

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL  
CIVIL DIVISION  
BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. BP535/2016

**CATCHWORDS**

Work and labour - quotation for laying of 20mm stone pavers on a sand base - quotation accepted - sand base unsuitable for laying 20mm pavers although work in accordance with contract in that respect - warranty by the pavior that that method of laying was satisfactory - paving defective - work done of no value - money paid ordered to be refunded - other unrelated work partially done before contractor ordered from the site - order that the applicants pay reasonable value of the other work done.

<b>APPLICANTS</b>	Marc Pearce and Karen Pearce
<b>RESPONDENT</b>	Mark Rasmussen
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R. Walker
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	8 December 2016
<b>DATE OF ORDER</b>	15 February 2017
<b>CITATION</b>	Pearce v Rasmussen (Building and Property) [2017] VCAT 222

**ORDERS**

1. Order on the claim that the Respondent to pay to the Applicants the sum of \$13,984.00.
2. Order on the counterclaim that the Applicants paid to the Respondent the sum of \$5,296.00.
3. The orders will be set off and the difference of \$8,688.00 shall be paid by the Respondent to the Applicants.

**SENIOR MEMBER R. WALKER**

**APPEARANCES:**

For the Applicants

In person

For the Respondent

In person

## REASONS FOR DECISION

### The dispute

1. The Applicants are the owners of a dwelling house in Caulfield. The Respondent is a qualified landscape gardener.
2. The dispute concerns paving work carried out by the Respondent at the Applicants' property which they have had pulled up and redone by someone else. They seek to recover the money they paid the Respondent for the work that had to be redone plus the cost of obtaining an expert's report. The Respondent counterclaims for the balance that he says is due to him for the work that he carried out both for the paving work and for other landscaping work that he did at the Applicants' property.

### Hearing

3. The matter came before me for hearing on 8 December 2016 with one day allocated. The parties appeared in person.
4. I heard evidence from the applicant, Mr Pearce, a Mr Grinter, who was a builder who carried out work for him at the time, and a Mr van Dieman, an expert witness. For the Respondent I heard his evidence and that of his workman, Mr Cumberland, who was also a qualified landscape.
5. After hearing evidence there was insufficient time left in which to properly consider the matters raised and I informed the parties that I would provide a written decision.

### Background

6. On 25 November 2015 the Respondent provided a quotation to the Applicants to supply and lay 72 square metres of natural stone paving with 5 to 10 mm joints on a concrete base for a price of \$22,250.00. In the same document, he quoted to carry out various other items of work, including an irrigation system, laying grass, constructing a vegetable garden and repairing some existing paved areas for various sums totalling \$9,190.00.
7. On 7 December 2015 the Respondent provided a further quotation to the Applicants to lay the same area of stone paving on a concrete slab for a reduced price of \$21,250.00. This second quotation contained an alternate reduced scope of works namely, laying 72 square metres of natural stone paving with 3 mm joints on a compacted crushed rock and sand base, the paving to match existing paving levels and to slope away from the house.
8. According to the Respondent, the alternate reduced scope of works was because Mr Pearce told him that the cost of laying the pavers on concrete was over budget and that he could not afford it. He said that he told Mr Pearce that he could lay the pavers on a crushed rock and sand base if the paving was only to receive pedestrian traffic. He said that he warned Mr Pearce that tree roots could move the pavers around.
9. As well as the paving, the Applicants were having a covered pergola, a seat and a retaining wall built by Mr Grinter in the same area. The pergola had been constructed

before the Respondent started work, although there were no downpipes or guttering to drain the roof.

### **A fixed completion date**

10. There was nothing in either quotation concerning when the work was to be done by or how long it was to take. Mr Pearce said that it was to be done by 18 January so as to allow Mr Grinter until 25 January to complete his work in that same area in time for the Applicants' daughter's third birthday party. The Respondent said that he told Mr Pearce that he would try to have it done by then but that it was subject to the weather.
11. According to Mr Pearce, he accepted the quotation for the lesser scope of works between Christmas and New Year. It was not explained why, if a finishing date of 18 January was critical, the quotation was not accepted a lot earlier. A deposit of \$5,000 was requested on 4 January and, since the Applicants were going away on holiday, access was arranged while they were away.
12. On 11 January Mr Grinter asked the Respondent by email how the paving work was going. He responded on the following day to describe the preparation work that had been done and I note that the crushed rock was only delivered on that day. Mr Grinter replied that he had three carpenters and an air conditioning installer to start work on 18 January as he had a deadline to comply with and could not alter those plans. He said: "In short it has to be ready by Sunday night".
13. The Respondent replied that he should have it finished by then, saying that there would be three men working and that they would work through the weekend and the following week in order to finish. However in a follow-up email sent the same day, he told Mr Grinter that he had just realised that the 17<sup>th</sup> was the following Sunday and that he would not be finished by then. He said: "We will just have to limit the access to the finished areas. Otherwise we will have to wait until you are done". An argument by email then ensued between Mr Grinter and the Respondent in which Mr Grinter alleged that the Respondent had told him that he would be finished by the 18<sup>th</sup> and the Respondent denied that he had done so, pointing out that the pavers had been chosen only two days previously
14. On this issue I prefer the evidence of the Respondent. It is unlikely that he would have given the Applicants a definite completion date since the weather was uncertain and a starting date had not been agreed.
15. I am not satisfied that it was a term of the agreement that the Respondent would complete the paving by 18 January. In the absence of an agreed date it was his obligation to carry out the work within a reasonable time.

### **The progress of the work**

16. The Respondent said that there were delays in the choice of paving, that the Applicants were away on holiday and that Mr Grinter, with whom he was to deal, was overseas. The Respondent arranged for the Applicants to view some pavers when they came back from holiday on 11 January and the crushed rock was to arrive on 12 January.

17. It was acknowledged there was builder's rubbish in the area where the paving was to be laid and it was agreed that \$500 was to be paid to the Respondent to remove it. The Respondent said that, during preparations for the paving he had to leave the job because electricians were digging trenches. He said that it took three of them two hours to reinstate the area after the electricians had finished.
18. The Respondent said that, after work commenced, Mr Grinter informed him that the existing drainage system was blocked and would have to be reinstated at the Respondent's expense. He said that significant drainage works were undertaken during construction of the subbase, including replacing blocked drainage pipes, the connection of new drainage pipes and stormwater for the newly constructed pergola.
19. When the quotation was given it was known that there was to be a retaining wall constructed between the house and the back fence, which would form one side of the area to be paved. The Respondent said that he had assumed that the retaining wall would be erected parallel to the house but instead, it was erected parallel to the fence. This meant that the retaining wall was on an angle to the rectangular pavers. This sort of problem would have been avoided if there had been a plan for the work but there was none.
20. The work was not completed by 18 January. Mr Pearce said that he allowed the Respondent an extension of time until 25 January but that, by 23 January, it was clear that it would probably not be done in time and the Respondent agreed to work through the weekend to get the paving stable enough for Mr Grinter to build the seat. He said that the Respondent said it would be all right so long as they were very careful on the edge of the paving.
21. The Respondent said that work stopped due to heavy rain between 20 and 26 January. He said that the paving was substantially complete except that the edges had not been haunched and the stone had not been sealed to prevent staining. It was explained that haunching involves concreting around the external edges of the paving to hold the pavers together and prevent them from moving outwards. He said the sealing of the pavers and the haunching could only be done when the area had dried out sufficiently.
22. I am satisfied that the Respondent carried out his work with reasonable expedition and that many of the ensuing problems were the result of an unrealistic works program agreed to between the Applicants and Mr Grinter and a lack of any coordination of the different trades employed on the job. That was not the fault of the Respondent.

### **The damage to the paving**

23. The Respondent said that he warned both Mr Pearce and Mr Grinter that any work done on the paving would affect the paving and that Mr Grinter agreed that he and his workmen would work on the lawn. However in a letter to the Applicants' solicitors dated 6 March 2015 the Respondent said that he was told by Mr Grinter that he was planning to allow eight people to work on the paving area for four days before the job was finished. He said that he pleaded with Mr Grinter to wait until he had finished the paving and that he explained that working on the paving would disrupt the finished levels. He said that Mr Grinter nonetheless said that he had planned to do the work and that it was going ahead regardless.

24. Mr Pearce said that the Respondent told him that it would be all right to build the seat on the paved area provided they were careful on the edges. That is likely to be true.
25. I am not satisfied that there was any agreement by Mr Grinter that he would not work on the paved area but I am satisfied that he was aware that the paving work had not been finished and that the Respondent was concerned about him damaging the unfinished paving by working on it.
26. Mr Grinter commenced work on 27 January. The Respondent said that Mr Grinter and his workers and all their equipment including large saws, timber, compressors and ladders were put on the unfinished paved area and they worked there building large timber structures for three days. He said that there were also two air-conditioning people working on the unfinished paving. He said that his work was ruined as a result.
27. Some work in that area was inevitable because the seats that were to be constructed were to be installed against the retaining wall and were to sit on the paving. In the course of building these seats and carrying out the work that they did over that three days, a number of tiles were stained by sawdust, nails and builder's debris. According to Mr Pearce there were only six such tiles but the Respondent said that there were many more than that. I prefer the Respondent's evidence.
28. Thereafter there was a dispute as to who was responsible for the staining of the tiles. In a series of text messages passing between Mr Pearce and the Respondent, the Respondent complained about staining and instead of dealing with the matter, Mr Pearce said that the Respondent had to sort it out with Mr Grinter.
29. On 4 February 2016 the stains were cleaned off by the Respondent and a number of pavers were replaced but brown marks re-appeared on many of the pavers. The Applicants claim that the Respondent damaged the paving with acid when he attempted to remove some mortar stains. The original stains were not from mortar but from timber and builder's debris and it is unclear whether the stains that reappeared were the original stains returning or new stains caused by the cleaning agent used by the Respondent, which was hydrochloric acid.

### **Allegation of defects**

30. The Applicants then complained about the quality of the work. Various deficiencies were alleged and there were discussions between the parties concerning them and a meeting took place on site on 15 February when, according to Mr Pearce, the Respondent was asked to make a proposal to deal with all of the issues.
31. On 16 February the Respondent sent the Applicants an email in which he offered to:
  - (a) realign the joints in the paving so that all joints would be between 3 mm and 5 mm;
  - (b) ensure that the paver joints lined up across the job;
  - (c) cut the pavers to ensure that there was a 10 mm spacing around the sleeper wall;
  - (d) cut the pavers in around the drain, near the tap, around the posts and the entry to the house;
  - (e) clean the stained pavers or replace them where very bad;

- (f) relay or realign the high pavers;
- (g) seal the pavers to reduce staining and assist in cleaning.

He said that he would need a full week to address those issues.

32. In response to this email Mr Pearce said that he did not believe that the Respondent could rectify the defective work and demanded a refund of the \$13,500 that the Applicants had paid.

### **The defects alleged**

33. In his expert's report, Mr van Diemen identified the following defects
- (a) the pavers are too thin for laying on sand and crushed rock;
  - (b) the surface drainage is insufficient to allow water to run off to the drainage pit;
  - (c) parts of the paving are falling in the wrong direction;
  - (d) the surface of the paved paving is uneven;
  - (e) the joint lines of the paving in both directions are not straight in many places;
  - (f) there is staining of a number of pavers caused by acid;
  - (g) the cutting of the pavers has been poorly done;
  - (h) some chipping has occurred.

There are photographs in his report to illustrate the points that he made.

34. Mr van Diemen was present at the hearing and was questioned in regard to the matters raised in his report. He had an impressive resume as an expert in segmented paving.
35. Evidence was given concerning the quality of the work by the Respondent and also by Mr Cumberland. Each of them is a qualified landscaper and I accept that there were able to give expert evidence in regard to the allegations raised in Mr van Diemen's report. However their evidence was general in nature and focussed more on the overall initial appearance of the job, the initial satisfaction of Mr Pearce and the damage done to the job, rather than on the specific criticisms that were made by Mr van Diemen. Being the persons who carried out the work they are not disinterested witnesses but the real difficulty with their evidence is that they did not specifically deal with the criticisms Mr van Diemen made.
36. An expert's report by a stone mason, Mr Arthur Tsakonas, was tendered on behalf of the Respondent but he was not called. Much of this report deals with the events that took place on site and the difficulties experienced by the Respondent in carrying out the work. Most of the text appears to be a repetition of many of the allegations made by the Respondent and it does not appear that the author of this document ever saw the completed paving. Rather, it seems as though he has relied upon what he has been told by the Respondent and the photographs that he was shown. However most significantly, he does not address the specific criticisms that Mr van Diemen made of the work.
37. I prefer the evidence of Mr van Diemen in regard to the paving because it is borne out by the photographs in his report and the matters that he raised have not been answered.

38. Mr van Diemen said that some of the defects that he had identified were only minor but the majority were major defects that could not be rectified. Most significantly, he said that the use of a flexible paving method was inappropriate for this type of paver. He concluded that the entire paved area needed to be removed and re-laid as rigid segmental paving. Of course, that was the more expensive method described in the original quotation.
39. The key allegation on behalf of the Applicants was that pavers of this thickness are not suitable to be laid on a sand and crushed rock base and so, regardless of the other defects alleged, the whole job would have to be pulled up in any event. However since the contract required 20 mm pavers to be laid on sand and crushed rock base, laying them in this way cannot be said to have been a breach of the contract.

### **Warranty**

40. This method of laying was suggested by the Respondent in an email of 7 December 2015. In that email, he described it as laying pavers on a sand base with 3 mm sand joints and no grouting and said that it would be a substantially cheaper result with the work being completed much sooner. He did not suggest that the quality of the work would be less but the job was \$10,000 less in cost and the Applicants were aware that for that reduced price they would not get stone pavers laid on a concrete base but on a sand and crushed rock base. They were also aware that the pavers could move to some limited extent.
41. In his defence to the counterclaim, Mr Pearce said that the Respondent told him that the job would be the same with the only difference being that the cheaper option would change over time due to tree roots and that it was fine unless you were driving cars over it. He said that he was not advised that the job would be inferior. The respondent's version of this conversation was that he advised Mr Pearce that the method of laying pavers would be satisfactory provided that the paving was only to receive pedestrian traffic. He was aware that Mr Grinter was going to be installing seating on it and did not suggest that that would cause difficulties.
42. I think that the quotation and what the Respondent told Mr Pearce amounted to a warranty that laying stone pavers that were only 20 mm thick on a sand and crushed rock base was a reasonable method of construction to adopt in the circumstances. I am satisfied that the Applicants accepted the Respondent's quotation on the faith of that warranty. I must find on the evidence of Mr van Diemen that the warranty was broken and that laying stone pavers of that thickness on a sand and crushed rock base was not a reasonable method of construction and for that reason alone the job had to be redone. The damages suffered by the Applicants by reason of the breach of warranty was the money that they paid for the work that was rendered useless.
43. The complaint therefore is for breach of a warranty by the Respondent to the effect that the method construction proposed was suitable for the purpose.
44. Although I accept the evidence of the Respondent to the effect that the paving was substantially damaged by Mr Grinter and his men working on before it was finished, I am satisfied on the evidence of Mr van Diemen that the paving was defective in the various respects that he identified in his report and that the method of laying was not



suitable for pavers of that thickness. Consequently, the job had to be done again and the work and materials that the Respondent supplied in regard to the paving was of no value.

45. For these reasons the Applicants are entitled to an order that the amount of \$13,500.00 that they paid to the Respondent for the paving be refunded.

#### **The claim for the concrete mower strip**

46. The Applicants claim that the Respondent damaged a concrete mower strip in the course of landscaping the front garden and seek an order for the cost of its repair. There is a photograph in Mr van Diemen's report showing a narrow concrete garden edging strip that appears to be undamaged with an arrow pointing to an area at the back of the area photographed that is in darkness and I can make nothing out. He said in his report: "Due to the damage done to the existing mower strip the mower strip will now need to be replaced".
47. The Respondent said that the mower strip was already broken by tree roots. There appear to be trees near the dark area that I cannot see clearly in the photograph. In the absence of any clear evidence I am unable to find that this concrete edging was broken by the Respondent and so this part of the claim is not made out.

#### **The counterclaim**

48. The Respondent was ordered from the site before he completed the landscaping work that he had contracted to do for the Applicants. It was not suggested at the time that the landscaping work that he had done was deficient. Rather, the termination of the relationship between the parties was due solely to the argument about the paving.
49. The various areas of work were separately quoted and one was not expressed to be dependent upon another. No justification has been shown for the Applicants to terminate the other jobs that the Respondent had contracted to carry out. The Applicants have had the benefit of the work that he had already done and they would be unjustly enriched if they enjoyed that benefit without paying its fair value.

#### **The irrigation system**

50. The quotation with respect to the irrigation system was for \$2,864.00. The Respondent said that of this, he supplied a gate valve attached to an existing tap at the rear of the property, he ran 25 lineal metres of 20 mm PVC pipe under the paving sub-base and through the retaining wall in preparation for watering the trees. He said that a solenoid control wire was located through the conduit in the sub-base to be wired to a four stage solenoid manifold and a large moulded plastic solenoid housing access pit that was located in the rear garden bed. He said that this involved the supply of \$770.00 worth of materials and two days labour for three people, which she said was \$1,360.00. That makes a total claim of \$2,130.00.
51. Mr van Diemen said in his report that the irrigation system was poorly designed and incorrectly and only partially installed. He said there is no backflow valve installed and that there are four solenoids required which in turn requires a minimum of five wires because a master wire is necessary. He said this indicated a lack of expertise in this area.

52. The Respondent acknowledged that the system was only partially installed but disputed these criticisms saying that there was a control wire installed. He said that what he had done was correct and although the work was incomplete he was only claiming for what he had done. The Respondent is a qualified landscaper and has a bachelor's degree of Applied Science in that area. It does not appear from the description of Mr van Diemen's qualifications and experience in his report that he is an expert in irrigation. Whereas the Respondent was able to say what he did, Mr van Diemen could only comment on what he was able to see. I prefer the evidence of the Respondent.
53. In the absence of any contrary evidence as to the value of the work done by the Respondent, the amount claimed will be allowed.

### **Turf grass**

54. The quotation for grass was \$840.00 for excavation of existing grass, weeds and soil and placement of compost and topsoil, \$740.00 for the supply and delivery of 48 m<sup>2</sup> of Kikuyu grass and another \$780.00 for the laying of the grass and fertiliser.
55. Of this, the Respondent claims the hire of a bobcat loader, the excavation of the old grass and tree roots and the removal of spoil, 3 cubic metres of fresh topsoil and the removal of large areas of existing concrete pavers to prepare the area for the laying of the turf. The total claim is \$1,336.00 for materials and machine hire and \$660.00 for labour, making a total of \$1,966.00.
56. Again, since there is no contrary evidence as to the value of the work done, the amount claimed will be allowed.

### **Garden areas**

57. The quotation was \$2,750.00 to prepare a vegetable garden area of two cubic metres. Of that, the Respondent claims to have supplied and installed 20 m of black plastic, half a cubic metre of scoria on top of an agricultural pipe to provide subsurface drainage, the supply and placement of two cubic metres of garden soil, commencement of rock work and the removal of excess rocks. An amount of \$460.00 is claimed for materials and rubbish removal and \$280.00 is claimed for labour, making a total of \$740.00.
58. There being no contrary evidence as to the value of the work done, the amount claimed will be allowed.

### **Repair of existing paved areas**

59. An amount of \$1,300.00 was quoted to remove some old pavers, excavate material and relay. The Respondent said that about one third of this work was completed, that several areas were levelled out and pavers were re-laid, a large garden bed was removed including soil and plants and the area was levelled out and partially filled in. For materials, green waste and labour the amount claimed is \$460.00. There being no contrary evidence as to the value of the work done, that amount will be allowed.

**Orders to be made**

60. There will be an order on the claim that the Respondent pay to the Applicants the sum of \$13,500.00 plus \$484.00, being the cost of Mr van Diemen's report, making a total of \$13,984. On the counterclaim there will be an order that the Applicants pay to the Respondent the sum of \$5,296.00. The orders will be set off and the difference of \$8,688.00 shall be paid by the Respondent to the Applicants.

**SENIOR MEMBER R. WALKER**