

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

VCAT REFERENCE NO. BP181/2015

**BUILDING AND PROPERTY LIST**

**CATCHWORDS**

Agreement to construct garage – construction defective – damages – claims by both sides for moneys paid voluntarily not recoverable – work agreed to be done at no charge not claimable

<b>APPLICANT</b>	Mrs Klety Shaw
<b>RESPONDENTS</b>	Mr Atef Gaid and Mrs Georgette Gaid
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R. Walker
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	10 September 2015
<b>DATE OF ORDER</b>	25 September 2015
<b>CITATION</b>	Shaw v Gaid (Building and Property) [2015] VCAT 1509

**ORDER**

- 1 Pursuant to s.60 of the *Victorian Civil and Administrative Tribunal Act* 1998, and of the Tribunal's own motion, Georgette Gaid of 11 Glenora Street, Chadstone 3148 is joined as a respondent to this proceeding and applicant to the counterclaim.
- 2 Order that the Respondents pay to the Applicant \$7,114.10.
- 3 Further order the Respondents to pay the Applicant's costs, being witnesses expenses, of \$825.00.

**SENIOR MEMBER R. WALKER**

**APPEARANCES:**

For the Applicant	In person
For the Respondents	In person

## REASONS

### Background

1. In 2010 the Applicant, Mrs Shaw, who is a building designer, was the owner of a dwelling house in Huntingdale Road, Oakleigh. The house was situated towards the front of the block and had a large back garden. She decided to build a unit in the back garden, extend the existing house and sub-divide the land so that each of the two resulting units would be on a separate title. The existing house would become Unit 1 and the new Unit to be constructed would become Unit 2. Her intentions as to what was to be done with the two units are unclear.
2. She prepared plans for the construction of Unit 2 and for the extension of the house but, when her husband was diagnosed as suffering from a serious illness, she decided that instead of carrying out the development herself she would sell the land to be sub-divided into Unit 2 along with the plans and the building permit for the construction of Unit 2.

### The sale

3. She engaged an estate agent and, by contract of sale dated 9 January 2013 (“the Contract”), she sold the land, plans and permits for Unit 2 to the Respondents for a price of \$272,000.00.
4. The Contract included the following special conditions:
  - “1. Vendor to supply all documents to the purchaser in regards to the development prior to settlement.
  2. The Purchaser will construct Unit 1 proposed garage at their cost.
  3. Both Vendor and Purchaser agree to pay all bonds to the council, Vendor needs to pay \$5,000 bond for landscaping to the council for lot 1. Purchaser agrees to pay \$5,000 bond for landscaping, \$4,000 draining for lot 2.
  4. Purchaser agrees to pay for a new driveway.” (sic.)
5. Settlement took place in about July 2013. The Respondents obtained a building permit for the construction of Unit 2 and the Applicant obtained a building permit for the extension and renovations to Unit 1 which included the construction of a new Unit 1 garage. By force of the special condition, the Unit 1 garage was to be constructed by the Respondents.

### The dispute

6. Both Units have now been constructed and Unit 2 has been sold by the Respondents. The Applicant now complains about a number of matters, the main claim being that the Unit 1 garage has not been properly constructed. Various claims are also made against her by the Respondents.
7. The matter came before me for hearing on 10 September 2015 with one day allocated. The parties appeared in person and gave evidence and the

Applicant also called a Mr Kodikara, who is the relevant building surveyor for the construction of Unit 1, including the garage.

8. The evidence was extensive and was not completed until just before 4:15 p.m. which gave insufficient time to properly consider what the parties had said and provide a decision. I therefore informed the parties that they would receive a brief written decision in the mail.
9. The findings made and the reasons for them are as follows. I shall deal first with the claims made by Applicant and then those made by the Respondents.

### **Electricity and water**

10. The Applicant claims the cost of her electricity and water that she says was used by the Respondents for the construction of Unit 2. The Respondents acknowledge having used electricity through the Applicant's metre but say that this was pursuant to an agreement that, in exchange for the electricity, they would cut up and remove concrete from the rear of Unit 1 which they claim to have done. The Applicant's evidence is somewhat similar, that is; that in exchange for the electricity the Respondents were to clear the back of Unit 1.
11. It appears from the evidence that the concrete was cut up and removed and the photographic evidence from the Applicant would suggest that what she is really complaining about is that some rubbish has been deposited on Unit 1 by the respondent.
12. The onus of proving this claim is upon the Applicant and the arrangement entered into seems to have been informal and lacking in detail. I am satisfied that the power was used with the Applicant's consent and I am not satisfied that it is established that the Respondents failed to provide the consideration agreed upon for the provision of the power.
13. As to the provision of the water, the Respondents produced accounts from the water supplier dating from the beginning of construction showing small amounts of water usage through their own meter. I think it is unlikely that they would have also used the Applicant's water as she contends. I am not satisfied that this claim is established.

### **Defective construction of the garage**

14. There was a great deal of evidence concerning what was required for the construction. In the original plans prepared for town planning purposes the garage is described in one place as a carport and there is no wall shown on the side abutting the garden to Unit 1. However there is a party wall shown separating it from the adjacent garage to Unit 2, a double brick wall along the rear boundary and a roller door and façade facing the communal driveway.
15. The Respondents insisted that all that the plans required them to do was to provide posts and a roof but I think that even the elevations shown in the

town planning drawings indicate that the façade of the front of the garage was to be brick.

16. The Respondents claim that what they have provided is an excess of what was required. I am satisfied that the final construction was arrived at following some changes in design, all of which were agreed between the parties and some of which were requested by the Respondents.
17. Evidence was given by the building surveyor, Mr Kodikara, of difficulties he encountered with the inspections that he carried out of the work on the garage as it progressed. The Respondents argued with him about the required depth of the footings although finally they complied with his instruction to construct them to the required depth. Several inspections were required for the footings and the frame and the construction has still not been passed due to defects that Mr Kodikara outlined in his evidence and also in a building inspection report.
18. On going through these in evidence, it appears that there is concern as to the sufficiency of the pieces of timber used as framing materials, none of which have any grading stamped on them and which, according to Mr Kodikara, appear to be second hand.
19. The Respondents deny that the pieces of timber are second hand and attribute their appearance to delays in construction of the garage which they blame on the Applicant.
20. The items listed in the final inspection report requiring attention before the garage will be approved included:
  - (a) repairing missing brick work;
  - (b) providing missing flashing;
  - (c) establishing the stress grade of the rafters used;
  - (d) rectifying inadequately joined framing material.
21. Mr Kodikara also pointed out that there were many voids and holes in the mortar, that the masonry was not cleaned and that some external bricks had been damaged and cracked. He pointed out that the top two courses of bricks above the integrated piers were not consistent and appeared to have been laid not in a workmanlike manner. He also said that there were visible cracks and splits and significant staining in some of the rafters.
22. The Respondents acknowledge having constructed the garage themselves using tradesmen that they hired directly, rather than through the registered builder that they had engaged for the construction of Unit 2. They said that this was because the Applicant would not give them a copy of her building permit which their builder had required. The Applicant denied having refused to give them her permit and said that the Respondents never asked for it.

23. There was some reference in two emails about this but I cannot find in the material any refusal on the part of the Applicant to provide the building permit. Mr Kodikara said that, although he had meetings with Mr Gaid there was no request ever made to him for a copy of the building permit. I am not satisfied with the Respondents' evidence on this issue.
24. There was some concern expressed by Mr Kodikara as to whether the integrated piers forming the fire wall between the two garages were in fact integrated or whether they had just been mortared onto the face of a single skin brick wall. After looking at some photographs taken during construction I am satisfied that they are properly integrated piers and that therefore there is no reason to be concerned about that.
25. The Applicant has obtained quotations for the rebuilding of the garage at a cost of \$33,396. However I am not satisfied on the evidence that the garage requires to be rebuilt. I am satisfied however that it requires substantial reconstruction to accord with Mr Kodikara's requirements in order for him to be able to issue a final certificate. For that the Applicant has obtained a quotation for \$7,184.10 and that sum will be allowed.
26. I should add that I am not satisfied that there was any requirement for the Respondents to provide a ceiling or a motor for the roller door as the Applicant claims. There was no such provision in the Contract or plans and the garage can be said to be complete without having the ceiling lined with plaster.

#### **The missing posi-struts.**

27. The Applicant had three posi-struts in the front yard of Unit1 which were left over and which she thought she would use in the construction of a front verandah. The Respondents took the posi-struts without her agreement and used them to shore up the excavations for the trenches of the footings for the garage of Unit 1. They deteriorated in the ground. There was some argument then as to what should occur. Eventually the Applicant agreed that she would forego any claim for the value of the posi-struts if the Respondents were to cut up and remove them from the site. They cut up and removed two but one remained. The evidence on this issue is quite vague. I think the appropriate way of dealing with this is to make an allowance for the disposal of the remaining deteriorated posi-strut and for that I will allow \$50.

#### **Additional building inspection**

28. Because the Applicant was paying the building surveyor, she had to bear the cost of the additional inspections caused by the failure of the Respondents to carry out the work inspected properly in the first place. According to Mr Kodikara there were four such additional inspections which should not have been required at \$110 each and so the sum of \$440 will be allowed.

### **“Michael Shaw’s costs”**

29. Under the terms of the Contract, the Respondents were to construct the driveway at their cost. The Applicant’s husband, Michael Shaw, quoted to construct the driveway for them in bitumen. After a small amount of work had been done an argument took place between Mr Shaw and Mr Gaid over whether GST was included in the quoted price and Mr Shaw subsequently did not carry out the works. He subsequently removed some screenings from the site that he had laid.
30. Mr Gaid complained about the amount of crushed rock that Mr Shaw had removed from the driveway and since I do not know whose story to believe I must find that neither the Applicant’s nor the Respondents’ claims for the crushed rock in the driveway are established.
31. The Applicant also claims the cost of excavating and pouring a concrete base for a group meter and for the preliminary work her husband did on the driveway. As to the claim for the concrete base for the group meter I will consider this in relation to the Respondents’ claim for the construction of the brickwork for the group meter.

### **Damages and interest**

32. The Applicant claims that her \$5,000 bond is being held at the council because she cannot complete the landscaping due to the incomplete garage. She claims interest on this amount.
33. I am not satisfied that the hold up in the landscaping has anything to do with the defect in the garage. I also find her claim that she was unable to park her car in the garage because she did not feel safe in doing so difficult to believe.
34. The Applicant claims that she spent \$350 for landscaping of the common area. As she does not suggest that this was done with any prior consultation or agreement with the Respondents it seems to have been a voluntary payment and is not recoverable.

### **Town planning drawing**

35. The Applicant claims \$660 for amended town planning drawings she did at the Respondents’ request. She did these in order to raise the floor level of Unit 2 so that the excavation would not interfere with the root area of a protected tree. It was agreed at the time between the parties that no charge would be made for this and the Applicant acknowledged that. Having agreed to do the work for no charge she cannot now claim payment.
36. I now turn to the Respondents’ claims

### **Stormwater**

37. The Respondents constructed a stormwater drain under the driveway incorporating a detention system in accordance with the permit that was granted for the construction of Unit 2. According to an invoice from their

builder, their cost of constructing the stormwater system was \$16,500 inclusive of GST. They claim that, since the stormwater from Unit 1 is also to be directed into that system the Applicant should pay half.

38. It was not suggested that there was any consultation with the Applicant as to the amount to be spent or the scope of work to be done. There was no provision in the Contract that this cost would be shared and no evidence of any agreement by the Applicant that, if the Respondents were to incur the expense she would pay half. It is a voluntary payment that the Respondents have paid.
39. Although the town planning permit directed that the stormwater drainage from Unit 1 had to be directed into that system the cost of that would be confined to connecting Unit 1 to the system, not the provision of the system itself. According to the Applicant's evidence she paid her plumber to connect Unit 1 to the system. This claim is not established.

### **Group metre**

40. Unit 1 had an existing metre box but the Respondents wanted to construct a group metre for both Units. I am satisfied that the Applicant agreed to this because her husband poured the base for the construction of the group metre box and the Applicant now makes a claim for the cost of that.
41. The Respondents claim \$660 being one half of the cost of the construction of the group metre box. If I am to allow this, and I think that I should, I should also allow the claim by the Applicant for the construction of the base. As to that, doing the best I can on the figures provided I will allow \$200 for the construction of the base, one half of which is \$100. When taken off the \$660 that leaves a balance of \$560 which should be paid to the Respondents by the Applicant. I am satisfied that the Applicant agreed to the construction of the group metre.

### **Foot path repairs**

42. The Respondents paid \$2,420 for the cutting and replacement of the foot path and repairs to the nature strip following damage done during the course of construction. There was a dispute between the parties as to whose contractor or supplier caused this damage.
43. The Respondents agreed that they did not consult with the Applicant before carrying out this work or incurring the expense. The Applicant says that the Respondents had bricks delivered and heavier traffic entered the site for the construction of Unit 2 than was used for the extensions to Unit 1.
44. I have no way of knowing which particular vehicle or vehicles caused the damage but since the Respondents have now repaired it that is a voluntary payment they have made without any agreement on behalf of the Applicant to contribute to it. There is no basis for making any award in their favour.

### **Installation of kerb on the driveway**

45. When the Respondents' contractor constructed the driveway it sloped towards the neighbouring property causing water to pond against the fence. The neighbour complained about water penetration and resulting damage. The council intervened and required the construction of a concrete kerb along the boundary to prevent the water from reaching the fence. This was constructed by the Respondents at a cost of \$1,550 plus GST. They claim that the Applicant should contribute half.
46. It does not seem to me that there is any basis for this claim since the need for the work arose from the apparent failure of the Respondents to construct the driveway properly in the first place.
47. I should add that, although the driveway appears to have been defectively constructed, that issue is not before me and is really something that should be dealt with only in proceedings to which the Owners' Corporation is a party.

### **Removal of concrete from Unit 1**

48. The Respondents claim \$1,950 being the cost of cutting up and removing concrete from the rear of Unit 1. This was the work that was to be done in exchange for the use of power from Unit 1 and since I found that there was such an agreement and that the power was used and supplied, there is no basis for this claim.

### **Mistake on the plans**

49. The Respondents claim that there was a mistake on the plans supplied by the Applicant and as a result they have had to put in stairs at the back of the Unit whereas the plans did not show any stairs.
50. It is clear from the evidence that the plans had to be amended in order to raise Unit 2 so as to avoid interfering with the roots of the protected tree. There is no evidence before me that there was any mistake in the plans. The need for stairs might well have arisen because the level of the Unit was raised. The plans that were drawn by the Applicant to increase that height were drawn without charge as previously referred to.

### **Rubbish removal on driveway**

51. The Respondents claim that the driveway, which was to provide access for the work done on both Units, was obstructed with rubbish by the Applicant. There is no detailed evidence of the alleged obstruction in terms of dates, amounts of material and what was done in order to remove it or what damage arose as a result of it. The Respondents claim the sum of \$2,150 plus GST which their builder has charged them for rubbish removal. I am not satisfied that this claim is proven.



### **Change to carport**

52. The Respondents claim an amount of \$4,500 because they say the cladding of the garage for Unit 1 was changed from some other cladding to bricks. It is apparent from the limited email evidence available that the parties discussed the manner of construction of this garage. It is called a carport at one point on the town planning drawings but it is otherwise described as a garage. It is referred to as a garage in the Contract.
53. It is not suggested that there was any agreement on the part of the Applicant to pay any extra for any change in the method of construction of the garage. I am satisfied that the method of construction was as agreed, albeit it was carried out defectively as referred to above.

### **Driveway level**

54. The Respondents claim that the driveway level was interfered with by the Applicant's labourer removing crushed rock when it became apparent that her husband would not be constructing the driveway. As stated earlier, there is conflicting evidence in regard to this issue. The obligation to construct the driveway was on the Respondents and the levels of the driveway appear to have been defective. I am not able to attribute this to the Applicant nor can I find that it cost the Respondents \$500 to rectify anything that the Applicant might have done to the driveway area.

### **Crushed rock and Bobcat**

55. The Respondents claim \$1,129.14 for crushed rock that they purchased and a Bobcat that they obtained to spread the crushed rock in order for the Applicant's husband to asphalt the driveway. They say that he then declined to do so.
56. It seems to me that there was no concluded agreement between the parties for the Applicant's husband to carry out this work. There was never an agreement on the price to be paid and so there was no contract of which the Applicant's husband could have been in breach.

### **Driveway landscaping**

57. The Respondents say they have expended \$313.75 in landscaping the common area.
58. The photograph they produced showed that this was spent in installing plants and soil in the garden immediately adjacent to Unit 2 which they subsequently sold. As with the claim by the Applicant for landscaping, I am not satisfied about this claim. It was something voluntarily done by the Respondents without the agreement of the Applicant and they cannot now make her contribute to it.

### **Orders to be made**

59. As a consequence I find that the Respondents should pay to the Applicant \$7,674.10 and that the Applicant should pay to the Respondents \$560.00.

The two figures shall be set off and there will be an order that the Respondents pay to the Applicant \$7,114.10.

60. The Applicant claimed an order for costs. As a general rule no orders for costs are made in these proceedings, particularly where it is a small claim. However I think it is appropriate to make an order for the payment by the Respondents of Mr Kodikara's witnesses expenses, which were \$825.00, because the Applicant was entirely successful on the issue which required his attendance.

**SENIOR MEMBER R. WALKER**