VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO. D117/2007

CATCHWORDS

Domestic Building List; Claim for final payment; Counterclaim for liquidated damages; Whether liquidated damages claimable under terms of contract where building work physically complete and owners in possession and residing in completed building because Certificate of Final Inspection not provided; No liquidated damages payable; Claim for final instalment reduced by cost of rectifying wiring defects

APPLICANT	Rangeview Building Pty Ltd (ACN 007 340 089)
1ST RESPONDENT	Ross Wilson
2ND RESPONDENT	Anne Wilson
WHERE HELD	Melbourne
BEFORE	M.F. Macnamara, Deputy President
HEARING TYPE	Hearing
DATE OF HEARING	11 April 2007
DATE OF ORDER	20 April 2007
CITATION	Rangview Building Pty Ltd v Wilson (Domestic Building) [2007] VCAT 643

ORDER

The respondents must pay the applicant the sum of $8,817.71.

M.F. Macnamara
Deputy President

APPEARANCES:

For Applicant	Mr Ian McGain, Director
For Respondents	Mr John Pastro, Solicitor of John Pastro & Co

REASONS

BACKGROUND

1 This proceeding raises an interesting and surprisingly difficult issue as to the construction and operation of the Victorian, Alterations Additions & Renovations *'Plain English'* contract (August 2000) published by the Housing Industry Association Limited. Mr & Mrs Wilson who occupy a rural property on approximately 5 acres at 91 Old Diamond Creek Road, Diamond Creek, signed a contract for alterations and additions to their house with Rangeview Building Pty Ltd (whose principal is Mr Ian McGain) on 14 May 2002. The contract provided for completion of the works in 90 days with a total contract price of $61,380. A five percent deposit in the sum of $3,069 was required.

2 Contrary to expectation a planning permit was required. Rangeview procured that permit and planning and building permit were available on 22 July 2002. Rangeview commenced work on 25 July. Mr McGain complained that the Wilsons would not give his company a key and would not agree to work being carried out unless either Mr or Mrs Wilson was present. As a result, said Mr McGain, work had to be fitted in around Mrs Wilson's part-time work schedule. Most of the work was completed by early October. On 9 October the Wilsons wrote to Rangeview including a list of *'defects and outstanding items'*. The letter concluded *'final payment will be negotiated after all of the enclosed points have been attended to'*. The letter also remarked:

> We are disappointed at the time it has taken to complete our relatively straight forward project, particularly in light of our clearly defined deadline. Unfortunately we were not able to hose [sic, presumably house] our Japanese guests in the surroundings we had hoped for, it is frustrating that the only two days where builders have been present in the past two weeks were two of the four days our guests were here. Loud power tools and hammering commenced at 7.30 am directly outside the guest bedroom window. We also suffered substantial pressure in co-ordinating painting, carpeting and furnishing due to the works not being completed by the date you advised. However we did appreciate the efforts made towards the end to 'work around' each other.

3 Mr McGain said that with building operations complete he let his contract with the Wilsons slip, giving attention to other jobs. He arranged for a final inspection by the Building Inspector, Mr Danny Hick, until 20 December 2002. The inspector did not approve the building at final inspection. He raised a number of issues as to:

1. the location of smoke detectors;
2. the provision of a glazing certificate;

3. provision of a letter from the *'owner/builder to state doors leading out of bedrooms 3 and 4 are to remain locked at all times …'*;

4. an issue as to the installation of beading on the risers of steps to the timber decking.

4 According to Mr McGain the letter and the certificate were readily provided but substantial discussions ensued with regard to the other matters. He said that the objections relative to smoke detectors proceeded from a misconception on the part of the building inspector as to where the addition ended and the original building began. Ultimately Mr Hick issued a Certificate of Final Inspection on 11 June 2003. Again, Mr McGain did not give immediate attention to this matter. He issued a final claim in the form of a tax invoice dated 14 September 2003 showing a balance due on the contract price of $7,827. This calculation included a claim for variations in the sum of $1,689 which were the subject of a second invoice bearing the same date.

5 Following discussion he sent an amended tax invoice on 11 October 2003 claiming the sum of $7,047.14 representing certain deductions which he agreed should be made. The Wilsons had sent a letter dated 24 September 2003. They said that the contract required that the building be completed during a building period of 90 days which they said expired on 23 October 2002. In their view the building was not completed until they received a final invoice and Certificate of Final Inspection on 15 September 2002. Accordingly they said from the date on which the work should have been completed until 15 September 2003 *'a period of 46 weeks five days elapsed'*, liquidated damages at the contractual rate of $150 per week totalling $7,007.14. They paid $499.86 and denied liability for any further amount. The Wilsons denied liability to make any further payment and made no further payment in response to the revised tax invoice given in October 2003.

6 Matters had reached a deadlock. In early March 2007 Rangeview filed a claim in the Tribunal commencing the present proceeding. It sought the sum of $7,047.14 plus interest at the rate stipulated in the Building Code for interest on overdue moneys from 11 October 2003 to 11 October 2006 making a total of $9,971.

7 On 23 March 2007 solicitors acting for the Wilsons filed a notice of counterclaim seeking *'the sum of $8,070 plus legal costs by way of counterclaim'*. The counterclaim consisted of the claim for $7,007 liquidated damages originally propounded in the Wilsons' letter of 24 September 2003 together with a claim for $1,063.00 for *'rectification work carried out by a registered electrician'*.

RANGEVIEW'S CASE

8 Mr McGain presented the case on behalf of his company. He submitted that the amounts claimed were properly payable. He denied the validity of any claim made for liquidated damages. He said the building works were completed within the three month period stipulated in the contract and there was no right to claim any liquidated damages.

THE WILSONS' CASE

9 The Wilsons were represented by Mr John Pastro, Solicitor. He relied on Clause 43 of the relevant contract which stated:

> 43.0 If the **Building Works** are not completed by the end of the **Building Period** the **Owner** is entitled to agreed damages worked out by reference to the extra time taken to complete the **Building Works** and the amount per week set out in Item 9 of Schedule 1 calculated on a daily basis. If no amount is specified in Item 9 of Schedule 1 and the **Owner** vacates the premises during the **Building Works**, Item 9 is deemed to read $250 or if the **Owner** remains in occupation Item 9 is deemed to read $130.
>
> 43.1 The **Owner** may deduct the amount of any such damages from the **Final Payment**.

10 He noted that *'$150'* was the figure shown in Item 9 for agreed damages and was the basis for his clients' claim. He said that what amounted to completion could be derived from the definition of that word in Clause 1.0 of the contract as follows:

> **'Completion'** means that the **Building Works** to be carried out under the Contract have been completed in accordance with the **Plans** and **Specifications** set out in the Contract and the **Owner** has been given a copy of the occupancy permit under the *Building Act* 1993, if the building permit for the **Building Works** carried out under the Contract requires the issue of an occupancy permit or in any other case, a copy of the certificate of final inspection.

11 According to Mr Pastro this *'completion'* took place only on 15 September 2003 hence the calculations which had been made.

12 He produced a tax invoice from a Kevin Riley, electrical contractor of Eltham which referred to the following services charging them at $1,063.48 inclusive of GST, namely:

> 1. Locate fault to lighting circuit new extension area lighting wiring was connected to power circuit.
>
> Disconnect power feed and wire lighting off new lighting circuit.
>
> 2. Rewire feed to two gang switch for outside lights found old switch used to extend old rubber wiring (computer room)

3. Locate old rubber camies joined to PVC behind arc's [scil architraves] in toilet and bathrooms for lights and fans.

13 Mr Pastro called evidence from Mr Wilson who said that the work described in the invoice related solely to the new extension. He said that he had engaged Mr Riley to check and repair the wiring system throughout his house. The main house he said was 40 years old. The work done on the extension was done as a result of the findings of the electrical audit. It was not necessitated by any operational problem which had manifested itself.

CONCLUSION

14 The narrative given stands in stark contrast to many of the *'horror'* stories which we encounter in the Domestic Building List. The operational elements of the building work were completed within the stipulated period in the contract, though it seems from Mr Wilson's letter of 9 October 2003 that Mr McGain had promised that the works would be completed more quickly than that. As appears from the correspondence and as was not denied by Mr Wilson in his evidence, from October 2003 onwards he and Mrs Wilson have had the advantage of the extensions. It is difficult not to regard a claim for liquidated damages in these circumstances as a travesty. Mr Pastro however contended that this was the entitlement which the contract gave his clients. Mr McGain admitted that he had let things slip. His view however was that realistically the Wilsons had no cause for complaint because the work had been finished and the lack of a final account meant that his company was the one out of its money.

15 Clause 39 of the contract was headed *'Completion of Works – Final Inspection'*. The clause lays down a procedure for the builder to give the owner written notice that the works are complete, that is a document known as a *'Notice of Completion'*. The builder is also required to give the owner its *'final claim'*. Unless the owner attends to an inspection of the premises the final payment is then due within seven days. If the owner does carry out a final inspection there are procedures for defect lists and the like. Clause 41 headed *'Handover and Final Payment'* provides for the builder to handover the building works to the owner *'together with all keys, certificates and warranties in the **Builder's** possession'*. Clause 41.1 states:

> If the **Owner** takes possession of the **Building Works** without the **Builder's** consent or before making the **Final Payment**:
>
> - the **Owner** is deemed to have accepted the **Building Works** as having reached **Completion**;
> - the **Owner** is not entitled to agreed damages under Clause 43 as and from the day of taking possession; and
> - all moneys that are payable to the **Builder** under this Contract are a debt due and payable.

16 It can be seen that Rangeview did not follow this procedure, a point commented upon by the Wilsons in their letter of 24 September 2003, nevertheless there is no evidence and indeed no suggestion that the Wilsons have suffered any loss and damage as a result.

17 Mr Pastro's contentions turn crucially upon regarding the definition of *'completion'* found in Clause 1 of the contract as being applicable to the phrase *'not completed'* in Clause 43, so that according to this view the building works are *'not completed'* even where their physical elements have been constructed but no Certificate of Final Inspection has been handed to the owner. There is a note in the margin of the contract stating:

> Throughout the Contract whenever a defined phrase or word is used it is shown in bold print.

18 Clause 2 provides that this marginal note is not to be regarded as part of the contract; nevertheless a perusal of the contract form indicates that this principle has been adopted. It follows that the definition applies where a bolded expression is employed in the text but not otherwise. Significantly there is no general definitional provision to the effect that the definitions apply except in the case where a contrary intention is evident to other parts of the same word. It follows that it is not self-evident that the building works have not been completed merely because *'completion'* as defined in the contract has not been attained. Curiously the defined term *'completion'* is hardly used in the body of the contract at all, it is used in the definition of the defined term *'notice of completion'* to be found later in Clause 1 in the heading *'E. Completion of works'* and in the first dot point appended to Clause 42.1 which is quoted above. The defined term does not appear to be employed anywhere else. To give the word *'completed'* in Clause 43 the same purport as the defined term *'completion'* in Clause 1 threatens to create a signal injustice. The present counterclaim is a case in point. A more just effect is given to the contract by having the word *'completed'* in Clause 43 bear its ordinary meaning so that building works are completed when they are physically constructed as was the case by late October 2002 in the present case. Had those who drafted this standard form intended to create the situation argued for by Mr Pastro they would have drawn Clause 43 as follows:

> If the **Building Works** have not reached **Completion** by the end of the **Building Period** …

They would thereby have clearly adopted the definition of *'completion'* provided for in Clause 1 of the contract.

19 It follows that in my view the counterclaim insofar as it is based upon a claim for liquidated damages must fail.

20 The claim for $1,083.00 for electrical works carried out stands in a different case. Regrettably I heard evidence neither from the electrical contractor employed by Rangeview to do the initial work nor from Mr Riley who carried out the re-wiring for which a counterclaim is now made. Given the

sums of money that were involved however it is difficult to be too critical of either party. With some hesitation I conclude that, in light of the evidence of Mr Wilson and the production of the invoice from Mr Riley, there is sufficient evidence to find that the work carried out by Rangeview in wiring the extensions was not of the proper standard. Whilst Mr Wilson conceded that it would have been open to him to go back to Rangeview and seek rectification I do not understand that he was under any legal obligation to take that course. Since the issue of the final payment was an open wound between the Wilsons and Rangeview it is perhaps understandable that the Wilsons would not have followed that course.

21 In the result therefore Rangeview's claim should succeed but should be reduced by the sum of $1,083 by way of setoff arising out of the successful portion of the Wilsons' counterclaim.

MFM:RB