

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D509/2010

CATCHWORDS

Termination of building contract – whether with cause or consensual; Restitution - right to recover over-payment where value of work completed is less than monies paid; Payment made under mistake of fact – right to recover based on money had and received.

APPLICANT	Hwei-Nee Choo
RESPONDENT	Bradley Price t/as BCP Constructions
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Small Claim Hearing
DATE OF HEARING	13 October and 9 November 2010
DATE OF ORDER	25 November 2010
CITATION	Choo v Bradley Price trading as BCP Constructions (Domestic Building) [2010] VCAT 1898

ORDER

1. The Respondent is to pay the Applicant \$2,185.
2. No order as to costs.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	Ms Hwei-Nee Choo in person
For the Respondent	Mr Bradley Price in person

REASONS

1. This matter concerns a claim made by Ms Choo against Mr Price, who trades under the name BCP Constructions, for \$5,550. The claim relates to excavation work performed by Mr Price at a residential property owned by Ms Choo in Burwood (**'the Property'**).
2. During late 2009, Ms Choo engaged contractors to demolish an existing dwelling located on the Property. Her intention was that she would construct a new dwelling on the Property.
3. In early 2010 Ms Choo contacted Mr Price and asked whether he could provide her with a quotation to undertake excavation of the site cut for the proposed new dwelling. On 19 January 2010, Mr Price provided a written quotation for \$4,565 inclusive of GST. The quotation stated:

We require 50% deposit to secure a date, we require the balance within 7 days of completing job, payment is made by a direct deposit.
4. After further discussion between the parties, the scope of the proposed work was increased to include excavation for a driveway and some landscaping work. Consequently, Mr Price prepared another written quotation for \$14,200 inclusive of GST. That quotation was given to Ms Choo on 9 March 2010. It stated:

I have looked at your revised drawings, at this stage I will quote for all works except foundation cut, this quote includes toppings for driveway, planter boxes, soil, retaining wall (timber), site preparation, agi drains. Site will be pretty much complete when finished, we have also included a site clean after the builders have completed the house.

We require 50% deposit to secure a date, we require the balance within 7 days of completing job, payment is made by direct deposit.
5. Ms Choo and Mr Price continued to negotiate about the scope of work and the price to undertake that work. Ultimately, Ms Choo and Mr Price agreed orally on a price of \$12,500 cash, with \$6,250 paid prior to commencement of any work. On 9 March 2010, the parties confirmed that oral agreement through email correspondence passing between them.
6. Ms Choo subsequently paid Mr Price \$6,250 and the works relating to the site cut commenced shortly thereafter. In late March, the site cut had been substantially completed. According to Ms Choo, the site cut was 90% complete. She gave evidence that there were two small sections of the site cut that had not been completed and that she ultimately paid another contractor by the name of Daniel Bruggink, trading as Oz Yardworks, \$500 to complete that excavation work.
7. In or around April 2010, and prior to the commencement of the next stage of excavation, Mr Price requested payment of the balance of the

contract price of \$6,250. According to Mr Price, he understood that the terms of the oral agreement were that he would be paid \$6,250 upfront for the site cut work and \$6,250 upfront for the landscaping and driveway excavation work. According to Ms Choo, there was no such agreement. Consequently, the parties fell into dispute as to the terms of the oral agreement between them. In particular, Mr Price refused to undertake any further work without payment being made in advance. Consequently, Ms Choo engaged another contractor to complete the excavation work.

THE ISSUES IN DISPUTE

8. Ms Choo's claim against Mr Price comprises two elements. First, Ms Choo claims that she overpaid Mr Price relative to the value of work he completed. In that regard, Ms Choo contends that the reasonable value of the work comprising the site cut was \$1,650 but that she paid Mr Price \$6,250. She claims the difference between these two sums of \$4,600. Second, Ms Choo claims loss and damage of \$500, being the cost to engage another contractor to complete the site cut, making her total claim \$5,100.
9. By contrast, Mr Price contends that the price for the site cut was agreed and fixed at \$6,250. Alternatively, he contends that even if the Tribunal were to find that this amount was not agreed and fixed, the value of the site cut exceeded that amount.

WAS THE PRICE FOR THE SITE CUT FIXED AT \$6,250?

10. According to Ms Choo, the oral agreement required that \$6,250 was to be paid as a deposit with the balance of the agreed contract price payable upon completion of all of the excavation works. By contrast, Mr Price said that \$6,250 represented the price of the site cut and that a further \$6,250 represented the price of the driveway and landscaping.
11. It seems to me that the contemporaneous email correspondence passing between the parties supports the evidence of Ms Choo. In particular, in an email dated 9 March 2010 from Mr Price, he stated:

Hi Nee, We can start Monday depending on surveyor, it will take me 4 days then the concretor man can cut foundations, after than I'll start on the drive and build up next to footpath for easy access to the block by various contractors. Whilst the builders are there I'll be working in the backyard. Then finish off after the house is to lockup stage. A deposit of 50% is to be made previous to the job, our quote is inclusive of GST, although as you can requested we can do it for \$12,000 neat. I need the surveyor to put in building lines and pegs for the cut, I am certainly not a surveyor but I can follow pegs, etc. it's only an hour job for him.

Cheers

Brad

12. It would appear that the payment of \$6,250, representing 50% of the contract price, by way of a deposit (rather than being the fixed cost of the site cut only) is also consistent with previous quotations prepared by Mr Price and referred to above.¹
13. Given the above, I find that the terms of the agreement were such that the \$6,250 was payable by way of a deposit. That amount did not therefore constitute the fixed price of the site cut only. I further find that it was a term of the agreement that the balance of \$6,250 was payable upon completion of all of the works. Having made those findings, it is my view that Mr Price had no entitlement to suspend the works pending payment of \$6,250 in advance of undertaking any further work. That was not agreed to between the parties. His failure to proceed with the works constitutes a breach of the contract.
14. Ms Choo gave evidence that despite numerous requests to continue with the works and offers to make stage progress payments, Mr Price remained resolute in not returning to undertake any further work unless Ms Choo paid the balance of the contract price in advance. Consequently, Ms Choo subsequently engaged another contractor to undertake the excavation works. It is not entirely clear on the evidence before me whether Ms Choo treated Mr Price's conduct as a repudiation of the contract and thereby sought to determine the contract with cause or whether the parties simply accepted that the relationship between them was unworkable and thereby mutually agreed to end the contract.
15. There was no submission by either party to suggest that Ms Choo had sought to terminate the contract with cause. Similarly, there is no direct evidence before me that Ms Choo sought to terminate the contract based on Mr Price's breach of contract. In fact, the evidence before me indicates that both parties had accepted that the contract was no longer salvageable given difference in each other's understanding of how payments were to be made under it and as a consequence, each went their separate way.
16. On that basis, I find that the parties mutually ended the contract, subject to each reserving their rights. That finding is consistent with the manner by which Ms Choo has framed her claim and the manner by which Mr Price defends such claim. In other words, both parties accept that Mr Price is entitled to be paid for the work undertaken by him prior to the contract coming to an end, although each party has a different view on the quantum of that payment.

WHAT IS THE REASONABLE VALUE OF THE SITE WORKS?

17. As indicated above, Ms Choo claims that she is only obligated to pay Mr Price for the reasonable value of the work performed by him, which she

¹ See paragraphs 3 and 4 above.

says is \$1,650. She claims that Mr Price has no entitlement to retain anything more than the reasonable value of the works performed by him.

18. Ms Choo contends that Mr Price had previously admitted that the cost of the site works was \$1,650. She referred to a transcript of a text message forwarded to her by Mr Price on 10 March 2010. That text message stated:

My internet is down all day today and still is. You could be looking at \$10,850 cash without the site cut.

19. Ms Choo argued that this text message indicated that the cost of the site cut could be calculated by deducting \$10,850 from the contract price of \$12,500 in order to determine what the cost of the site cut alone was. In other words, she contended that the cost of the site cut was \$1,650 based on that text message.

20. Mr Price rejected that calculation. He said that it was impossible to undertake the site cut for \$1,650 and he had no idea what he meant by the words of that text message. He suggested that the text message may have been taken out of context or may have even related to another project.

21. Ms Choo gave further evidence, which she said supported her contention that the cost of the site cut was \$1,650. She said that Daniel Bruggink from Oz Yard Works had told her that the estimated price of cutting her site was between \$1,850 to \$2,400 depending on whether he encountered rock and needed to bring in heavy equipment. However, Ms Choo did not call Mr Bruggink as a witness to give evidence in the proceeding. I therefore place no weight on that hearsay evidence.

22. By contrast, Mr Sean Jonker of Eastern Earthworks provided a statutory declaration dated 28 October 2010, which Ms Choo filed in the proceeding. In that statutory declaration, Mr Jonker stated:

Nee has asked me to write a short statement as to what I think the work at 16 Gould Street would have cost, and what machinery I would have used. I have been in excavation for about 10 years now and the majority of my work is site cuts and driveway excavation.

It would be unfair for me to give Nee a price for the job as I didn't see the site before it was excavated, but Nee did say that a 2 and 5 tonne excavator was used to excavate the site, and in my experience these machines would have been far too small for the job. Any size machine could be used to excavate the site but with a vacant site and an excavation the size of one at 16 Gould Street, with 2 and 5 tonne machines would have been very slow and therefore expensive.

If I had quoted the job from the start I would have quoted the excavation at \$20 per cubic metre, to excavate and remove soil which would have included the excavator hire, float to and from

the site, tip fees and truck hire. As the site was vacant at the time of excavation, I would have used a 13 tonne excavator and Nee has told me that there were about 200 cubic metres of soil removed from site, if this was the case the job should have taken only one day.

23. According to Mr Jonker, the total cost of excavation would have been \$4,000 (\$20 per cubic metres x 200 cubic metres).
24. Mr Price contended that it was unsafe to rely on the statutory declaration of Mr Jonker because Mr Jonker had not seen the Property before giving his price estimate.
25. Mr Price gave evidence that the costs actually incurred by him were commensurate with the amount he had been paid. In particular, he gave evidence that the cost of the works were:
- | | | |
|-----|--|---------|
| (a) | Bobcat at \$80 per hour for 30 hours | \$2,400 |
| (b) | Five ton excavator at \$85 per hour for 15 hours | \$1,275 |
| (c) | Two ton excavator at \$75 per hour for 30 hours | \$2,250 |
| (d) | Float | \$600 |
| (e) | Labourer at \$300 per day for 2 days | \$600 |
| | Total | \$6,525 |
26. Ms Choo disputed the evidence of Mr Price as to the amount of time that each of the above machines were on site. She relied upon a statutory declaration of Hanlet Lui dated 2 November 2010 and filed in the proceeding. Ms Lui was the engineer engaged by Ms Choo. A number of photographs were attached to that statutory declaration, which Mr Lui states were taken on 18 March and 21 March 2010. Those photographs showed only one machine operating at that time. Ms Choo contended that the photographs were consistent with her own observations that she visited the site on each day that Mr Price was working and only ever saw one machine operating at one given time.
27. Ms Choo also relied upon the statutory declaration of Sean Jonker wherein he stated that the excavation could have been completed within one full day.
28. Ms Choo further contended that there were delays in the work undertaken by Mr Price because his machinery kept breaking down. Her evidence is corroborated by the transcript of two text messages sent from Mr Price to Ms Choo on 22 and 23 March 2010 wherein he stated:
- Machine broke down yesterday mechanic's coming to look at it today.
- The excavation is finished tonight we still had problems with machine. It seems to run for one hour and then breaks down. Mechanics are back there today.

29. In other words, Ms Choo contends that even if the hours claimed by Mr Price are correct, those hours do not reflect what a reasonably competent excavator would take to complete the works undertaken by Mr Price and therefore should not be taken as an accurate means of assessing the reasonable value of the work.
30. There is force in the argument advanced by Ms Choo that the hours worked by Mr Price may not reflect what a reasonably competent excavator would take to complete the works, given the delays suffered by him. Consequently, I do not accept that the actual hours worked by Mr Price is an accurate means of assessing the reasonable cost of the works.
31. In my view, the best evidence of what the reasonable value of the works are is found in Mr Price's quotation dated 19 January 2010.² In that quotation Mr Price states that the cost of the excavation for the site cut is \$4,565 inclusive of GST. That price seems to be consistent with the price that Mr Jonker says he would have quoted (\$4,000).
32. Accordingly, I find based on the evidence before me that the reasonable value of the site cut work is \$4,565.³

DAMAGES CLAIM

33. I accept the evidence of Ms Choo that she paid a further \$500 in order to complete the site cut. In that respect, she said that there were two small sections of excavation work that were not completed by Mr Price and that she paid Mr Bruggink \$500 to undertake that work. That evidence is corroborated by the statutory declaration of Hanlet Lui, wherein she states:

My next inspection was conducted in April 2010 when Dan Bruggink, the concreter was there with his men to do preparation for the garage and house's bottom slab. I was called in as the site had not been excavated properly and Nee asked if it could be easier to design around the two sections that were not completed. After discussions with Dan and Nee, we decided that it was cheaper and faster to excavate the parts not completed by Brad.

34. There being no contrary evidence from Mr Price to suggest that the site cut works were wholly completed or that the \$500 expended by Ms Choo was not reasonable, I find in favour of Ms Choo in the amount of \$500. That amount is to be deducted from the amount that I have assessed as being fair and reasonable value of the works completed by Mr Price. In other words, I find that the fair and reasonable price for the works completed by Mr Price, taking into account the incomplete works, amounts to \$4,065.
35. The uncontested evidence before me is that \$6,250 has been paid by Ms Choo. Accordingly, I find that the difference between that amount and

² See paragraph 3 above.

³ Subject to any deduction for incomplete or defective work.

the reasonable value of the works as assessed by me (\$4,065) constitutes an over-payment by Ms Choo in favour of Mr Price, which I consider is recoverable by Ms Choo in restitution⁴ or as a claim for money had and received.⁵ Accordingly, I order that \$2,185 be re-paid to Ms Choo.

SENIOR MEMBER E. RIEGLER

⁴ *Roxborough v Rothmans of Pall Mall Australia* [2001] HCA 68.

⁵ *David Securities Pty Ltd v CBA* (1992) 175 CLR 353.