

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL  
CIVIL DIVISION**

**BUILDING & PROPERTY LIST**

VCAT REFERENCE NO.BP1110/2015

**CATCHWORDS**

Application for reinstatement of proceeding; expert appointed by Terms of Settlement to assess completion of rectification works; Terms of Settlement provided that if rectification works not completed within 8 weeks of exchange of signed Terms, applicants at liberty to seek reinstatement of proceeding and default judgement for cost of completion of works as assessed by applicants' expert; respondent failed to complete rectification works within period stipulated by Term of Settlement; before rectification period had expired, expert appointed by Terms of Settlement directed respondent not to return to the site by reason of first applicant's threatening behaviour towards director of respondent; appointed expert assessed cost of completion of works at a sum substantially less than sum assessed by applicants' expert; held that Terms of Settlement did not empower appointed expert to issue directions or assess cost of completion of uncompleted works; leave granted to applicants to reinstate proceeding and obtain default judgement for cost of completion of uncompleted works as assessed by their expert.

<b>FIRST APPLICANT</b>	Ya Ge Xu
<b>SECOND APPLICANT</b>	Qing Xiao Chen
<b>RESPONDENT</b>	Hallbuild Pty Ltd (ACN 155 388 604)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	B Thomas Member
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	8 November 2017
<b>DATE OF ORDER</b>	9 March 2018
<b>DATE OF WRITTEN REASONS</b>	9 March 2018
<b>CITATION</b>	Xu v Hallbuild Pty Ltd (Building and Property) [2018] VCAT 386

**ORDERS**

1. The proceeding is reinstated.
2. The respondent must pay the applicants the sum of \$5,170.00.
3. Costs are reserved with liberty to apply.
4. Any submission as to costs by either party must be in writing, filed with the Tribunal and served on the other party by 20 March 2018.

5. Any determination as to costs will be made in Chambers.

B W Thomas  
**MEMBER**

**APPEARANCES:**

For the Applicants

Mr Ya Ge Xu

For the Respondent

Mr E Fah, solicitor

## REASONS

### INTRODUCTION

- 1 In a building dispute, the parties having agreed to settle the dispute on terms is one thing; the parties agreeing that each has fulfilled their obligations under the settlement is another. In this proceeding both parties allege the other has not complied with Terms of Settlement.
- 2 This is an application by the applicants (the owners) for reinstatement of the proceeding by reason of the alleged failure by the respondent (the builder) to comply with Terms of Settlement dated 23 August 2016 (the Terms). Annexure B to the Terms contained a list of 26 items of building work that the builder agreed to rectify (the rectification works).
- 3 I heard the Application on 8 November 2017. Mr Xu gave evidence for the owners. The builder was represented by Mr Fah, solicitor. Mr Richard O'Bryan, a building consultant, gave evidence on behalf of the builder.

### BACKGROUND

- 4 On 22 August 2013, the parties entered into an HIA Domestic Building Contract for the construction of a residence in Plummer Road, Mentone.
- 5 During construction, disputes arose between the parties concerning alleged defective building work, the scope of the building work, incomplete items of building work and monies owed under the contract. In or about May 2016, the owners commenced proceedings in the Tribunal.
- 6 On 23 August 2016, the parties entered into the Terms. Under the Terms Mr Richard O'Bryan was appointed to assess the rectification under works. On 26 August 2016, the proceeding were struck out with the right to either party to apply for reinstatement.
- 7 On 10 March 2017, the owners filed an application for the proceedings to be reinstated on the basis that certain items in Annexure B had not been rectified and claimed \$67,210.00 as the cost of rectification of those items.
- 8 The owners submit that the following certain items of work in Annexure B have not been adequately completed or completed at all.

### THE TERMS

- 9 The Terms provided that the builder would undertake 26 items of rectification work to the satisfaction of Mr Richard O'Bryan, the appointed expert. The work was to be completed within 6 weeks of signing an exchange of the Terms.
- 10 The relevant clauses of the Terms are:
  - 1.1 Hallbuild will rectify the defects listed in **Annexure B (Rectifications)**.

- 1.2 The Owners acknowledge that **Annexure B** contains the complete list of defects in the Home which require rectification and that the remaining defects in the Proceeding are not pursued.
- 1.3 The Rectifications are to be completed by Hallbuild within 6 weeks of the date of the exchange of these executed Terms of Settlement (Rectification Period).
- 2.1 ... the parties are to agree a suitably qualified expert for the purpose of assessing the Rectification is pursuant to this clause to (Expert). The Expert will be Richard O'Bryan ...
- 2.4 As soon as practicable after Hallbuild provides notification completion of the rectifications pursuant to clause 1.12 above, the Expert is to attend the Home to assess the Rectifications ... The Expert will inform the parties in writing as:
- (a) whether the Rectification of the item is complete; and
  - (b) any further steps required by Hallbuild to finalise the Rectifications.
- 2.5 If, following the Expert's assessment, there is any further work to be done by Hallbuild to finalise the Rectifications:
- (a) Hallbuild is to undertake that work within 2 weeks of the Expert's report to the parties or as otherwise agreed; and
  - (b) the Expert is then to re-assess the work in accordance with clause 2.4 above, and rectification and re-assessment is to continue until there is no further work to be done.
- 2.6 Any works not completed and signed off by the Expert within 8 weeks of the date of the exchange of these executed Terms of Settlement become outstanding works (Outstanding Works).
- 2.7 The parties are bound by the Expert's assessment.
- 4.3 Should there be any Outstanding Works, Hallbuild and the Owners you revocably consent to the following:
- (a) the Owners will be at liberty to apply to have the Proceeding reinstated to obtain default judgement for the cost to complete any Outstanding Works at the cost rates set out in Ian Forest's Report dated 22 July 2016, and the reasonable costs associated with the reinstatement of the Proceeding.

## THE ALLEGED BREACHES OF THE TERMS

- 11 The owners allege that the builder breached the Terms in that Items 3, 5, 6, 13 and 20 have not been rectified and they claim \$67,210.00 as the cost of rectification of those items.
- 12 The owners rely on Clause 4.3 of the Terms and the following costing rates of Mr Ian Forrest for completion of these items:

Item 3	Front entry porch landing ponds	\$2,500.00
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	during a rainstorm	
Item 5	Edges between front entry porch and side canopies not watertight	\$4,000.00
Item 6	First floor balcony, West facing wall, has two cracked tiles	\$1,800.00
Item 13	Water leaking from rooftop	\$29,000.00
Item 20	Timber floor	\$1,320.00
New item	Double glazed door	\$3,125.00
New item	Service cost for leak detection	\$385.00
<b>Sub Total</b>		<b>\$48,880.00</b>
<b>Builder Profit and Margin (25%)</b>		<b>\$12,220.00</b>
<b>GST Allowance (10%)</b>		<b>\$6,110.00</b>
<b>TOTAL COST</b>		<b>\$67,210.00</b>

- 13 The builder submits that Mr O'Bryan was nominated by Mr Xu as the Expert pursuant to the Terms and the builder did not take issue with his appointment. Mr O'Bryan's role under the Terms was effectively to be the superintendent of the rectification works, and his opinion whether an item in Annexure B was completed was determinative. Mr O'Bryan has declared that the items referred to in paragraph 12 have been satisfactorily completed by the builder, and pursuant to the Terms, the owners have released the builder from further liability with respect to those items. Mr O'Bryan has issued a direction with respect to the double glazed door which, pursuant to the Terms, which the owners are required to accept. The owners have not provided any detail with respect to the leak detection quotation. Clauses 1.2 and 6.4 of the Terms preclude the owners from claiming the 2 new items as they were not part of Connection B.
- 14 On 3 October 2016, Mr O'Bryan sent an email to the parties stating that only Item 20 (replacement of the timber floor) in Annexure B remained outstanding, but the owner had requested that this not be undertaken for 6 months. The owners have not suggested there was any impropriety in Mr O'Bryan making this finding. Accordingly, save for item 20, the owners have

given a full release to the builder for all rectification works, and are therefore precluded from pursuing these items.

- 15 In an email to the parties dated 1 March 2017, Mr O'Bryan stated among other things:
  - (a) he had witnessed two attempts by Mr Xu to engage Mr Hall, the director of the respondent, in a physical manner:
  - (b) he deemed the site to be an unsafe working environment and directed the builder not to return to the site; and
  - (c) the eight issues raised by Mr Xu in his 26 February 2017 email, raised repeated and new items.
- 16 With respect to Item 20, in view of Mr O'Bryan's direction to the builder of 1 March 2017 not to return to the site, a quotation for completion of that item of work for \$1,320.00 has been obtained. Accordingly, builder should be able to pay the owners that sum and the owners' application be dismissed.
- 17 On 8 March 2017 before the owners filed this application, Mr O'Bryan had directed the builder not return to the site and the builder offered to pay the owners sum of \$5,970.00 in lieu of carrying out any further work.
- 18 The builder submits that in Mr Xu attempting to engage Mr Hall in a physical manner, the owners had prevented the builder from completing the rectification works, and thereby breached the Terms. I accept that submission; Mr Xu's demeanour at the hearing was clearly antagonistic towards Mr Hall, and he made it clear that under no circumstances would he entertain Mr Hall returning to the site.
- 19 In his evidence to the Tribunal on 8 November 2017, Mr Xu said that, although he was no longer claiming Items 13 and 19, Items 3, 5, 6, and 20 in Annexure B had not been rectified by the builder. Based on the opinion of Mr Ian Roberts referred to in Clause 4.3 of the Terms, the cost of rectification of these items, and two additional items –replacement of a double glazed door and a quotation for leak detection services, including a builder's profit and margin of 25% and GST, is \$67,210.00. Mr Xu was not cross examined by Mr Fah.
- 20 Mr O'Bryan said Items 3 and 5 needed to be rectified at a cost of \$1,200.00 and \$50.00 respectively. The cracked tiles (Item 6) had been replaced and any further cracking was not as a result of the rectification works, but could be due to settlement of the house. Item 20 was accepted and he costed rectification at \$2,500.00. Neither replacement of the double glazed door or the need for leak detection were items in Annexure B. 20% was a more appropriate builder's profit and margin, but a registered builder was not required, as a handyman would quite capable of undertaking the required rectification works. Mr O'Bryan was not cross-examined by Mr Xu.
- 21 Mr O'Bryan gave evidence, which was not contradicted by Mr Xu, that the amounts claimed by the owners to rectify the allegedly outstanding rectification works were inflated. He said that "handyman" type work was

simply involved and a registered builder was not required. If a builder was engaged to undertake works, profit margin of 8-15% would be reasonable and not 25% as stated by Mr Forrest.

- 22 Mr O'Bryan's costings for the outstanding rectification works can be summarised as follows:

Item 3		\$1,200.00
Item 5		\$250.00
Item 6	No evidence that the tiles were cracked by the builder	\$0.00
Item 13	The case of the leak is due to the owners' door and window system	\$0.00
Item 19	The owners did not pursue this item	\$0.00
Item 20	Timber floor.00	\$1,320.00
Item 20	Son's shower leaking water between AC sheet and floor	\$2,400.00
Double glazed door	Not covered by Annexure B	\$700.00
Leak detection	Expense not incurred	
<b>TOTAL</b>		<b>\$5,870.00</b>

- 23 Mr O'Bryan concedes that Items 3, 5 and 20 are uncomplete. As to Item 6 (2 cracked tiles on first floor balcony), I find that the owners have not proved on the balance of probabilities, that these tiles were cracked during the rectification works. As to Item 13, Mr O'Bryan opines that the leaking is due to the door and window system itself, which was supplied by the owners, being defective. The owners did not provide any evidence in response to this opinion. The owners did not pursue Item 19.
- 24 I find that the double glazed door is a new item and is not covered by Annexure 2 in the Terms. I do not allow leak detection quotation as it also is not an Annexure 2 item and also is an expense not incurred by the owners.

## DISCUSSION

- 25 I accept that the Terms were signed and exchanged on 23 August 2016. Therefore, pursuant to clause 1.3 of the Terms, the builder was required to complete the rectification of the defects listed in Annexure B within six weeks of 23 August 2016; that is by 4 October 2016.
- 26 In view of the parties being bound by Mr O'Bryan's assessment pursuant to clause 2.7, other than Item 20, as at 4 October 2016 there were no

Outstanding Works. However, Mr O'Bryan conceded in his evidence before the Tribunal that Items 3, 5 and 20 had not been rectified.

- 27 I do not accept the builder's submission that Mr O'Bryan's role under the Terms was effectively to be the superintendent of the rectification works, and his opinion whether an item in Annexure B was determinative. The Terms are specific as to the limited role to be performed by Mr O'Bryan; that is simply to assess the rectification and then inform the parties whether rectification is complete, and if not, what further action is required by the builder to finalise rectification.
- 28 However, I consider that the owners' conduct in threatening Mr Hall was unreasonable and without justification. The consequence was that the builder was prevented from completing rectification and to that extent, I find that the owners have repudiated the Terms and that the builder accepted that repudiation.
- 29 Having found that conduct of the owners was unjustified, I consider that the owners cannot benefit from their repudiation of the Terms. Therefore, they are not entitled to rely on Clause 4.3 of the Terms and seek to obtain default judgement for the Outstanding Works at the cost rates set out in Ian Forrest's report dated 22 July 2016.
- 30 I accept Mr O'Bryan costing of \$5,780.00 for the completion of the outstanding items of rectification. However, I find that the sum of \$700.00 (double glazed door) should be excluded as this item is not covered by Annexure B.
31. I will therefore order that;
  - (a) the proceeding is reinstated; and
  - (b) the respondent must pay the applicants the sum of \$5,170.00.

B W Thomas  
**MEMBER**