

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP862/2018

CATCHWORDS

Contract to lay concrete, variation to include extensions to retaining wall, whether retaining wall permanent or temporary, measure of the applicant's loss, tradesperson contracting with owner may not do work which he knows requires a building permit without a building permit, even if ordered to do so by the owner.

APPLICANT	Ali Azimi
RESPONDENT	Murtaza Alikhani t/as Ariana Concrete
WHERE HELD	Melbourne
BEFORE	M. Lothian, Senior Member
HEARING TYPE	Hearing
DATE OF HEARING	31 May 2019
DATE OF ORDER AND REASONS	13 June 2019
CITATION	Azimi v Alikhani (Building and Property) [2019] VCAT 874

ORDERS

- 1 The respondent must pay the applicant \$5000 forthwith.
- 2 Costs and fees are reserved with liberty to apply until 31 July 2019.
- 3 **I direct the Principal Registrar to send copies of these Orders and Reasons to the parties by email.**
- 4 **If either party makes an application for costs and/or fees, I direct the Principal Registrar to list a hearing before Senior Member Lothian with an estimated hearing time of 2 hours.**

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant	Mr B. Amani, solicitor.
For Respondent	Mr P. Bourke, solicitor.

REASONS

- 1 The applicant owns a home in Hampton Park. His claim against the respondent concerns a contract between them for concreting work and various other items. The applicant's claim is for \$18,500 for rectification and repair work and refund of the whole sum paid to the respondent of \$13,000. The total claim is therefore \$31,500.
- 2 As stated at order 2.8 of the orders of 12 February 2019, the repair costs sought by the applicant are as follows:

Date	Payee and Item	Amount
	Engineers (\$1870 on 4/5/17)	\$5,200
	City of Casey	\$50
	Officeworks	\$6.30
22/1/18	Pacific Mowing – concrete cutting	\$2,200
29/1/18	Pacific Mowing – soil removal	\$4,551
29/1/18	Melsteel	\$538.56
31/1/18	Melsteel	\$769.91
30/1/18	Bunnings	\$182.01
30/1/18	Inform – building permit	\$165
2/2/18	Berwick Sand – 2m ³ of concrete	\$412
5/2/18	Lyndpark – screenings etc	\$197
5/2/18	Daisey's Garden Supplies	\$948
10/2/18	HPS Fencing	\$2,633
10/2/18	HPS Fencing – 31.5m of retaining wall	\$3,200
10/2/18	HPS Fencing – labour to install new wall	\$670
22/2/18	Coles for diesel	\$9.70
1/3/18	Lyndpark – scoria	\$170
	Kennards Hire – excavation vacuum and suction hose	\$556

- 3 The respondent resists the applicant's claim and had counterclaimed for threats and defamation. However, the respondent's solicitor withdrew the counterclaim at the commencement of the hearing acknowledging that the Tribunal does not have jurisdiction to deal with the matters complained of by the respondent.
- 4 An examination of Google Maps shows that the property is on a corner. The street frontage on the left of the photographs provided by the parties faces approximately north, the splayed corner of the retaining wall is approximately north west and the street frontage to the right of the photographs is approximately west.

- 5 At the hearing, Mr B. Amani, solicitor, appeared for the applicant. The applicant gave evidence as did his wife, Mrs F. Bayanie, and his wife's brother Mr S. Kulah. The applicant had also filed and served a document prepared by San Gnanaseelan of Master Engineers Pty Ltd headed "Assessment of Existing RW After Addition" which was not in the form of an expert report and which was not referred to during hearing. I have regard to it with respect to the retaining wall. There was no expert evidence about the concrete.
- 6 Mr P. Bourke, solicitor, appeared for the respondent, who gave evidence.

The contract

- 7 The parties agree that the contract between them was for \$13,000 and the whole of that sum was paid by the applicant to the respondent. However, they disagree about their obligations under the contract.
- 8 The parties agree that the contract was, at least in part, to lay concrete on two sides of the applicant's home, to the north and the west. According to the respondent, the original agreement was to lay concrete along the length of two sides of the home, but only about 1.5 m wide. He said that after discussion with one of his employees, the applicant sought to have concrete laid from the edge of the home to the edge of the existing retaining wall.
- 9 It is agreed by the parties that the top of the old retaining wall was lower than the base of home. The respondent said he asked the applicant whether the applicant wished the concrete to slope from the home to the height of the retaining wall, as it was, or whether the applicant wished the concrete to be closer to level, therefore necessitating additional soil and scoria to support it.
- 10 I accept the respondent's evidence that the contract sum was originally \$8000 but after discussion was increased by \$5000 to \$13,000. I find that the additional \$5000 was for all the works associated with extending the concrete to the edge of the retaining wall, additional soil and scoria to raise the level of the site and work and materials to the retaining wall to increase its height.

Measure of loss and damage

- 11 Even if I had found that all the respondent's work had to be removed, I could not be satisfied that the applicant is entitled to recover both the cost of rectification and refund of amounts paid to the respondent. The applicant is only entitled to be put in the position he would have been in if the contract had not been breached.¹
- 12 As the applicant did not give evidence regarding the items listed in paragraph 2 above, I regard the proper measure of any loss as the part of the amount paid to the respondent for which the applicant did not receive value

¹ *Robinson v Harmon* (1848) 154 ER 363 at 365. Also see *Baltic Shipping Co v Dillon* (1993) 176 CLR 844, applied in *Tambassis v Gribbin* [2019] VCAT 540 at [12-14].

plus an allowance for removal of the items that should not have been supplied by the applicant.

- 13 Under cross-examination the applicant admitted that the sum of \$18,500 included the cost of a new white fence above the low retaining wall mentioned below under “Repair”. This is not an item that the respondent was required to provide under the contract, nor is it relevant to rectification works. It is an example of a claim by the applicant for an item to which he was not entitled.

Alleged breaches of contract

- 14 Early in his evidence the applicant said that his claim was for rubbish removal, concrete, drainage and the retaining wall. The applicant also complained of the respondent’s alleged delay. The applicant said the job was to be completed in two weeks, but took six months. However, no claim for compensation was made for the alleged delay. I do not take it into account.

Repair

- 15 The solution adopted by the applicant to rectify the alleged defects was to remove the structure added to the old retaining wall by the respondent, minimal repair to the old retaining wall, removal of some of the soil and scoria added to the site, and the placement of a new, low retaining wall at the edge of the concrete, where it had been cut by the applicant’s new contractor.

Rubbish removal

- 16 According to the respondent, the \$13,000 included an amount to cut back some bushes and vines and remove an old timber paling fence, which work was undertaken. I am not satisfied that the respondent failed to remove rubbish that he was obliged to remove in accordance with the concreting contract. I make no allowance for this item.

The concrete

- 17 There is no serious complaint about the quality of the concrete work, although the applicant claims that it did not include reinforcing. The applicant did not provide expert evidence about the alleged lack of reinforcing. Photographs provided by the applicant showed that repair works had not removed the whole of the concrete but had cut it back to approximately 1.5 m from the home.
- 18 As discussed in greater detail below under “Retaining Wall”, I find that a competent concreter should not have laid concrete to the edge of the retaining wall, and that the steps taken by the applicant to overcome his loss by having the concrete cut back to approximately 1.5 meters from the home have been reasonable. I therefore find the \$5,000 mentioned in paragraph 10 above represents the amount the applicant should not have paid to the

respondent, as this was for work which the respondent should not have done without a building permit for the retaining wall, as discussed below under “The retaining wall”.

- 19 In the absence of better evidence, I also allow the applicant’s payment of \$2,200 to Pacific Mowing which is described as:

Concrete cutting 1.5m along the fence line.

Removing soil and 3 sleepers.

- 20 There are no other items which are unequivocally for removal of the work the respondent should not have undertaken.

Drainage

- 21 I am not satisfied that the respondent has failed to install drainage that he was obliged to install under the contract with the applicant. The applicant’s evidence is that the concrete should have been sloped to drainage pits attached to a stormwater pipe to carry the water accumulating on the concrete to a point of discharge. I accept the respondent’s evidence that there were no drainage pits and no obvious point of discharge for stormwater. I find this is the work of a plumber not a concreter, and I find that if the applicant wished to have drainage of this nature he should have engaged a plumber.

- 22 I note that the respondent sloped the concrete to a small hole in the retaining wall through which water could drain. It was not a particularly professional solution to the applicant’s drainage problem and could potentially have been a hazard on the public footpath below the drain.

- 23 Nevertheless, I make no additional allowance for the drainage as this is a matter dealt with under the concrete and retaining wall.

The retaining wall

- 24 The parties agree that there was an old, existing retaining wall before they entered their contract. Photographs from before the respondent started work show that the retaining wall was not in particularly good condition. I note in particular that at the north end of the western section the old retaining wall had separated from the splayed corner. It appears that at least part of the western retaining wall had rotated outwards at the top by a distance of at least 25 mm.

- 25 The parties agree that the respondent added three boards to the top of the retaining wall, supported by vertical posts adjacent to the existing posts, but not extending to the ground or into it. The new posts and boards were bound to the existing structure using galvanised iron strips such as those used to brace framing.

- 26 The finished appearance was of an alarmingly badly designed and built retaining wall. Neither party seemed to have been particularly concerned by its appearance or function until the local authority, the City of Casey, sent a

building notice to the applicant. I remark that the building notice is for the retaining wall alone, not for the concrete. It required demolition and rebuilding in accordance with a building permit. I accept the applicant's evidence that he received a notice about one month after the wall was finished.

- 27 The applicant appears to have characterised the extension to the old retaining wall as new retaining wall works by the respondent. The respondent characterised it as, in part form-work for the concrete (and soil/scoria beneath) and in part, a temporary structure until the applicant built a new brick retaining wall. The applicant did not give evidence about the alleged new brick retaining wall and did not cross-examine the respondent about it, although the allegation concerning the new brick wall was made under cross-examination. Neither did the respondent put it to the applicant in cross-examination before the respondent gave his evidence.
- 28 I cannot be confident about any discussions between the parties concerning whether the structure was intended to be permanent. However, given its amateurish appearance, on balance I find that the parties intended it to be temporary rather than permanent. It is difficult to accept that the applicant would have tolerated such an obviously incompetent retaining wall if it was meant to be permanent. However, I am also not satisfied that "temporary" meant that it would be removed within a relatively short time. The wall, as extended, appeared to be a potential danger to anyone using the footpath. It was not fenced off to prevent possible injury to passers-by.
- 29 Each party blames the other for the lack of a building permit. They both say it was discussed before the work was done. It was the applicant's evidence that the respondent said "It's your land, you can do as you wish." The respondent said the applicant told him that it is his (the applicant's) land, so he could do as he wished. Mrs Bayanie gave evidence that she was not in a room with her husband and the respondent, but overheard a conversation between them, through a door, where the respondent said that a permit was not necessary for the concreting.
- 30 I remark that no permit was necessary for the concreting, but it was necessary for the retaining wall extension.
- 31 The respondent gave evidence that he knew a building permit was necessary for the retaining wall, but that he relied on the applicant's order that he undertake the work without a building permit. I am not satisfied that the respondent was entitled to undertake work which required a building permit without seeing proof that there was a building permit, and to do so was a breach of the contract to undertake work in accordance with the standards of a reasonably competent building practitioner. The work should not have been done and the respondent should not have been paid for it.
- 32 On balance, I find that neither party seriously addressed the issue of whether a building permit was necessary and neither obtained an engineering design before the work was undertaken.

33 The Master Engineers' "Conclusion & Recommendation" is:

(1) Not adequately designed retaining wall members

The original retaining wall uprights were under designed to retain even a 1.8 m. Additional loads to already under designed member causes more leaning than original state.

(2) Footings not adequate for new loadings

Footings details are unknown. Even we assume the original footings were designed and constructed in accordance with appropriate standards, these footings were not designed for new loadings. The additional overturning movement causes more rotation on footings. [sic]

34 Although the respondent's work might have hastened the failure of the old retaining wall, any repair to the wall to restore it to the condition it was in before the respondent commenced work would still leave it "under designed". It was going to fail at some point; the respondent's work did not cause the failure but may have hastened it.

35 It follows that the applicant is not entitled to recover repair to, or replacement of, the old retaining wall from the respondent.

36 The contract between the parties was for the respondent to lay concrete. As discussed above, the value derived by the applicant was the concrete laid by the respondent which remains in place. Had the original design been for the low retaining wall since built, either the applicant would have obtained the services of another contractor to build it, or paid the respondent to build it. I am not satisfied that a wall of this nature was part of the deal between the parties.

37 The only compensation to which the applicant is entitled is the amount of \$5000 that should not have been charged for work that should not have been done, and \$2200 for its removal, as described in paragraphs 18 and 19 above.

Result

38 The respondent must pay the applicant \$7200 forthwith.

Costs and fees

39 Costs are reserved with liberty to apply. Nevertheless, the attention of the parties was drawn to s109 of the *Victorian Civil and Administrative Tribunal Act 1998* and the parties were warned that there is unlikely to be an order for costs.

40 Fees are also reserved and the parties are referred to s 115B of the Act.

SENIOR MEMBER M. LOTHIAN