

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

**CIVIL DIVISION
DOMESTIC BUILDING LIST**

VCAT Reference: D407/2005

CATCHWORDS

No concluded contract - Quasi contract - Work and labour done – liability of person requesting the work to pay a fair and reasonable price – confined to work actually done

[2005] VCAT 2368

APPLICANT: Peter Lawler
RESPONDENT: Moshe Arad
WHERE HELD: Melbourne
BEFORE: Senior Member R. Walker
HEARING TYPE: Hearing
DATE OF HEARING: 2 November 2005
DATE OF ORDER: 10 November 2005

ORDERS

1. Order the Respondent to pay to the Applicant the sum of \$34,093.50.
2. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant: Mr P. Pickering of Counsel
For the Respondent: Mr G. Doran, Solicitor

REASONS FOR DECISION

Background

1. The Applicant, Mr Lawler is a builder although at times material to this proceeding he was not registered as such. At all material times the Respondent, Mr Arad, was the owner of land at 41 Locksley Road, Ivanhoe (“the Site”) upon which there was erected five partially completed residential units.
2. The units had been the subject of some dispute between Mr Arad and an earlier builder. By the time Mr Lawler was approached, they had stood in their unfinished state for many months during which they became substantially damaged by vandals. There were also a number of defects in their construction.
3. Between December 2003 and mid February 2004 Mr Lawler engaged and paid for tradesmen and building materials and supervised construction work to repair the damage and defects and to bring all units to a more complete state. He then ceased work because of lack of payment from Mr Arad and has brought these proceedings to recover the amounts he says are due to him.
4. He first issued proceedings in the Magistrates’ Court but that case was discontinued in order to bring these proceedings.

The hearing

5. The matter was listed before me for hearing on 2 November 2005 but was then adjourned to start on 3 November 2005 to enable the Mr Arad’s solicitor to examine some subpoenaed documents. Mr Lawler was represented by Mr Pickering of Counsel and Mr Arad by his Solicitor, Mr Doran.
6. For the Applicant, I heard sworn evidence from Mr Lawler, a Mr Pople and a Mr Aldred. Mr Aldred had been subpoenaed by both parties but was examined in chief by Mr Pickering. Witness statements were admitted by consent from Mr Lawler’s wife, who was nearby when a critical meeting occurred, and his brother who prepared a draft agreement that was never ultimately signed. For the Respondent, I heard only from Mr Arad.

7. From his demeanour in the witness box Mr Lawler impressed me as being a truthful witness as also did Mr Pople. I generally accepted the evidence of Mr Aldred although I do not think he has an accurate recollection of a meeting which I find took place in about mid November 2003 between the parties. I was less impressed with the evidence of Mr Arad. He raised a number of matters in the course of cross examination which did not appear in his witness statement and in the course of cross examination seemed more concerned with making statements about matters he wanted to raise rather than answering the questions put to him. Where there is any conflict between the evidence of Mr Arad and Mr Lawler I accept the evidence of Mr Lawler.

The issues

8. The key issue in the case was whether a meeting took place in mid November 2003 between Mr Lawler, Mr Pople, Mr Aldred and Mr Arad at the Site. Both Mr Lawler and Mr Pople swore that such a meeting took place and their evidence was corroborated by the statement of Mrs Lawler which was filed by consent. According to this evidence, the purpose of the meeting was to enable Mr Lawler to inspect the units and provide advice as to what had to be done and a price for him to do it. Mr Pople drove Mr Aldred to the site in his car and there met Mr and Mrs Lawler. Mr Arad arrive shortly afterwards and opened the security gate to allow them access. Mr Aldred said that such a meeting did not occur although he did acknowledge that he had visited the site with Mr Pople and had also seen Mr Lawler on site although he could not recall when. Mr Aldred was also unable to say how Mr Lawler gained access to the site for the purpose of quoting on the work that was required. He (Mr Aldred) did not have a key to the site until just before Christmas. I think it is likely that Mr Arad would have been at the meeting. It was a matter of vital importance to him to bring the project to a condition where he would be able to obtain finance to finish the construction and then sell the units. However, he swore that there was no such meeting and that he never met Mr Lawler before a conference that took place at the Magistrates' Court long afterwards. I do not believe this evidence.
9. According to Mr Lawler's account, which I accept, Mr Arad opened the cyclone security gate to allow Mr Lawler and the others access and, after Mr Lawler had inspected the units, a conversation then took place wherein Mr Lawler told Mr Aldred

and Mr Arad what needed to be done and how long it would take to do it. He said to them that he would need to work out the cost of completion and submit a quote.

Who was to do the work

10. At the time of the initial inspection and for a short time afterwards, Mr Lawler was proposing to carry out the work in the name of a company he was associated with called Bucknall Bourke Constructions Pty Ltd (“Bucknall”) although the letter from Mr Pople accepting the quote on behalf of Mr Arad is addressed to Mr Lawler personally. Subsequent invoices named Bucknall, but a letter of 19 January 2004 from Mr Lawler states that he was operating as an individual. There is no evidence that Bucknall was involved in carrying out any of the work and I am satisfied that the request for the work to be done was made to Mr Lawler.
11. Mr Lawler required payment of a deposit of \$45,000.00 upon signing a contract but no contract was ultimately signed and no such deposit was ever paid. Mr Lawler nonetheless proceeded to carry out the work he had been requested to do with great expedition, since he had been told that the matter was urgent.

The work

12. During January and February Mr Lawler engaged tradesmen and purchased quantities of materials in repairing and furthering the construction of the units. He made repeated requests for payment to Mr Pople but received only \$5,400.00.
13. At one stage it was suggested to him that he would be paid if he signed a written contract for the supervision of the work. His brother, who was a solicitor, drew up a draft document but it was never signed by Mr Arad. There was the initial quote that was accepted but then nothing was signed and the parties do not appear to have proceeded with that arrangement. In fact, there is insufficient evidence that the parties ever entered into any firm contractual arrangement. There was an initial request to Mr Lawler to do the work and promises of payment and contracts thereafter on behalf of Mr Arad which were not fulfilled.
14. After the first meeting on site, there was no further direct communication between Mr

Lawler and Mr Arad. According to Mr Pople's evidence Mr Aldred had suggested that he (Mr Pople) act as intermediary and after the quote was accepted, all communications came from Mr Arad to Mr Aldred and then to Mr Pople then to Mr Lawler.

The end of the work

15. Mr Lawler finally stopped work on the project when he was unable to obtain any further payment. Mr Arad then entered into an agreement with a financier which engaged another builder and the units have now been finished and sold. Mr Arad now claims:
 - (a) that Mr Lawler was instructed to bring only two of the five units to lock up stage at a maximum cost of \$25,000.00;
 - (b) that the work was done for Mr Aldred and not him.

16. In regard to how much work was required the suggestion that only limited work to two of the units was to be done is quite inconsistent with the quotation that was given and accepted, which was to complete all five units. It is also inconsistent with Mr Arad's own witness statement where he says that all units were to be brought to lock up stage.

17. As to the identity of the contracting party, Mr Arad acknowledged that Mr Aldred was authorised by him to repair the units, find finance and to obtain a builder.

18. Mr Arad provided to Mr Aldred \$45,000.00 by means of a bank cheque which was deposited in a cheque account to provide funds for the project. It was out of these funds that Mr Aldred paid to Mr Lawler the amounts that he received. Subsequently, Mr Arad required Mr Lawler to refund \$15,000.00 of this money to him. This is inconsistent with the notion that Mr Aldred was to assume personal liability for the work.

19. I am satisfied that Mr Aldred was authorised by Mr Arad to act as his agent in engaging Mr Lawler to carry out the work that was done. As Mr Arad said himself, Mr Aldred had no money and that it was he, Mr Arad, who supplied the money for the work. It also appears from what Mr Arad said that he has a number of issues with Mr Aldred but these are not things that should concern Mr Lawler or prevent him from being paid.

Conclusion

20. I am satisfied that Mr Lawler carried out the work that he described. I am also satisfied that the work was done at the request of Mr Arad, both in the initial face to face meeting and then subsequently as conveyed by his agent Mr Aldred. No formal contract was signed but Mr Arad is required to pay a fair and reasonable sum to Mr Lawler for what he has done at his request to his units.

21. According to Mr Lawler's evidence, a total of \$33,493.50 was paid by Mr Lawler to contractors and for materials. In addition, he has rendered invoices for management fees of \$15,000.00. His evidence is that these sums were fair and reasonable for what was done and there is no contrary evidence. He also claims an amount of \$30,000.00, being the balance of management fees that he would have received if he had completed the units. I do not see how this is recoverable since the rest of the work to bring the units to completion was never done by Mr Lawler. I think what he is entitled to is a fair and reasonable sum for what he has done, which is \$48,493.50. From this must be deducted the amount of \$14,400.00 that Mr Arad has paid which leaves a balance of \$34,093.50.

22. I have not heard from the parties on the question of costs so they will be reserved.

Rohan Walker
Senior Member