

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT Reference: D411/2010

CATCHWORDS

Construction of contract – contra proferentum; GST – whether to added to contract price

APPLICANT: Lorna Julie Mann

RESPONDENT: Tomma Fashions Pty Ltd (ACN 005 111 179) t/as Pizzazz Interiors

WHERE HELD: Melbourne

BEFORE: Senior Member E. Riegler

HEARING TYPE: Small Claim Hearing

DATE OF HEARING: 1 September 2010

DATE OF ORDER: 1 September 2010

DATE OF REASONS: 25 October 2010

CITATION: Mann v Tomma Fashions Pty Ltd tas Pizzazz Interiors (Domestic Building) [2010] VCAT 1794

ORDERS

1. The respondent is to pay the applicant \$1,395.00.
2. The respondent's counterclaim is dismissed.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the applicant: In person.

For the respondent: Mr T. Kilpatrick, Director.

REASONS

1. On 1 September 2010, I heard an application comprising a claim by the applicant, Ms Mann against Tomma Fashions Pty Ltd, trading as Pizzazz Interiors (**'Pizzazz'**) for \$3,355 and a counterclaim by Pizzazz against Ms Mann for \$2,775. At the conclusion of that hearing, I ordered that Pizzazz pay Ms Mann \$1,395 and that Pizzazz's counterclaim is dismissed. By letter dated 10 September 2010, Pizzazz requested that I provide written reasons, which I now provide.
2. In December 2009, the parties entered into a contract for the supply and installation of a kitchen into residential premises owned by Ms Mann (**'the Works'**). The contract is constituted by a written quotation dated 5 December 2009 (**'the Quotation'**).
3. Installation of the joinery component of the Works commenced on 30 January 2010, at which time a template for the proposed granite bench top was made. Installation of the granite benchtop occurred on 10 February 2010. The design of that granite benchtop included what the parties have referred to as a 'waterfall' feature. In essence, this meant that the horizontal section of granite continued over the edge of the breakfast bar and ran vertically to the floor.

The issues in dispute

4. The parties fell into dispute after the Works were completed. In particular, Ms Mann contends that the granite stonework (**'the Stonework'**) is defective in that:
 - (a) the join between the horizontal and vertical face of the granite has a large gap; and
 - (b) the 'waterfall' does not extend fully to the floor.
5. Ms Mann contends that the reasonable cost to make good the stonework is \$3,355, which she claims from Pizzazz.
6. By contrast, Mr Kilpatrick, who appeared on behalf of Pizzazz, contends that the scope of the Works under the contract between the parties (**'the Contract'**) only included the cabinetry component of the Works and did not include any of the Stonework. He said that Pizzazz was only responsible for co-ordinating the installation of the Stonework and that the supply and installation of that work was undertaken under a separate contract between Ms Mann and the relevant stonemason.
7. Mr Kilpatrick further contends that \$2,775 remains outstanding under the Contract, which Pizzazz counterclaims from Ms Mann. Ms Mann disputes that \$2,775 remains unpaid under the Contract. She contends that only \$1,850 remains unpaid. The difference between these two

sums is the addition of GST. In that respect, Ms Mann said that the price stated in the Quotation included GST, whereas Mr Kilpatrick said that the quoted price excluded GST.

Was the stonework part of the scope of the work under the Contract?

8. The Quotation states:
 - DOORS in: vinyl wrap gloss no 1 door \$9,250
 - BENCHTOP in: Granite \$4000 + GST
9. Ms Mann contends that the reference to the Stonework in the Quotation is evidence that the Stonework formed part of the Contract. Mr Kilpatrick gave evidence that the reference to the Stonework in the Quotation was simply to give Ms Mann an idea of the overall cost of the kitchen but did not mean that Pizzazz was responsible for that work. He said that the supply and installation of the Stonework was a separate contract between Ms Mann and the stonemason chosen by Pizzazz.
10. Mr Kilpatrick referred me to a sketch plan, which he said was given to Ms Mann. That sketch plan has a hand written note at the bottom of the page, which states
 - Vinyl wrap No 1 door with gloss. Stone benchtop 40mm by client.*
11. Mr Kilpatrick contends that the hand written note is evidence that the Stonework was not part of the Works that Pizzazz was to perform. I note that the copy of the sketch plan provided to me also states that the price of the Works that Pizzazz was to undertake is \$10,600 plus GST, which totals \$11,660. This is a different price to the price written in the Quotation, which prices the cabinetry component of the Works at \$9,250. It seems to me that the two different prices indicate that the parties may have continued to negotiate on the price and possibly the scope of the work.
12. In my view, further negotiation between the parties leading to a different final price to what was originally hand written on the sketch plan indicates that the hand written note in the sketch plan may have been superseded by what is expressly stated in the Quotation. In other words, it appears to me that the Quotation represents the final agreement reached between the parties. That Quotation does not exclude the Stonework from the scope of the Works contemplated by the Contract.
13. Further, Ms Mann says that she paid Pizzazz \$2,000 as a deposit for the Stonework. Mr Kilpatrick contends that Pizzazz collected the deposit as agent for the stonemason. Ms Mann disputes that. She produced an invoice for the \$2,000 deposit, which appears to be on the same letterhead as other invoices issued by Pizzazz.

14. Importantly, there is no evidence before me of any contract between Ms Mann and the stonemason. In fact, there is no evidence to suggest that Ms Mann had any involvement in the selection or procurement of the person who supplied and installed the Stonework.
15. In weighing all these factors, I accept the evidence of Ms Mann that she paid \$2,000 to Pizzazz as a deposit for the Stonework. I do not accept that Pizzazz simply collected this money as agent for the Stonemason. Therefore, I find that the Stonework was part of the Contract between Ms Mann and Pizzazz.

Was the Stonework defective?

16. Ms Mann relied on an undated report prepared by Leo Panagiotidis from European Marble Centre. In that report Mr Panagiotidis states that the granite waterfall is 18mm too short because it does not reach the floor and that the join between the horizontal face and the vertical face of the stonework exhibited gaps of 3.5 mm where the gap should only be 0.5 mm. However, Ms Mann did not call Mr Panagiotidis to give evidence. Consequently, there was no opportunity to cross-examine him on the matters set out in his report or in relation to his qualifications. On that basis, I have had little regard to the contents of that report.
17. Nevertheless, Ms Mann produced a number of photographs showing the as-constructed Stonework. One of those photographs depicted the junction between the vertical and horizontal face of the Stonework. It was clear from that photograph that there was a sizeable gap between the meeting of those two surfaces. In my view, that junction was unsightly. Consequently, I do not regard that work as having been carried out in professional and workmanlike manner.
18. Other photographs produced by Ms Mann depicted the gap between the floor and the bottom edge of the vertical face of the Stonework (the waterfall). Those photographs showed that there was a gap of approximately 20mm. Mr Kilpatrick did not dispute this but suggested that the gap would be reduced after the kitchen floor tiles were laid. He also said that any remaining gap could then be caulked or grouted.
19. Ms Mann gave evidence that the Contract required that the Stonework was to be carried through to the floor, presumably to allow the floor tiles to be laid so that they abutted the stonework, rather than being laid under it. Mr Kilpatrick did not dispute this. As I have already stated, his evidence focused on ways to remedy the gap. Accordingly, I find that the failure to carry the vertical stonework (the waterfall) to the floor was in breach of the terms of the Contract.
20. Further, it was implicit that the Works carried out under the Contract, including the work of the stonemason, was to be performed in a professional and workmanlike manner. I find that the failure to produce

a clean juncture between the horizontal and vertical face of the Stonework was in breach of that term.

Quantum of damages

21. Ms Mann produced a quotation, again from Mr Panagiotidis, for the cost of making good defects in the Stonework. The quotation describes two different scopes of work and prices for that work. The first scope of work contemplates replacing all of the Stonework for \$4,050, excluding GST. The second reduces that price by \$1,100 by leaving the sink area untouched, making a total of \$2,950. If I add GST to that amount, the second price amounts to \$3,245. In the absence of any contrary evidence, I find that this amount represents a reasonable sum make good defects in the Stonework. However, I consider that the net loss suffered by Ms Mann must take into consideration any monies unpaid under the Contract.
22. Mr Kilpatrick contended that the amount outstanding under the Contract was \$2,775, being the amount of the counterclaim. He said that this amount comprised \$1,850, being the final progress payment for the cabinetry component of the Works (**‘the Cabinetry Works’**) due under the Contract plus \$925 representing GST for the cost of the Cabinetry Works. Ms Mann conceded that she had not paid \$1,850 but disputed that she had any liability to pay GST for the Cabinetry Works because the quoted price (\$9,250) already included GST.
23. The Quotation does not state that GST is to be added to the price for the Cabinetry Works. By contrast, the quoted price for the Stonework expressly states: *\$4000+ GST*.¹
24. Moreover, the Quotation further states:
- | | |
|---|---------|
| Method of payment (cabinetry component only) | |
| 20% on acceptance of quote | \$1,850 |
| 30% on check measure | \$2,775 |
| 30% on delivery | \$2,775 |
| 20% on completion of installation of cabinets | \$1,850 |
25. Again, nothing is stated to indicate that GST is to be added to the progress payments for the Cabinetry Works. Clearly, there is ambiguity as to how to construe the Quotation, given that the price for the Stonework is expressly stated to be exclusive of GST. In my view, that ambiguity should be determined against Pizzazz, it being the author of the Quotation. My finding is in accordance with the legal doctrine *contra proferentum* - *that the construction least favourable to the author of the document should be adopted against him*. That interpretation is also consistent with the Explanatory Memorandum to

¹ See paragraph 8 above.

A New Tax System (Goods and Services Tax) Bill 1998, which states that the prices of goods should be displayed as being inclusive of GST.

26. Therefore, I find that Contract price for the Cabinetry Works was inclusive of GST. Accordingly, I determine that the balance of the Contract price was \$1,850.
27. Consequently, I find that the net loss suffered by Ms Mann as a result of the defective work is \$1,395. This is calculated by deducting the balance of the Contract price (\$1,850) from the cost of rectification (\$3,245). Having made that finding, I further determine that the counterclaim is to be dismissed.