

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP59/2016

CATCHWORDS

Breach of contract; Sections.8 and 40 of the *Domestic Building Contracts Act 1995*; Section 221D of the *Building Act 1993*

APPLICANT	Peter Alexopoulos
FIRST RESPONDENT	Michael Tzakopoulos t/as Meticulous Carpentry (ABN 29 685 864 928)
SECOND RESPONDENT	Athanasios Tzakopoulos t/as Meticulous Carpentry (ABN 29 685 864 928)
WHERE HELD	Melbourne
BEFORE	Member J. Pennell
HEARING TYPE	Hearing
DATE OF HEARING	18 April 2017 & 16 June 2017
DATE OF ORDER	26 October 2017
CITATION	Alexopoulos v Tzakopoulos (Building and Property) [2017] VCAT 1740

ORDERS

1. The applicant's claim against the first respondent and second respondent is dismissed.
2. The first respondent's claim by counterclaim against the applicant is dismissed.
3. The second respondent's claim by counterclaim against the applicant is dismissed.
4. Having considered s.109 and s.115B of the *Victorian Civil and Administrative Tribunal Act 1998* the Tribunal makes no order as to costs or the reimbursement of any fees.

MEMBER J. PENNELL

APPEARANCES:

For the Applicant

Mr J. Catalono, Professional Advocate

For the Respondents

Mr A. Jacobs, Professional Advocate

REASONS

- 1 The applicant is the registered proprietor of the property known as 11 Cromb Avenue, Beaumaris in the State of Victoria ('the property').
- 2 At all relevant time the respondents worked as carpenters under the business name known as Meticulous Carpentry. It is an issue in this case as to whether the first and second respondents operated the business known as Meticulous Carpentry as partners or as principal and employee.
- 3 The applicant claims that he entered into two agreements with the respondents to perform carpentry and roofing work at the property. The applicant states that the respondents failed to perform the carpentry and roofing work in accordance with their obligations under the *Domestic Building Contracts Act 1995* and the *Building Act 1993*.
- 4 In particular, the applicant claims the respondents breached sections 8 and 40 of the *Domestic Building Contracts Act 1995* ('the DBC Act') by failing to:
 - (a) install and complete the flooring at the property in a proper and workman like manner.
 - (b) install the roof installation, guttering, flashing and downpipes at the property in a proper and workman like manner.
 - (c) to carry out the building works in accordance with all laws and legal requirements including the Building Act 1993 and the regulations made under that Act.
 - (d) to carry out the works with reasonable care and skill.
- 5 The respondents deny that they have failed to carry out the works in breach of the *Domestic Building Contracts Act 1995* and the *Building Act 1993*.
- 6 In addition the respondents say that the second respondent is not liable to the applicant by reason that he was not a party to any agreement with the applicant. That is, at all relevant times the second respondent worked for the first respondent as an employee and not as a principal of the business known as Meticulous Carpentry (A.B.N. 77 384 277 606).
- 7 By counterclaim the first respondent claims an amount of \$10,325.00 for unpaid invoices for carpentry works performed by 'Meticulous Carpentry' for the applicant from February 2012 to June 2012.
- 8 The respondents also make a claim against the applicant in relation to the sale of a 1993 Ford Fiesta motor vehicle.

The Hearing

- 9 For the hearing the parties provided files and served the following:
 - (a) Witness statement of Peter Alexopoulos dated 31 March 2017.
 - (b) Witness statement of Effie Alexopoulos dated 31 March 2017.

- (c) Witness statement of Michael Tzakopoulos dated 23 March 2017.
 - (d) Witness statement of Athanasios Tzakopoulos dated 23 March 2017.
 - (e) Witness statement of Christian Tzakopoulos dated 23 March 2017.
 - (f) Witness statement of Lesley-Anne Knopper dated 23 March 2017.
 - (g) Witness statement of Louie Tzakopoulos dated 23 March 2017.
 - (h) Witness statement of Nick Tongopoulos dated 23 March 2017.
 - (i) Witness statement of Pam Tzakopoulos dated 23 March 2017.
 - (j) Witness statement of Steven Tzakopoulos dated 23 March 2017.
 - (k) Expert report by Mr Michael Gaut dated 31 March 2017; and
 - (l) Expert report by Alan Sherrard dated 26 September 2016.
- 10 In addition to their witness statements Mr Michael Gaut, Alan Sherrard, Mr Peter Alexopolous, Mr Michael Tzakopoulos and Mr Athanasios Tzakopolous all gave oral evidence at the hearing.
- 11 In addition I attended the property on 19 April 2017 for the purposes of inspecting the works.

The Flooring Agreement

- 12 The applicant says that in or about November 2011 his concreter introduced him to the respondents. At a meeting between the applicant and the respondents in or about January 2012 the applicant explained the nature and the scope of works to be performed. In addition to the framing, roofing, cladding, door installation, architraves and skirting boards, the works included the laying of timber floorboards ('the flooring agreement'). The respondents commenced the carpentry works in or about February 2012.
- 13 The applicant's evidence was that, in accordance with the terms of the flooring agreement, he paid for all materials as sourced by the respondents. In addition, the applicant said that he would pay the respondents for their services in cash when and as requested by the respondents. The respondents agreed that they had been paid cash for the work, but disputed they had been paid in full.
- 14 The applicant's evidence was that he purchased the timber floorboards, at a reasonable price, from Monte's Timber Merchants ('Montes') on the instructions of the first respondent.
- 15 The respondents say that at the request of the applicant they supplied the name of Monte's, together with two other timber merchants, for the applicant to purchase supplies. The respondents said that while the applicant did consult them from time to time about the price and availability

of some materials, the quality and grade of all materials purchased was the applicant's responsibility. They said that as an owner-builder he was responsible for the purchase and supply of all materials.

- 16 The applicant says that the respondents breached their duty to perform the works in a proper and workmanlike manner by failing to:
 - (a) install the floor boards in a proper manner. The respondents says that the boards have not been installed to specification using a method known as secret nailing rather than top nailing; and
 - (b) allow the timber to acclimatise before installing the floorboards. The applicant says that the respondents installed the floorboards immediately upon delivery and did not allow them to acclimatise prior to installation. The respondents deny this and says that as owner builder it was the applicant's responsibility to ensure that the boards were acclimatised.
- 17 The Australian Standard requires boards up to 85 mm to be fixed by either face-nailing with one or two nails or by secret-nailed with one nail at each joist. Boards over 85 mm cover width are to be fixed with two face-nails at each joist.¹
- 18 The floorboards installed by the respondents were 135mm and were installed by the respondents using the secret nails method. Mr Sherrard for the applicant said that the use of the secret nail method greatly contributed to the splitting of the boards at the edges, to the development of gaps and squeaking in various areas.²
- 19 However, the respondents' expert, Mr Matthew Gaut, disputed that the secret nails method was not appropriate. His evidence was that the secret nails method of securing timber floors was now exclusively used for all size floorboards. His observation was that none of the secret nails installed by the respondents had broken or were protruding, but all joins were correctly installed and that there were no structural faults to the laying or installation of the floorboards.³
- 20 Mr Gaut observations included the following:⁴
 - (a) The timber used was a low grade of timber being Tasmanian Oak. The applicant's own evidence was that he had purchased the timber at what he believed to be an attractive price.
 - (b) The method of installation involved laying 22 micron plastic sheeting over the concrete slab to prevent moisture, fixing the floor joists to the concrete slab with timber floorboards laid onto joists, secret nailed and glued.

¹ Australian Standard 1684.2 para 5.5.2.2

² Alan Nicholas and Associates Consulting Expert Report by Alan Sherrard dated 26 September 2016

³ Timberland Floors Pty Ltd Expert Report by Matthew Guat dated 31 March 2017 p.5

⁴ Op Cit p.4-5

- (c) That areas of the floor had shrunk and some gaps had appeared which were standard as to size over a 5 to 6 year period.
 - (d) That excessive gapping had occurred due to shrinkage in one room that had originally been a garage and had been converted to a living room space. This room had no or little ventilation, housed a clothes dryer and consisted of large glass walls that allowed constant unfiltered direct sunlight.
 - (e) There were several dark stains on the floor that lead him to believe that the floor had been exposed to significant moisture at one point in time and that the drying out of the room had caused shrinkage to the floorboards.
 - (f) The floorboards did not have adequate protective coating or sealer.
- 21 The applicant objected in the strongest terms to Mr Guat's observations. The applicant particularly objected to the suggestion that the lounge room was not ventilated properly and that a dryer had been used in the room. The applicant explained that there was nothing wrong with the ventilation in the lounge room and that a dryer had only been used occasionally.
- 22 However, timber is a natural product and is hygroscopic in nature. During the life of a timber floor, the boards generally take up and lose a little moisture in a cyclical way as the changing seasons and heating and cooling systems influence the relative humidity and temperature in the local area and within the building. As a result, boards expand and shrink a little. As noted by the Australian Timber Floor Association, the amount of expansion and shrinkage is generally small and often not noticeable.⁵ However, longer periods of hot dry weather or wet weather may give rise to some noticeable shrinkage or expansion in the width of the boards. Similarly, heating and cooling systems can also bring about changes. As such, a timber floor will adjust its moisture content to be in equilibrium with the humidity and temperature conditions within a building.⁶
- 23 Acclimatisation is simply a process of getting the moisture content of the flooring closer to its expected in-service moisture content so that shrinkage or swelling of the floorboards will be less after installation.
- 24 The expected in-service environment of a property can be influenced by a number of factors, including heating and cooling of a building. For example in cool temperate climates, heating can create quite a dry internal environment while refrigerated air-conditioning if used continuously can dramatically reduce the general moisture content within the house.⁷ Similarly, shutting a house up when away on holidays for long periods can create abnormal humidity conditions and therefore some ventilation may

⁵ Australian Timber Floor Association (atfa) Acclimatisation of Solid T & G Flooring Information Sheet #25 September 2010

⁶ Ibid

⁷ Ibid

need to be considered depending on the time of the year.⁸ Full length windows, large glass areas and skylights which admit direct sunlight can create sunroom conditions with high temperatures and low moisture conditions causing flooring to shrink.⁹

- 25 Therefore, the use of a dryer, unfiltered direct sunlight and poor ventilation are factors that will directly affect the in house environment of the property to which the floorboards would, overtime, acclimatised. In circumstances it is unlikely that the in house environment at the time the floorboards were installed would remain the same over time. As a consequence the boards would continue to acclimatise to any change in the in house environment.
- 26 In the past acclimatisation was nearly always recommended. There was an expectation that the floorboards would be cut upside down and used as a work platform, during which time they would acclimatise to their surroundings. However, with improved drying practices and greater knowledge of the drying process, floorboards are now supplied at a moisture content that is predictable and reasonably uniform. Australian flooring is generally dried to be in the range from 9% to 14% as set out in Australian standards covering the manufacture of the product. Within this range it is normally supplied at average moisture content between 10% and 12.5% and often toward the lower end of this range.¹⁰
- 27 Acclimatisation will not correct poor drying practices. Poor drying practices result in a wide variation in moisture content of the timber supplied. Therefore, with acclimatisation, the moisture content range of poorly dried boards will be reduced but the cover width variation will be increased. Because of the increased variation in cover width, the floor can be difficult to lay.¹¹ Therefore, it appears that in the event that the timber boards were not dried correctly the respondents would not have been able to lay the floors correctly in any event.
- 28 No evidence was provided to me in relation to the drying practices of the timber supplier or the actual moisture content of the timber at the time it was delivered. The applicant claims that the respondents should have known not to install the timber before it was acclimatised. However, the evidence of the respondents and Mr Gaut was that industry practice is now to commence installation of timber flooring upon it being delivered. The reason for this (as previously noted) was that the vast majority of timber floorboards are now supplied with moisture content within an acceptable range and near the expected average in-service moisture content.
- 29 In this case the applicant is the owner builder and therefore responsible for the purchase and supply of all materials. He has purchased and supplied to the respondents a product which he ought to have known required

⁸ Ibid

⁹ Ibid

¹⁰ ibid

¹¹ ibid

acclimatisation. The applicant as owner builder is responsible for the purchase and supply of materials. The respondents were merely engaged to perform the carpentry works. There is no evidence that suggests that the carpentry works were performed in an unsatisfactory manner. In fact the evidence of Mr Gaut was that the works were performed correctly and to a satisfactory standard. Accordingly, I find that there has been no breach of duty by the respondents in securing the timber floorboards as alleged by the applicant.

- 30 I therefore dismiss the applicant's claim in relation to the installation of the timber floorboards.

The Roofing Agreement

31 The applicant further claims that while performing the flooring agreement the respondents agreed to perform further works at the property which included the installation of the roofing, guttering, flashings and downpipes ('the roofing agreement').

32 The applicant claims that the terms of the roofing agreement were that:

- (a) the respondents would source all the materials required to complete the works;
- (b) the applicant would pay all material suppliers directly; and
- (c) the respondents would perform the works in a workmanlike manner and in compliance with Australian Building Standards and all legislative requirements.

33 The applicant claims that in breach of s.221D of the *Building Act 1993* (Vic) the respondents are not licensed or registered roof plumbers and therefore not authorised to have carried out the roofing works. Accordingly, the applicant claims that respondents have performed the works in breach of the Building Act, the consequence of which he is unable to obtain a Certificate of Compliance for the works.

34 Section 221D of the *Building Act 1993* states:

221D Plumbing work only to be carried out by licensed or registered plumbers

- (1) A person must not carry out any *plumbing work* of a particular class or type unless he or she is licensed or registered by the Authority to carry out work of that class or type.

Penalty: 500 penalty units.

- (2) Despite subsection (1), a person who is not licensed or registered by the Authority may—
 - (a) repair a tap in any dwelling that the person owns and occupies; and

- (b) carry out any other plumbing work that the regulations state is plumbing work that may be carried out by a person who is not licensed or registered.
- (3) Subsection (2)(a) does not permit a person to repair any thermostatic mixing valve, tempering valve or backflow prevention device.
- (4) Despite subsection (1), a person who is being trained to carry out work that may be carried out by the holder of a restricted licence may carry out that work without being licensed or registered by the Authority if the work is carried out under the supervision of a person who is licensed to carry out that type of work.
- (5) Despite subsection (1)—
 - (a) a sheetmetal worker, first class may carry out sheetmetal work in connection with the manufacture, installation, maintenance or repair of ventilation or air conditioning plant or equipment;
 - (b) a metal worker may carry out pipework in connection with the fabrication, installation, maintenance or repair of industrial pipework

35 The applicant says that he engaged the respondents to perform all the roofing works. He admits that he had engaged a plumber to perform the roofing works but says that he had become frustrated with him as he was not performing the work as efficiently as he had planned.

36 In contrast to the applicant, the first respondent's evidence was that the plumber was undertaking all roofing works including the installation of guttering and downpipes, drains and water proofing and sealing.¹² However, he says that during the framing works the applicant asked him if he would be able to assist his plumber to lay metal deck sheet roofing. The first respondent says that the plumber was to oversee, complete and certify the works. He says that the applicant supplied all the materials to site, including the metal deck roofing. His evidence was that he assisted the applicant and the plumber to lift the metal sheeting on to the roof and lay them into position. The second respondent nor any other employee of his was involved in the roofing works due to the fact that it was outside the scope of their normal work.¹³ The applicant in cross-examination accepted that the works were outside the first respondents' normal scope and that he assisted the plumber on site.

37 I do not accept the applicant's evidence in relation to the roofing works. In particular, having already engaged a plumber to perform the roofing works, I do not accept that he was not aware that the respondents were not licensed plumbers. Having engaged the respondents as carpenters it must have been

¹² Witness statement of Michael Tzakopoulos dated 23 March 2017 paragraph 17.

¹³ Ibid

obvious to the applicant that they were not licensed plumbers and therefore not able to provide the necessary certificate for the roofing works. The applicant's claim that the respondents were responsible for the installation of the roofing works is inconsistent with the fact that he had already engaged a licensed plumber to perform such works.

- 38 I accept the first respondent's evidence that he was engaged by the applicant to assist the licensed plumber and at all times his works was supervised and controlled by the plumber. In addition, I find it unlikely that the first respondent would have agreed to have performed the roofing works in circumstances where he knew that such works were required to be performed and supervised by a licensed plumber. Rather, I accept the first respondent's evidence that he assisted the plumber and the applicant in his personal capacity to lift and place the metal sheets on the roof under guidance of the plumber.
- 39 I therefore reject the applicant's claim in relation to the roofing works.

Liability of Second Respondent

- 40 Given that I have dismissed the applicant's claim against the respondents it is not necessary for me to consider the second respondent's defence that he was an employee of the first respondent and therefore not liable to the applicant for any amount claimed.

RESPONDENTS' COUNTERCLAIM

- 41 I dismiss the respondents' claims by counterclaim for the reasons set out below.

(a) Unpaid Invoices

The respondents claim that the applicant has failed to pay the amount of \$5,728.00 being the total of the invoice dated 17 May 2012 for \$2,978.00 and invoice dated 20 June 2012 in the amount of \$2,750.00.

The applicant says that he had paid the respondents in cash and in full.

The respondents provided a copy of invoices that they claimed to have presented to the applicant. However, the invoices provided to the Tribunal did not include the 17 May 2012 and 20 June 2012 invoices for the amounts of \$2,978.00 and \$2,750.00 respectively. In addition, the respondents did not provide any evidence of the work said to be performed in May and June 2012 totalling the claimed amount. The invoices presented to the Tribunal merely listed 'carpentry work' and 'labour' as the description of the works but failed to provide any details as to the time and hourly rate charged.

Accordingly, I am not satisfied on the balance of probabilities that the amount claimed by the respondents is owed by the applicant.

I therefore find that the applicant is not liable to the respondents for the total amount of \$5,728.00, being the balance of the invoices dated 17 May 2012 and 20 June 2012.

(b) Residential Development Partnership.

The first respondent claims that in or about February 2012 he and the applicant agreed to enter into a partnership to develop and sell up to four residential townhouses, as may be approved by the local council on the land known as 22 Banksia Ave Beaumaris, Victoria ('the site'). The site is next door to the applicant's property.

- 42 The first respondent claims that the terms of the agreement were:
- (a) The first respondent would supervise the majority of construction activities.
 - (b) The first respondent would undertake all necessary carpentry labour services for framing lock up and fix at no cost to the partnership.
 - (c) The applicant would pay for valuations, geotechnical reports and draftsman's drawings procured by the first respondent in relation to the site.
 - (d) The first respondent would manage the preliminary approvals process by reviewing all reports and drawings; and
 - (e) the proceeds of sale would be distributed on a 50:50 basis.
- 43 The first respondent claims that in accordance with the terms of the partnership he spent about \$1,100.00 on draftsmen, valuations and engineers in preparation of the development of the site.
- 44 The applicant denies there was any agreement. While he admitted to having general discussions with the first respondent about the possibility of developing the site, he says that at no time were any terms agreed and as such denies the agreement as alleged by the first respondent. He says that the first respondent took it upon himself to incur costs without his approval or consent.
- 45 The applicant subsequently sold the property.
- 46 The first respondent did not provide any documentation as evidence of the terms of the agreement as alleged nor did he provide any independent evidence of his expenditure as claimed. While I am satisfied that there were discussions between the parties about the development of the site I am not able to conclude that a formal binding agreement had been made for the development of the site in the terms as expressed by the first respondent.
- 47 I therefore find that the first respondent has not satisfied his evidentiary onus to prove his claim on the balance of probabilities and as such find that the applicant is not liable to the first respondent for the amount claimed of \$1,100.00.

(c) Disposal and sale of vehicle.

The second respondent claims that the applicant is liable to him for the value of a motor vehicle being a Ford Fiesta Registration No XNV-572 ('the vehicle') in the amount of \$2,600.00. He says that the vehicle was owned jointly by him and Ms Lesley-Anne Knopper. The second respondent claims that the applicant sold the vehicle but failed to account to him for the sale proceeds.

The second respondent provided the following documentation in relation to the vehicle:

- (a) Vehicle Registration Transfer dated 8 May 2010 from Nicholas William as seller to Lesley-Anne Knopper as buyer for the sale price of \$2,600.00.
- (b) Vicroad Certificate of Registration dated 7 May 2011 in the name of Nicholas Williams.
- (c) VicRoads Certificate of Roadworthiness dated 7 May 2010 in the name of Nicholas Williams.
- (d) Invoice dated 6 May 2010 from Fordwise addressed to Lesley-Anne Knopper.

48 The documentation provided to the Tribunal indicates that the second respondent was not the registered owner of the vehicle. In addition, Ms Knopper by her witness statement dated 23 March 2017 expressly states that it was her vehicle and did not refer to it being owned jointly by her and the second respondent. Accordingly, I find that Ms Knopper was the owner of the vehicle and not the second respondent.

49 I therefore find that the applicant is not liable to the second respondent or the applicant is not liable to the second respondent for the amount claimed.

ORDERS

50 For the reasons provided above I make the following orders:

- 1 The applicant's claim against the first respondent and second respondent is dismissed.
- 2 The first respondent's claim by counterclaim against the applicant is dismissed.
- 3 The second respondent's claim by counterclaim against the applicant is dismissed.

- 4 Having considered s.109 and s.115B of the *Victorian Civil and Administrative Tribunal Act 1998* the Tribunal makes no order as to costs or the reimbursement of any fees.

MEMBER J. PENNELL