of sundry materials. After allowing also for GST, I allow a total of \$4,004 calculated as follows:

- Labour 40 hours x \$65 per hour	\$2,600
- Sundry materials	<u>\$200</u>
- Sub-total	\$2,800
30% margin	<u>\$840</u>
Sub-total	\$3,640
GST	<u>\$364</u>
Total	\$4,004

- 47 As discussed earlier, I also allow \$1,943 as the cost to re-tint the living room windows.
- 48 I think it reasonable also that the Owners be compensated for the reasonable cost of four nights’ alternative accommodation during the period that the rectifications are being carried out. The Applicants produced a quotation from Quest Apartments for accommodation cost of \$299 per night. I

consider that to be a reasonable amount and I will allow four nights at this rate, namely \$1,196.

49 I make no allowance for furniture storage. The nature of the rectification works will not, in my view, necessitate anything more than relatively minor shifting of furniture within the home.

50 The total of all the above allowances is \$7,143.

51 The contract sum between the Applicants and the Respondent was \$7,150 (inclusive of GST). The Applicants paid the Respondent \$3,000, leaving an unpaid contract balance of \$4,150.

52 As discussed above, the sum of damages is calculated as the “extra” cost, over and above the contract sum, that the Applicants will incur in having the contract works satisfactorily completed. That extra cost is \$2,993, calculated as follows:

-	Cost to rectify and complete the painting works	\$7,143
-	Less the unpaid balance of the contract between the Applicants and the Respondent	\$4,150
	Balance	\$2,993

COSTS

53 The Applicants claim the cost of Mr McKinnon’s inspection report, \$770. The report was obtained in mid March 2015, shortly before the Applicants commenced this proceeding. It is apparent that the report was obtained as evidence to be presented in the proceeding. As such, I do not consider the cost of the report to be “damages” suffered by the Applicants, but rather costs incurred in preparing for the proceeding.

54 The general rule as to costs is found in s.109 of the *Victorian Civil and Administrative Tribunal Act 1998* (“the Act”). Each party is to bear their own costs in a proceeding, however the Tribunal may, if it is satisfied that it is fair to do so, depart from the general rule and order that a party pay some or all of the specified part of the costs of another party.

55 Having regard to the nature of the dispute, the claims brought in the proceeding and the conduct of the parties during the hearing, I am satisfied that it would not be fair to depart from the general rule as to costs. Accordingly, save for reimbursement of the application fee as discussed below, I make no order in favour of either party as to the costs of the proceeding, including any costs the Applicants have incurred in engaging the services of Mr McKinnon.

56 The Applicants paid an application fee of \$525.60 on the commencement of the proceeding. Division 8A of Part IV in the Act makes special provision in respect of the reimbursement of fees in certain proceedings. As the Applicants have had success in the proceeding, I am satisfied it is appropriate to make an order pursuant to s115C of the Act, namely that the Respondent reimburse the Applicants the application fee paid by them.

CONCLUSION

57 For the above reasons I will make the following orders:

1. The Respondent, Hands Free Painting Pty Ltd, must pay the Applicants \$2,993
2. In addition, the Respondent must pay the Applicants \$525.60 as reimbursement of the application fee paid by the Applicants.
3. The Respondent's counterclaim is dismissed.

SENIOR MEMBER M. FARRELLY