

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. BP474/2018

**CATCHWORDS**

Painter; claim for extra works and retention amounts

|                        |   |
|------------------------|---|
| <b>APPLICANT</b>       | Sasa Boskovic t/as BSM Decoration (ABN: 97 751 143 684)                           |
| <b>RESPONDENT</b>      | Profine Constructions Pty Ltd (ACN: 076 335 290) t/as Profine Building Group      |
| <b>WHERE HELD</b>      | Melbourne   |
| <b>BEFORE</b>          | Member R. Buchanan  |
| <b>HEARING TYPE</b>    | Hearing   |
| <b>DATE OF HEARING</b> | 18 May 2018   |
| <b>DATE OF ORDER</b>   | 18 May 2018   |
| <b>DATE OF REASONS</b> | 29 October 2018   |
| <b>CITATION</b>        | Boskovic v Profine Constructions Pty Ltd (Building and Property) [2018] VCAT 1687 |

**ORDER**

The proceeding is dismissed.

R. Buchanan  
**Member**

**APPEARANCES:**

|                |                          |
|----------------|--------------------------|
| For Applicant  | Mr S Boskovic, in person |
| For Respondent | Mr T. Sekic              |

## REASONS

**[When this matter was heard, I gave detailed oral reasons for my decision. Some time later, the applicant requested written reasons for that decision.]**

- 1 This is a claim by a painter, Sasa Boskovic, against a builder, Profine Constructions Pty Ltd. Mr Boskovic appeared and gave evidence on his behalf and Tom Sekic, the builder's Construction Manager, appeared and gave evidence on behalf of the builder.
- 2 The painter trades as BSM Decoration. The builder is a house builder, currently completing about 100 homes a year. Both the painter and Mr Sekic are experienced tradesmen, with many years of experience in the building industry.
- 3 In 2017 the painter painted a number of houses for the builder. For each job the builder gave the painter a works order with a price. In each case, the painter accepted the works order and on completion was paid the price in the works order, less a retention amount.
- 4 After the jobs were done, the painter returned to do extra work to some, but not all, of the jobs. Thereafter, the painter and the builder fell into a dispute and the painter refused to return to do any further extra work. The painter said in evidence that he had stopped working for the builder because he had found that the builder's jobs did not pay well enough.
- 5 The painter subsequently rendered eight invoices, claiming payment of \$11,742.18 for:
  - extra work done over and above the original contract works,
  - retention amounts not paid, and
  - amounts for adjustment of the painter's rates.
- 6 The builder made part payment of some of those eight invoices, so that of the invoiced total, \$8,663.84 remained unpaid.
- 7 In this proceeding, the painter claimed the unpaid, invoiced amount of \$8,663.84.

### Evidence

- 8 In addition to the evidence given by the painter and Mr Sekic, I was assisted by a large number of colour photographs taken by the painter. The photographs showed the various jobs done by the painter and were taken at the point where the painter had returned to do the extra work. The photographs showed a great number of blue Post-it notes on the painted surfaces, as well as the presence of new work done by the builder after the painter had completed painting the houses. The photographs also showed obvious defects. Mr Sekic gave evidence that the Post-it notes showed

defects which went beyond what was considered reasonable, including missed areas of paint and staining, runs and failure to apply the contracted three coats of paint. The builder also tendered a number of emails from the builder to the painter listing defects to be remedied.

### **Extra work**

- 9 The parties agreed that part of the painter's extra work consisted of painting new works done by the builder.
- 10 What was disputed was the balance of the extra work, which the builder said had been necessary to rectify the painter's defects. The painter claimed that his work was not defective and that his work was of a reasonable, commercial standard. The work demanded by the builder as rectification was, the painter said, unnecessary - over and above a reasonable commercial standard. The painter had complied with the builder's requests for further work on a number of the jobs, but eventually had refused to return to carry out more extra work requested by the builder.
- 11 Effectively, the painter was claiming that the extra work covered by the eight invoices was either new work, or else unnecessary work, done at the builder's insistence and as such, that extra work constituted contract variations for which the painter was entitled to be paid.
- 12 For the builder, however, Mr Sekic said that, where the painter's extra work was caused by the builder's activities after the paint job had been done, the builder had paid part of the invoiced amount, to reflect the work for which the builder was responsible. As for the balance of the amount invoiced for extra work, Mr Sekic said the builder had not paid, because the painter was claiming the cost of fixing the painter's own defective works. I prefer the evidence of Mr Sekic, which was plausible and supported by documentary evidence.
- 13 The photographic evidence showed that there were defects, some of them substantial. It was clear from the evidence that the painter had invoiced for all of the extra work done, including work to rectify the painter's defects. It follows that the painter's evidence that (apart from new work which was the responsibility of the builder) his work was only required because the builder demanded an unrealistic standard of work, cannot be relied on. I therefore prefer the builder's evidence on this subject and find that the builder has paid for the extra work which was the builder's responsibility and that the balance of extra work claimed by the painter was only work required to rectify the painter's own defects.
- 14 I therefore find that no amount is owed to the painter by the builder in relation to extra works.

### **Retention amounts**

- 15 The builder acknowledged that it had not paid some of the painter's retention amounts. The builder gave evidence that, after the painter had

refused to return to carry out extra work, it had engaged another painter, who had rectified the defects in the painter's work. The invoices from the other painter were produced in evidence. Mr Sekic gave evidence explaining that the total invoiced by that other painter had been something less than the retention amounts and that the builder had paid the balance of the retention amounts to the painter.

- 16 The painter did not dispute the builder's evidence. I therefore find that no monies are owed by the builder to the painter in relation to the painter's claims for retention amounts.

#### **Amounts for adjustment of the painter's rates**

- 17 In relation to two of the jobs, the painter claimed a total of \$1,258.70 as "new rate balance". The builder gave evidence that the parties had negotiated a new rate to take effect from 18 August 2017 and that the jobs for which the painter was claiming the new rate had both been completed before 18 August 2017.
- 18 The painter did not dispute the builder's evidence and I therefore find that no amount is owed to the painter by the builder in relation to the painter's claims for "new rate balance".

#### **Conclusion**

- 19 I find that the painter is not entitled to any payment by the builder and the painter's claim is dismissed.

R. Buchanan  
**Member**