

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D189/2006

CATCHWORDS

Work and labour done – term of contract as to manner of performance – Respondent requiring different manner rendering performance unprofitable – breach of contract as to manner of payment – mutual abandonment of contract – no evidence of breach by Applicant – lack of expert evidence to prove set-off by Respondent

APPLICANT	CJ Roof Plumbing Pty Ltd (ACN 088 047 947)
RESPONDENT	R & S Homes Pty Ltd (ACN 105 079 123)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Small Claims Hearing
DATE OF HEARING	24 May 2006
DATE OF ORDER	31 May 2006
	[2006] VCAT 982

ORDER

Order that the Respondent pay to the Applicant the sum of \$7,666.00.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr & Mrs Pilon in person
For the Respondent	Mr Maksimiw, Mr Skibbe and Mr Rogers in person

REASONS FOR DECISION

Background

1. The Applicant is a plumbing contractor through which Mr Cliff Pilon conducts his plumbing business. Mr Pilon is a registered plumber and has been for 12 years. The Respondent is a builder and has been for many years. Its principals are Mr Maksimiw, Mr Skibbe and Mr Rogers.
2. In October 2005 the Respondent accepted a quotation from the Applicant to carry out roof plumbing work for a multi-unit development in accordance with the terms of the quotation. The quotation is in writing and two copies have been tendered. The first, dated 3 October 2005, is identical to the second which is dated 10 October 2005 except that the latter has the following handwritten annotation at the foot: "*Scaffold and incell to be provided by builder*". I am told that "incell" is an insulation material. According to Mrs Pilon she faxed this second copy of the quote bearing those handwritten words to the Respondent on 10 October. Nothing seems to turn on the point since both sides acknowledge that scaffolding and insulation were not included in the quote.
3. At the foot of both copies of the quotation there are a number of printed terms and conditions. Reference has been made to the second and fourth of these which read: "*Jobs over \$5,000.00 may require regular progress payment*"; and "*Upon completion of the job, payment is strictly 14 days*".
4. Mr Rogers was to supervise the construction of the development. He is a carpenter and a registered builder. The involvement of Mr Maksimiw and Mr Skibbe appears to have been on the administrative side. Neither is a qualified tradesman although Mr Maksimiw said that he had been involved in the construction of a great many dwellings over a long period. The contract price was \$79,820.40, inclusive of GST.

The work

5. The Applicant commenced work on 12 December 2005 and worked up to Christmas. Work recommenced in about mid January and on 18 January it claimed a progress payment of \$28,285.60 (inclusive of GST). An amount of

\$10,000.00 on account of the progress claim was paid on 3 February and the balance was paid on 10 February 2006. By this time, further work had been done.

6. The job did not proceed as anticipated and became unprofitable for the Applicant. According to Mr Pilon's evidence, there were two reasons for this.
 - (a) before the quote was accepted, Mr Pilon met Mr Rogers on site and was told there would only be a couple of units ready at a time. According to Mr Pilon's evidence this was significant because it meant that he and the Applicant's other employees could do the job along with the work it was doing for other builders at the time. As it turned out the units were constructed very rapidly. There were large numbers of tradesmen on site and the job progressed much more quickly than Mr Pilon had been told. In order to try and keep up with the increased pace of work he engaged subcontractors at considerable cost.
 - (b) Mr Rogers asked Mr Pilon to stop work on the first four of the units before they were finished and move onto the next four so that the Respondent could obtain lock up payments from the bank.

This evidence was not denied by the Respondent.

Concerns about payment

7. Mr Pilon says that he was also concerned about being paid. When he commenced work Mr Rogers asked him to hold off on issuing the progress claim until the first 4 units were at lock up stage when the Respondent would be able to obtain payment of a progress claim from its bank. This was not denied. He says that after he issued the progress claim pursuant to this request he was then told that he would not be paid within 14 days but rather within 30 days. In response to this allegation Mr Rogers said that he had informed Mr Pilon that the Respondent pays in 30 days but that he would endeavour to pay him as soon as they could. I prefer Mr Pilon's evidence. He was a more impressive witness than Mr Rogers and is supported by the condition on the quotations.
8. Mr Maksimiw says that he asked Mr Pilon for a breakdown of his charges. It is unclear from his evidence just when this request was made. At first I thought he wanted the breakdown in order to assess the legitimacy of the progress claim and

indeed, that is the way he gave his evidence to start with. However later it seemed that he wanted those details in order to assess what should be paid to the Applicant when it finished off the units it had started. No break down was given.

9. The progress payment was not paid within 14 days. Mr Pilon raised his concerns about payment with the Respondent and was told by Mr Maksimiw that he could keep going or leave without being paid. He says that Mr Maksimiw said to him that they could employ another company to complete the work and if there was any money left at the end they would pay him. Mr Maksimiw then said:

“You know there will be no money at the end”.

The Respondent’s witnesses did not deny that this conversation occurred.

Payment

10. An initial \$10,000.00 instalment was paid on account of the progress claim on 3 February 2006. Mr Pilon was told that the balance would be paid in four days. When he returned in four days he was told by Mr Skibbe that Mr Maksimiw had decided not to pay him. Mr Pilon spoke to Mr Maksimiw and after a lengthy argument Mr Maksimiw agreed to pay the following day but only if Mr Pilon provided him with a progress schedule. When he went to collect the cheque he was called into a meeting with Mr Maksimiw, Mr Skibbe and Mr Rogers and told that if he did not sign the progress schedule he would not be paid. He said that he signed it in order to receive payment for the work done as he could not afford to lose over \$18,000.00.
11. The progress schedule is a handwritten document dated 10 February 2006, which was a Friday. It refers to certain work to be done on that day, the following week and the week after that by which stage the work would be completed. Mr Pilon complains that Mr Maksimiw made several derogatory comments at the meeting directed to him but he did not say in his evidence what they were. In any event, when the cheque that he received on that day was cleared Mr Pilon did not return to the site.

Termination

12. On 16 February 2006 the Applicant wrote a letter to the Respondent in the following terms:

“This letter is official notification that we are ceasing our works to the above mentioned site for the following reasons –

- *we took the job on with the understanding that it was to be done in stages, completing 2 units at a time, not 9 at once.*
- *the next stage of the job has been carried out before our part is completed.*
- *terms & conditions on the quote have not been adhered to.*

We will not be returning to the job and highly suggest that you find another contractor to complete the work.

Enclosed is an invoice for work completed to date. Should this invoice not be paid within 7 days from the date of this letter, legal action will be taken.”

13. Accompanying the letter was an invoice for \$7,666.00 (inclusive of GST) which is described as being for:

“Work completed to date on the abovementioned site”.

Further developments

14. On the following day, 17 February 2006, the Respondent sent a letter to the Applicant advising that unless it returned to the site within seven day to complete the job it would instigate legal proceedings to recover the cost to complete the work and damages incurred. The Applicant’s letter of 16 February was not answered until 30 March 2006 when the Respondent sent a letter denying the allegations, suggesting that the Applicant had created delays, not performed according to the agreement and that it would be claiming damages for cost of completion.

15. On 12 May 2006 the Respondent had the work inspected by officers of the Plumbing Industry Commission. Two officers attended but neither officer has been called nor has any report from the Commission been produced. According to the Respondent’s evidence two defects were found namely, that the roof sheets should have had a minimum overhanging to the gutter of 50mm whereas the overhang on most units is only between 20-30mm. There was also a complaint about corrosion which relates to some rust spots shown in some of the photographs that were tendered.

16. In regard to the circumstances in which the Applicant left the site, Mr Maksimiw said that at the meeting when the progress schedule was signed it was agreed that Pilon need only finish the units it had started and that the Respondent would get someone else to finish the job. This seems inconsistent with the schedule that was signed at that same meeting. However Mr Pilon said that while he was still on site another roof plumber had been engaged by the Respondent to do some of the work. The Respondent's witnesses deny that, although they did acknowledge that one was on site when Mr Pilon arrived with the letter determining the contract.
17. It seems to me that by the time Mr Pilon arrived with the letter it was accepted by both parties that the Applicant would not complete the job. On the Applicant's side the manner of performance now required was not what had been agreed which rendered it uneconomical for the Applicant to continue. On the Respondent's side it appears that they wanted the job to proceed much more quickly than was originally anticipated and Mr Pilon was not able or willing to do that.

The claim

18. The Applicant now seeks payment of the final invoice. Mr Pilon gave evidence that he assessed the contract value of the labour and materials provided on a conservative basis and, after deducting what had already been paid, the balance due was \$6,969.09. Details of this calculation were provided in evidence. He said that was a fair and reasonable price for the work and materials supplied.
19. The Respondent produced a number of invoices that Mr Maksimiw said had been paid to another plumber for completing the work. The Respondent also produced a plan of the development showing the layout of the units with the 8 units upon which the Applicant had worked highlighted. On each of these there is a percentage written reflecting, according to the Respondent's witnesses, the percentage of work the Applicant had done on that unit. When I asked the Respondent's witnesses how they had arrived at these percentages they acknowledged that they were a rough guess and not an assessment made by a plumber or other qualified person.

20. The other plumber who completed the work was not called to give evidence as to what was done to complete the job nor to verify the reasonableness of the charges he had made to the Respondent. The invoices tendered were hand written and taken from a standard invoice book. No address, telephone number or other details of the plumber appear, apart from a hand written name and an ABN number. In any event, there is no counterclaim by the Respondent so I can only treat this as an informal attempt to set off the loss claimed against the amount now claimed by the Applicant. These proceedings are intended to be informal and I will proceed on this basis.

21. The other complaint made by the Respondent was that certain aspects of the work were defective. A number of photographs were tendered showing the stage of work reached and what were said to be defects. Rust spots were depicted in some photographs and the evidence of the Respondent's witnesses was that this had occurred on some of the roofs. Mr Pilon gave evidence that there were other trades on site working above the roofs, including the renderers. I pointed to something on a photograph that looked to me like silicone on the roof but Mr Pilon said that it was in fact render. There was also acid washing of the bricks in progress by another contractor and Mr Pilon's apprentice was burned by it. Mr Maksimiw suggested that the rust spots arose as a result of the Applicant failing to clean down the sheets after they had been drilled. This seems a possible explanation but there is no direct evidence of the cause and since there were other trades on site working above the roof after it was installed I cannot infer that it must have been something the Applicant has done.

22. The Respondent complains that the sheets did not overhang the gutter by 50mm. There is no expert evidence from a qualified plumber as to what the requirement is for an overhang. Certainly the photographs show a tape measure placed underneath the overhang indicating, assuming it was pushed all the way to the edge of the gutter, that the overhang is less than 50mm. Mr Pilon said that the frame upon which the roof sheets were laid was not regular and so the overhang was not uniform due to this problem. That may have given him cause to complain and possibly claim extra payment but if the requirement to properly fix the sheets was that they were to have a 50mm overhang that is what he should have done. In

the absence of any expert evidence as to the requirement for an overhang, in the presence of the parties I consulted the Guide to Standards and Tolerances published by the Building Commission which simply states that installation must be in accordance with the manufacturer's recommendations and data sheets. No such sheets have been tendered and no evidence has been given as to what the recommendations are. I am therefore unable to find on the balance of probabilities that this is a defect.

23. Complaints about damage to plaster from water penetration related to the Respondent prematurely installing plaster before the roofs were installed and flashed. That cannot be blamed on the Applicant. Apart from these matters the photographs depict either incomplete work or damage which looks more like damage caused to the roof and flashings after they were installed. It is acknowledged by the Applicant that the work was incomplete.

Lack of expert evidence

24. What the Respondent's defence and set off really required was evidence from a qualified plumber or other expert to establish that the work was defective and there is no such evidence. All I have is the sworn evidence of Mr Pilon who is a registered plumber to the effect that it was done in a proper and workmanlike manner. Being uncontradicted by other expert evidence I should accept it.
25. As to the cost of completion I am unable to find what it should reasonably have cost the Respondent to complete the work and so I am unable to find that it was more than the balance of the contract sum. In any event, I am not satisfied that the Respondent has established that the Applicant was in breach of the contract in stopping work in the circumstances established by the evidence.
26. As to the amount claimed by the Applicant the only expert evidence I have as to the reasonable value of the work done is that of Mr Pilon. No other expert has been called to give evidence as to that and so I must accept his evidence. There will be an order that the Respondent pay to the Applicant the sum of \$7,666.00.

SENIOR MEMBER R. WALKER

