VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP844/2017

CATCHWORDS

Domestic Building Contracts Act 1995: three claims for money for work and labour done on two projects; issues as to the applicability of the Act.

APPLICANT	Tomasz Bartczak (ABN 49 301 833 121)
RESPONDENT	Kang Jun Huang
WHERE HELD	Melbourne
BEFORE	Member C. Edquist
HEARING TYPE	Hearing
DATE OF HEARING	30 January 2019
DATE OF ORDERS	30 January 2019
DATE OF REASONS	10 September 2019
CITATION	Bartczak v Huang (Building and Property) [2019] VCAT 1396

ORDERS

1. The respondent must pay to the applicant $660 inclusive of GST for work and labour done in widening a door at the May Street project, as invoiced on 28 April 2016.
2. The respondent must pay to the applicant $2,500 in respect of the performance of work to rectify defective waterproofing at the May Street project.
3. The respondent's claim for the balance of $16,800 in respect to consultancy services at the Nickson Street project, after allowing for the deposit of $2,000 paid, is dismissed.
4. No order is made for reimbursement of filing fees paid by the applicant.

NOTES

A. The total amount to be paid by the respondent to the applicant under these orders is $3,160.

B. In respect of Order 1 above, no account has been taken of the alleged effect of the Deed of Agreement made between the applicant and the respondent dated 13 September 2016.

MEMBER C. EDQUIST

APPEARANCES:

For Applicant	Mr V. Peters of Counsel.
For Respondent	Mr K. J Huang, in person.

REASONS

1 Although the Orders made on 30 January 2019 meant that in monetary terms Mr Huang had been substantially successful, and although he was informed at the conclusion of the hearing that a recording of the hearing could be made available to him, he wrote to the Tribunal after the Orders had been published, seeking written reasons. I now set out in edited form the detailed reasons I gave orally at the conclusion of the hearing.

2. Mr Bartczak, is a registered domestic building manager, and is also a domestic builder registered to do landscaping work. Mr Huang is a property developer. He sometimes operates through a company. Today he is sued in his personal capacity. The case involves claims by Mr Bartczak for payment of amounts of $660.00, $2,500.00 and $16,800.00 for work and labour done said to be due in respect of two separate projects.

The claim for $660.00

3 It is convenient to deal with the claim for $660.00 first, because it is the most straight-forward claim in a number of respects. The claim arises in relation to work performed by Mr Bartczak for Mr Huang at a project in May Street Bundoora, Victoria. The evidence is that there was a design error, and the owner or occupier of one of the units could not get their white goods through the door. An instruction was given by Mr Huang to Mr Bartczak to undertake work on the doorway to enable the white goods to be moved in. Mr Bartczak did that work and invoiced $600.00 plus GST on 28 April 2016.

4 Mr Bartczak claims that $660.00 for work and labour done. Mr Huang acknowledges that the work had been done, but raises an unusual defence. He contends that he is not liable to pay the amount because he is entitled to a credit of $660.00 in respect of a payment which has been calculated as being due to him under a Deed of Agreement dated 13 September 2016. This Deed has been created in relation to the resolution of a dispute between himself and Mr Bartczak in relation to a joint venture to purchase a property elsewhere. This is a separate project.

5. The Deed of Agreement was put into evidence, and discussed during the course of the hearing. It is clear that there was a clause which made allowance for payments to Mr Huang of two amounts. At Clause 2.1 it was agreed that Mr Bartczak would pay Mr Huang the sum of $1,759.00 within 7 days of execution of the Deed, and a separate sum of $40,108.77 would be paid within 7 days of settlement of a property.

6. It is asserted by Mr Huang that the sum of $40,108.77 had been calculated on the basis that the $660.00 was to be credited to him. However, that is not apparent on the face of the document, so I order that Mr Huang must pay to Mr Bartczak $660.00 on this claim.

The claim for $5,500.00

7. The second limb of the case involves a claim for $5,500.00 in relation to rectification of defective waterproofing on balconies at the May Street, project. The evidence given regarding the involvement of Mr Bartczak is surprising because of the complexity of, and the unusual nature of, the contracting arrangements which had been put into place. In essence Mr Bartczak was not the builder of the project. Rather, his wife – who was apparently a registered building practitioner – was the builder. She signed a building contract, which was not put into evidence. The contracting arrangements became even more complex when, according to Mr Huang's evidence, a number of aspects of the builder's work were excised from the building contract and became his responsibility as owner. There is reference to this partitioning of the work under the building contract in an email issued at the end of the project, on 3 February 2016, by Mr Huang. This confirmed that the builder was responsible only for the structural warranty, and that all fixtures, fittings, concrete driveway, cooling and heating appliances and other internal fixtures and fittings were excluded from the builder's responsibility, as they were delivered by the owner.

8. The relevance of this unusual arrangement is that Mr Huang agrees that he had taken over responsibility for doing the water-proofing of the balcony. He deposes that he had directly contracted that work as owner-builder to Mr Bartczak. Mr Bartczak has carried out the work. Mr Bartczak is now suing Mr Huang for $5,500.00, which he says was the cost of doing the waterproofing work.

9. Mr Huang's defence to Mr Bartczak's claim is that the waterproofing work on the balconies has been established to be defective by a report prepared by a building consultant engaged by Mr Huang, named Luke O'Neill. This report was put into evidence by Mr Huang.

10. Mr O'Neill said it was unusual to have a failure of a water-based membrane so soon after laying, and suggested that a mixture of poor practice and material was at fault. He was not called to give evidence, and accordingly he was not cross-examined. However, no issue arises from this, because the case does not turn question of whether the membrane had failed. It is agreed that it had. At issue is: who was responsible for the failure?

11. There was an inspection of the site of the failed waterproofing on 19 August 2016, and there was a discussion about responsibility. By this point Mr O'Neill's report had been issued. It was dated 19 August 2016. Notwithstanding Mr O'Neill's comments about poor practice and materials was available to Mr Huang, Mr Bartczak argued that the failure was caused because Mr Huang insisted that he continue, to work on the balcony waterproofing in wet weather conditions and that was a contributing factor.

12. As a result of that discussion, an agreement was reached that Mr Huang would make a contribution to the cost of the waterproofing of $2,500.0 inclusive of GST. That agreement was evidenced by an email sent from Mr

Huang to Mr Bartczak on 27 September 2016. I emphasise that this email was dated after the O'Neill report.

13. Despite Mr Huang's clear agreement to contribute $2,500.00, the situation was then complicated by two developments. The first was that on 4 October Mr Bartczak texted Mr Huang saying:

> "Hi Ben, after investigation of your job at May St, unfortunately there will be additional costs of around $3k please come on site and I will explain".

That text was responded to by Mr Huang who said:

> "Not happy Tom, but if it needs to be done, just do it. I will pay. I will see you on site in the next few days".

14. Mr Huang's agreement to pay the extra $3,000.00 for the waterproofing is consistent with his earlier agreement to contribute $2,500.00. It explains why Mr Bartczak came to be claiming $5,500.00 for the work.

15. The second complication was that Mr Huang rescinded from the agreement to pay for the waterproofing. He is adamant about this. He acknowledges that he had agreed to pay $2,500.00, but says that after consulting with other builders he was persuaded that he should not be contributing to a problem that was not his fault, and so he changed his mind. He says that this explains why on 5 October 2016 he wrote an email saying that, amongst other things, that he did not agree to pay the $2,500.00.

16. In these circumstances I am faced with the questions of who should pay for what. A point to be made is that, on any view of the work which was to be carried out, it was domestic building work. The definition section in the *Domestic Building Contracts Act 1995*, section 3, defines *'domestic building work*' as 'any work referred to in section 5 that is not excluded from the operation of the Act by section 6'.

17. Pursuant to section 5, the Act relevantly applies to:

> (a) the erection or construction of a home, including associated work; and
>
> (b) the renovation, alteration, extension, improvement or repair of a home;

18. It is clear in, my view, that the work carried out by Mr Bartzcak at the May Street project was domestic building work, having regard to the fact that the May Street development was residential. The work was not excluded by section 6 of the Act - it is clear from the description of the work contained in Mr Huang's email to Mr Bartczak dated 27 September 2019 that more than one trade was involved. It was not disputed by either party that the work was domestic building work. The relevance of this is that in section 3 of the Act, '*domestic building contract'* is defined as a contract to carry out, or arrange or manage the carrying out of, domestic building work other than a contract between a builder or a sub-contractor'. Mr Huang, as an owner, has engaged a contractor to carry out domestic building work. Accordingly, I consider that we have here a domestic building contract.

19. In section 3 of the *Domestic Building Contracts Act 1995*, '*major domestic building contract'* is defined to mean 'a domestic building contract in which the contract price for the carrying out of domestic building work is more than $5,000.00 or any higher amount fixed by the regulations'. At the time of the contract, the amount prescribed was $5,000.00.[1]

20. Mr Bartczak contends that he is entitled to be paid $5,500.00 for the rectification of the balconies. That figure exceeds the then current threshold of $5,000.00, above which a major domestic building contract is required. That brings us to sub-section 31(1) of the Act which says that a builder must not enter into a major domestic building contract unless the contract is in writing. The sub-section then sets out a number of other requirements for the contract. For instance, it must be in writing and set out all the terms of the contract, have a detailed description of the work and include plans and specifications, state the names and addresses of the parties, and state the registration number of the builder.

21. A key matter is that sub-section 31(2) says a major domestic building contract is of no effect unless it is signed by the builder and the building owner (or their agents). The effect of sub-section 31(2) is that Mr Bartczak's claim is unsustainable because it is a claim in a figure in excess of $5,000.00 in circumstances where there was no signed major domestic building contract. The upshot, as established in other cases decided by the Tribunal such as *Tozoulis v Hughes*[2] and *Nicinski v Chemay*[3] the builder is entitled to be paid on a quantum meruit, which in lay terms means a reasonable amount for the work performed.

22. A problem for Mr Bartczak is that no evidence has been given by him as to the amount of time he spent in doing the waterproofing work. The only evidence I have as to the proper cost of that work was that it was negotiated at the outset that Mr Huang would contribute $2,500.00 for the work, inclusive of GST. Mr Bartczak asserts there was to be an additional cost of around $3,000.00, but that figure was not properly documented or explained. In the absence of any evidence justifying a higher quantum meruit assessment, I consider that the award to which Mr Bartczak is entitled is $2,500.00, which is the figure that Mr Huang initially agreed to contribute to the rectification of the waterproofing.

23. I acknowledge Mr Huang's evidence that he withdrew his agreement to pay $2,500.00 on 5 October 2016. However, the situation at that stage was that the need for the work to be performed had been identified, there had been a discussion about who was responsible, and Mr Huang had agreed on 27 September 2016 that he was responsible to make a contribution of $2,500.00. Mr Bartczak proceeded on the basis that he was going to be paid $2,500.00, and later asked for about $3,000.00 more. By the time Mr Huang's agreement to contribute had been rescinded on 5 October 2016, some work had been done by Mr Bartczak in expectation of payment of at

[1] The amount prescribed was increased to $10,000 from 1 August 2017.
[2] [2016] VCAT 512.
[3] [2016] VCAT 649.

least $2,500.00. It was then too late for Mr Huang to change his mind. When the agreement to pay was withdrawn, an equitable entitlement had arisen for Mr Bartczak to be paid on a quantum meruit.

24. At the hearing, the parties indicated that I should keep separate from Mr Bartczak's entitlement to an order for $2,500.00 the sum of $1,759.00 which had been brought to my attention as being due to be paid according to Clause 2.1(a) of the Deed of Agreement. The orders will reflect this.

The claim for $16,800.00 in respect of consultancy services

25. I now turn to the third claim for $16,800.00, which arises out of an agreement which Mr Bartczak asserts was reached concerning a development in Nickon Street, Bundoora. He says that this contract was formed at a meeting in a coffee shop in Bundoora. The arrangement was set out in an email dated 9 February 2016 that he was to consult in relation to town planning issues at the project, and to answer construction questions to the best of his knowledge. To this end there were to be meetings twice a week. The agreed fee was $16,800.00, which is 0.7 per cent of the total construction value plus GST and costs. Mr Bartczak also contends that the existence of this agreement was evidenced by a text dated 15 February 2016 from Mr Huang, which reads as follows – 'Sorry that I have not called you earlier - busy with Adam. Can you please start working on construction and waste management plan please. I am happy to pay as discussed'.

26. Mr Huang disputes that this text is relevant, arguing that it doesn't make it clear what project is being referred to.

27. I note that the text is dated 15 February 2016, which is only days after the email of 9 February 2016. Who Adam might be is suggested by the documents tendered by Mr Huang. One of these is a statutory declaration from Adam Naulty, who is landscape design company trades as Rosemont Nursery Landscaping & Design. A plan was put into evidence by Mr Huang prepared Mr Naulty's company for the project at 23-25 Nickson Street, Bundoora.

28. From this it may be inferred that the Adam involved was Adam Naulty, and that Mr Naulty's company was the landscaper in relation to the Nickson Street project. I conclude there was an agreement evidenced by the email of 9 February 2016, and confirmed by Mr Huang's confirmatory text of 6 days later, asking Mr Bartczak to start working on construction and a waste management plan. A critical question arises: is this agreement was an agreement for domestic building work?

29. There is some difficulty about this, because of the vagueness of the description of the work contained in the documentation. Mr Bartczak, in his email of 9 February 2016, said 'I'm happy to help you about the town planning issue', but he also said, 'I'll answer construction problems according to my best knowledge'. The text confirming the start says

> 'Please start work on construction and waste management plan'.

30. The Nickson Street project involved the construction of residences, so the work appears to be related to the erection or construction of at least one home. Sub-section 5(1)(a) of the *Domestic Building Contracts Act* is very general in its operation. It provides:

> This Act applies to the following work—
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> (a) the erection or construction of a home, including—
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> (i) any associated work including, but not limited to, landscaping, paving and the erection or construction of any building or fixture associated with the home (such as retaining structures, driveways, fencing, garages, carports, workshops, swimming pools or spas); and
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> (ii) the provision of lighting, heating, ventilation, air conditioning, water supply, sewerage or drainage to the home or the property on which the home is, or is to be;
>
> (b) the renovation, alteration, extension, improvement or repair of a home;
>
> (c) any work such as landscaping, paving or the erection or construction of retaining structures, driveways, fencing, garages, workshops, swimming pools or spas that is to be carried out in conjunction with the renovation, alteration, extension, improvement or repair of a home;
>
> (d) the demolition or removal of a home;
>
> (e) any work associated with the construction or erection of a building—
>
> (i) on land that is zoned for residential purposes under a planning scheme under the **Planning and Environment Act 1987**; and
>
> (ii) in respect of which a building permit is required under the **Building Act 1993**;

(f) any site work (including work required to gain access, or to remove impediments to access, to a site) related to work referred to in paragraphs (a) to (e);
(g) the preparation of plans or specifications for the carrying out of work referred to in paragraphs (a) to (f);
(h) any work that the regulations state is building work for the purposes of this Act.

31. As the definition includes the preparation of plans or specifications for carrying out the work referred to in paragraphs (a) to (f), planning for the physical work, and associated work, is also covered. On that basis, I find that advising in relation to town planning issues, construction problems, and waste management issues (because sewerage is expressly covered) is included in the definition of domestic building work. I note these works are not excluded from being domestic building work by section 6 of the Act. Accordingly, I find that the relevant work is domestic building work.

32. It is not necessary to repeat the analysis I set out before about the consequences of this finding, other than to re-state that where there is a situation where there is domestic building work worth more than $5,000.00, a major domestic building contract is required. As there is no such contract in existence signed by both owner and builder, sub-section 31 (2) of the Act applies, and the contract is of no effect. For the reasons explained in respect of the previous claim, Mr Bartczak is limited to recover for his consultancy services a quantum meruit.

33. The difficulty facing Mr Bartczak, again, is that there is very little evidence about the consultancy services actually performed by him. There was evidence of discussions from time to time, but the number of discussions was not quantified, and the time involved was not stated. Mr Bartczak said he had been paid a deposit of $2,000.00. There was a suggestion that Mr Bartczak's time had been valued at $100.00 an hour, but in the absence of appropriate evidence about the services performed to justify a quantum meruit, it is very difficult to conclude anything other than that the deposit payment represented about 20 hours work.

34. In the absence of further evidence about the services provided, I consider that it would be purely guesswork, and quite unfair to Mr Huang, to award more than $2,000.00 to Mr Bartczak. Mr Bartczak is entitled to keep the deposit paid of $2,000.00, but there will be no order that Mr Huang pay more. The third order I will make, accordingly, is that there is no award in respect of the claim for the balance of the $16,800.00.

Filing fee

35. There are stamped receipts for $150.00 and $31.90. The law about the recovery of fees is covered by section 115B and 115C of the *Victorian Civil and Administrative Tribunal Act 1998*. In brief, the Tribunal has a discretion in a case to award reimbursement by one party to another of a fee paid by the other, but under section 115C there is a presumption in a domestic building case, such as this, that the fee is reimbursable where one party has been substantially successful. Mr Bartczak's counsel conceded that he had not been substantially successful, and on this basis there will be no order for reimbursement of fees.

MEMBER C. EDQUIST