

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## CIVIL DIVISION

### BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP815/2016

### CATCHWORDS

Claim by subcontractor against head contractor for unpaid invoices for the supply and installation of balustrades to residential balconies and variations; counterclaim by head contractor for the cost of rectification of the balustrades to 3 balconies not installed in accordance with the contract drawings; the drawing containing the balcony details was omitted from the bundle of drawings provide by the head contractor to the subcontractor before the subcontractor signed the subcontract; the subcontractor failed to check the drawings provided and identify the missing drawing; the subcontractor failed to advise the head contractor that a drawing was missing; the subcontractor failed to follow the procedure in the subcontract for claiming variations; the subcontractor's claim dismissed and the head contractor's claim allowed

<b>APPLICANT</b>	Crawford Engineering Pty Ltd (ACN 160 818 968)
<b>RESPONDENT</b>	Newvision Holdings Pty Ltd (ACN 126 377 080)
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	B Thomas, Member
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	27 March 2017
<b>DATE OF ORDER</b>	31 May 2017
<b>CITATION</b>	Crawford Engineering Pty Ltd v Newvision Holdings Pty Ltd (Building and Property) [2017] VCAT 719

### ORDER

- 1 The applicant must pay the respondent the sum of \$2,345.61.
- 2 Costs are reserved with liberty to apply having regard to section 109 of the *Victorian Civil and Administrative Act 1998*.
- 3 If a party does not file an application for costs by 30 May 2017, there will be no order for costs.
- 4 Any application for costs must be supported by submissions in writing to be determined in chambers by Member B Thomas.

BW Thomas  
**Member**

**APPEARANCES:**

For Applicant

Mr C. Crawford, Director

For Respondents

Mr N. Phillpot of Counsel

## REASONS

### INTRODUCTION

- 1 Crawford Engineering provides welding and fabrication services. By a Master Builders Association Short Form Subcontract Agreement dated 14 April 2015, Newvision Holdings (“Newvision”) engaged Crawford Engineering to manufacture and install galvanised steel balustrades to the external balconies of 10 residential apartments in West Footscray (“the works”).
- 2 Newvision has refused to pay certain invoices Crawford Engineering has submitted for the works. Newvision alleges that in three apartments, the balustrades have not been installed according to the contract drawings in that there is a gap of approximately 60 mm between the edge of the balcony tiling and the balustrade screen vertical timber cladding which will need to be rectified.

### THE HEARING

- 3 I heard the proceeding on 24 January and 21 March 2017. Mr Cayden Crawford, the director of Crawford Engineering, and Mr Alex Barnett, Newvision’s former site manager, gave evidence on behalf of Crawford Engineering. Mr Aman Tanini, the director of Newvision, and Mr Trevor Jeffrey, a building consultant, gave evidence on behalf of Newvision. At the conclusion of hearing, I ordered that Crawford Engineering file and serve any reply to Newvision’s final submissions by 10 April 2017.

### THE CLAIM AND THE COUNTERCLAIM

- 4 Crawford Engineering claims \$15,202.09 made up of the following invoices –

18 June 2015	Invoice No. 339	\$3,258.01	(balance outstanding)
25 June 2015	Invoice No. 344	\$8,302.14	(variation)
2 July 2015	Invoice No. 347	\$93.50	(variation)
28 August 2015	Invoice No. 1026	\$1,766.88	(variation)
6 August 2015	Invoice No.1037	\$990.00	(variation)
20 August 2015	Invoice No. 1048	\$791.56	(interest on unpaid invoices)
- 5 The variations totalled \$11,944.08.
- 6 In its Amended Points of Defence and Counterclaim Newvision admitted that Invoice 339 was payable but counterclaimed \$7,464.00 as the cost of rectification of Crawford Engineering’s defective work, leaving a balance due to Newvision of \$4,205.99. At the commencement of the hearing, this balance was amended to \$2,345.61.

## THE ISSUES

- 7 The following matters were issues in dispute:
- a What design was Crawford Engineering obliged to work to?
  - b Did Crawford Engineering receive Drawing No. A411 revision CA.3 before Mr Crawford signed the Subcontract Agreement on 14 April 2015?
  - c Did Crawford Engineering seek written approval for the variations it has claimed as required by the Subcontract Agreement?
  - d Has Newvision benefitted from the variations claimed by Crawford Engineering?
  - e Is Crawford Engineering entitled to claim interest on unpaid invoices?
- 8 For the reasons set out below, I find that Newvision did not provide to Crawford Engineering Drawing No. A411 revision CA.3. However, Mr Crawford failed to check that Newvision had provided all drawings listed in Item 8 of the Schedule to the Subcontract and therefore, Crawford Engineering did not carry out the works in accordance with the Subcontract. I also find that Crawford Engineering did not submit variations in accordance with the procedure laid down in the Subcontract, but that Newvision did not benefit from the variations claimed by Crawford Engineering. Finally, I find that Crawford Engineering is not entitled to claim interest on unpaid invoices.

## THE SUBCONTRACT AGREEMENT

- 9 Item 8 of the Schedule of the Subcontract lists the “Drawings, Specifications and other relevant documents forming part of the Subcontract”. The Structural Drawings and Architectural Drawings are said to comprise the “Plans and Specifications”. Thirty-nine architectural drawings are listed including A411CA.3. The Sheet Title of that drawing is entitled “Typical Details” and shows “Typical Hob Balcony Screen Section”, “Typical Balcony Screen Section” and “Typical Balcony Screen Plan”.

- 10 Clause A of the Subcontract Agreement provides –

The Subcontractor will carry out and complete the Subcontract Works at the Site in accordance with the Plans and Specifications in a proper and workmanlike manner and to the satisfaction of the Contractor and in accordance with this Agreement, including the Conditions of Subcontract below and any Special Conditions.

Clause D provides –

The Contractor will pay to the Subcontractor the Subcontract Price as varied from time to time, upon satisfactory completion of the Subcontract Works and in accordance with this Agreement.

Clause G provides –

Unless and until approved in writing by the Contractor, no variation may be effected to the Subcontract. Unless and until the price for a variation is approved by the Contractor in writing the Sub contract Price will not be varied to include any allowance or price for that variation.

Clause J provides –

Until the expiry of the Defects Liability Period, or until the satisfactory rectification of all defects – whichever is the later – the Sub contractor is and remains responsible and liable for rectification and making good of

- any and all defective materials and/or workmanship provided by it under this Subcontract;
  - all consequential defect or damage.
- free of charge to the Contractor,

## THE EVIDENCE

- 11 Mr Crawford said he was engaged to fabricate and install the balustrades according to a design provided by Newvision. Some days before signing the Subcontract Agreement, he received by email from Newvision a file containing 42 sheets of plans prepared by Hinge Architects numbered A001 – A601 Revision CA.1 and dated 26 April 2013. He specifically referred to sheet A200 entitled ‘Elevations’ (Exhibit A1) which depicted the detail of the balustrades to be designed. The detail was vague and was limited to how the balustrades were to be constructed. He was not alerted to the fact that Drawing No. A411 CA.3 had not been provided by Newvision.
- 12 He agreed that it was his signature on the second page of the Subcontract Agreement and that the drawings listed in Item 8 of the Schedule had been provided to him before he signed the Agreement. However, he maintained that only realised that he had not been provided with this drawing when he read the Expert Report of Trevor Jeffrey (the Jeffrey Report) (Exhibit A11), who was engaged by Newvision. He agreed that the balustrades to the balconies of Apartments 1.2, 1.3 and 1.4 were not built according to the detail shown in that drawing, and that he had never asked Newvision for this drawing.
- 13 At 2.2.1. (Overview) of his report Mr Jeffrey states –

From the site inspection, I established the following:

  - i. Three of the balcony balustrade screens have not been constructed in accordance with the contract documents as such (sic), they are defective.
  - ii. All other balcony screens visible from the car park appear to have been fixed to the concrete slab in accordance with the Contract documentation as they do not have an excessive gap.

At 3 (Defects) Mr Jeffrey states –

The Contract documents require the balcony screens to be fixed to the balcony slab in accordance with “Typical Balcony Screen”, “Typical Balcony Screen Elevation”, and “Typical Balcony Screen Plan” as shown on Hinge Architect drawing A411 revision CA.3 ...

Hinge Architect drawing A411 revision CA.3 shows the balcony screen to be fixed by bolting the 50 x 50 structural RHS posts to the top of the balcony concrete slab ...

Crawford Engineering used an alternative method to fix the balcony screens to apartment balcony 1.1.2, a power apartment balcony 1.1.3 and apartment balcony 1.1.4. ...

The alternative fixing method adopted by Crawford Engineering for fixing the balcony screens to apartments 1.2, 1.3 and 1.4 resulted in an unacceptable 60 mm gap between the edge of the balcony tile and the balustrade vertical timber cladding.

- 14 Mr Crawford agreed that the balcony screens to apartments 1.1, 1.2 and 1.3 were not fixed in accordance with Drawing A411 CA.3. He denied that the screens to these apartments were not fixed in accordance with the Contract drawings; he said they were fixed according to the design of I.Struct.I, Newvision’s engineer. He did not become aware of the alleged defects until he received the Jeffrey Report and was not given the opportunity to rectify them. His explanation for the fixing of balcony screens to apartments 1.2, 1.3 and 1.4 was that due to the presence of reinforced steel in the concrete slabs for those balconies, it was not possible to bolt the steel upright posts directly onto the slabs as required by Drawing No. A411 CA.3.
- 15 As to the variations claimed (Invoices 344, 1026 and 1037), Mr Crawford said these were necessary and approved by Alex Barnett who had engaged Crawford Engineering.
- 16 Mr Barnett was a subcontractor of Newvision whom he invoiced fortnightly. He was responsible for ordering materials, organising and supervising the trades, ensuring compliance of the works with the Building Code of Australia and Occupational, Health and Safety matters. Drawing A200 CA1 dated 26 April 2013 was the only drawing of the balustrade design that he was provided. The balustrade design was approved by the architect, Hinge Architects, the engineer, I.Struct.I and Colin Hoang, Newvision’s contract administrator and estimator. He remained on the project for another 2-3 months after the balustrades were installed but was not notified by Newvision of any defects.
- 17 Mr Barnett said he was not authorised to make any decision regarding expenditure or to approve variations. He never received a written request for a variation from Crawford Engineering, but when asked by Mr Crawford to confirm works the subject of variations was carried out, he gave verbal approval retrospectively gave approval to variations requested by Mr Crawford. He was not advised by Mr Crawford of any discrepancy in the drawings or any missing drawing, although he had a vague recollection that Mr Crawford mentioned a lack of detail regarding the balustrades.

- 18 Mr Jeffrey is a quantity surveyor and the principal of Construction & Asset Management Consultants. His report is dated 22 August 2016 and was prepared following his inspection of the balconies on 19 August 2016. It contains a number of photographs taken from the carpark underneath the balconies of Apartments 1.2, 1.3 and 1.4 which clearly show a gap between the edge of the balcony tiles and the vertical timber cladding of the balustrade.
- 19 Page 29 of his report is the architect’s drawing A411 revision CA.3 showing the detail for a typical balcony section, and in particular, how the balustrading is to be fixed to the balcony. Page 30 is the same drawing with his notations “CONTRACT REQUIRED FIXING OF BALCONY SCREEN TO BALCONY SLAB”, “50 x 50 structural RHS post bolted to top of balcony concrete slab” and “If Crawford Engineering constructed in accordance with this detail, i.e. bolting frame to top of slab, then there would not have been a gap between the edge of the balcony tiling at the balustrade”. Page 31 is the same drawing but with the notations “ALTERNATIVE FIXING METHOD USED BY CRAWFORD ENGINEERING FOR FIXING BALCONY SCREEN TO BALCONY SLAB”, “unacceptable excessive gap created by altering the construction method required by the contract documents”, “50 x 50 structural RHS post has not been bolted to top of balcony concrete slab as required by contract documents” and “Alternative construction method adopted by Crawford Engineering: Plate welded to back of structural RHS and then fix to the edge of the concrete slab”.
- 20 Mr Jeffrey said that the Planning Permit required a setback of 1200mm from the western boundary of the site as shown on the Endorsed Plan. The balconies of Apartments 1.2, 1.3 and 1.4 were not set back the required 1200 mm therefore had not been constructed in accordance with the Planning Permit.
- 21 He costed rectification of the excessive gaps to the three balcony screens as follows –

Apartment 1.2	\$1,325.00
Apartment 1.3	\$2,055.00
Apartment 1.4	\$1,325.00
Supervision and Coordination	<u>\$ 680.00</u>
	\$5,385.00
Overheads, profit and contingencies	<u>\$1,400.00</u>
	\$6,785.00
GST	\$ <u>679.00</u>
	\$7,464.00

- 22 Mr Tanani is the sole director of Newvision and is a registered building practitioner. Newvision was the head contractor for the works. Crawford Engineering was not involved in the design of the balustrades, but simply required to supply and install them in accordance with Drawing No. A411 CA.3.
- 23 The Subcontract Agreement was prepared by Colin Hoang, Mr Tanini's assistant and Newvision's Contract Administrator, on Mr Tanini's instructions. Alex Barnett was a subcontractor on hourly rate to supervise the trades and report to Mr Tanini. He forwarded written requests for information or variations which were required to be approved by Mr Tanini, before any work was carried out. Alex Barnett did not have any involvement in the preparation of the Subcontract Agreement. The drawings listed in Item 8 of the Subcontract Agreement were provided to Crawford Engineering by email before the agreement was signed. He was not aware that Drawing No. A411.CA3 was not provided to Crawford Engineering, but Mr Crawford inspected the works before submitting its quotation. No written requests for information or variations or notification of any problem were received from Crawford Engineering and none were mentioned to him by Alex Barnett. The balustrades have not yet been rectified, but a retention of \$44,000.00 has not yet been released to Newvision.

## **DISCUSSION**

*What design was Crawford Engineering required to work to?*

- 24 As Mr Crawford received the file of drawings by email and then signed the Subcontract Agreement as the director of Crawford Engineering, I find that Crawford Engineering was required to supply and install the balustrades according to Drawing No. A411 CA.3, not the design of the engineer, I.Struct.I.

*Did Crawford Engineering receive Drawing No. A411 revision CA.3? If not, did Mr Crawford notify Newvision?*

- 25 I accept that Crawford Engineering did not receive the Drawing. However, I find that in turn Mr Crawford did not check the drawings he received from Newvision against the drawings listed in Item 8 of the Schedule to the Subcontract Agreement. The Subcontract Agreement required Crawford Engineering to supply and install the balustrades in accordance with its quotation dated 13 April 2015 (Exhibit 12) and Drawing No. A411.CA3. That drawing was critical as it shows the architect's details for the connection between the balustrade to the balcony slab as shown on page 29 of the Jeffrey report. If either party finds any discrepancy or ambiguity between the Plans and the Specifications, Condition 10 of the Subcontract Agreement requires that party to notify the other party of any such discrepancy or ambiguity. Clearly there was a discrepancy in the file of drawings Crawford Engineering received from Newvision – Drawing No.



A411.CA3 was missing. Commercial due diligence required Mr Crawford to check the plans received, and notify Newvision that Drawing No. A411.CA3 was missing.

- 26 I do not accept Mr Crawford's interpretation of the legal effect of the Subcontract Agreement. On the one hand he took the view that because Drawing No. A411.CA3 had not been provided by Newvision, Crawford Engineering was not required to meet its obligations under the Subcontract Agreement. On the other hand, despite the fact that he had signed the Subcontract Agreement on behalf of Crawford Engineering, as Crawford Engineering had been engaged by Mr Barnett, and Mr Barnett was the sole point of contact with Newvision, he was entitled to assume that Mr Barnett had authority to make decisions on behalf of Newvision. However, Mr Barnett's evidence was that he was only responsible for ordering materials, organising and supervising the sub trades, ensuring compliance of the works with the *Building Code of Australia* and occupational health and safety on the site. He specifically said that he had no authority to make any decision regarding expenditure or approve variations, and never received any written request for a variation from Mr Crawford. It was not clear from the evidence whether Mr Barnett had communicated the limitations in his authority to Mr Crawford, and yet he retrospectively verbally approved variation requests from Mr Crawford.
- 27 Clause A of the Subcontract Agreement required Crawford Engineering to construct and install the balustrades to the satisfaction of Newvision and in accordance with the Conditions of the Subcontract Agreement. Clause D required Newvision to pay Crawford Engineering, the Subcontract Price as varied upon satisfactory completion of the Subcontract Works and in accordance with the Subcontract Agreement. Clause J provided that until satisfactory rectification of all relevant defects, Crawford Engineering remains responsible and liable for rectification making good of any and all defective materials and/or workmanship. I find that Crawford Engineering has not completed the Subcontract Works in accordance with the Subcontract Agreement and remains liable for the cost of rectification as detailed in the Jeffrey report.
- 28 Mr Jeffrey's report complies with PNVCAT – 2. He said that the construction of the balconies to Apartments 1.2, 1.3, and 1.4 do not comply with Drawing No. A411.CA3 and cost of rectification to make them do so is \$7,464.00. I gave Mr Crawford the opportunity to call expert evidence in rebuttal of Mr Jeffrey's opinions, but Mr Crawford declined to do so, saying he would give expert evidence as an engineer himself. As the director of Crawford Engineering, Mr Crawford cannot be impartial in his opinions, I therefore accept the opinions expressed by Mr Jeffrey in his report and his evidence in preference to those of Mr Crawford.

*Did Crawford Engineering seek written approval for the variations it has claimed as required by the Subcontract Agreement?*

- 29 Invoices 344, 347, 1026 and 1037 are claims for variations by Crawford Engineering. Mr Barnett said he had no recollection of receiving a written request of these variations as required by Clause G. Invoice 344 is for \$8,302.14 and attached is Service Report No. 09323 which itemises the Services Carried Out as *Core drill, Scaffolding, core drilling hours, Gigs, Traffic Management, changing fixing points on PFC to back wall*. Also attached are two Kennard's Hire invoices for \$1,684.00 and \$168.40 respectively. This invoice appears to relate to the failure of Crawford Engineering to construct the three balconies according to Drawing No. A411.CA.3. Invoice 347 is for \$93.50 and states *2MM ANGLE X 2 (80 X 100)*. Invoice 1026 is for \$1766.88 but refers to an address in Surrey Hills and a different Job Number. Invoice 1037 is for \$990.00 and states that it is *Rent for Scaffolding x 6 weeks @\$150 per week*.
- 30 Clause G of the Subcontract Agreement provides that, unless approved in writing by Newvision, no variation may be effected to the Subcontract and the Subcontract Price will not be varied to include any allowance or price for that variation. No request for any variations were made by Newvision to Crawford Engineering. No request for any variation in writing as required by Clause G was provided by Crawford Engineering to Newvision. It appears that the need for a variation was not discussed by Mr Crawford and Mr Barnett before the work the subject of a variation was undertaken. Mr Barnett said he gave verbal approval for variations requested by Mr Crawford retrospectively. I find that Crawford Engineering's claims were not made in accordance with the procedure laid down in the Subcontract Agreement and were therefore in breach of the Subcontract Agreement.

*Has Newvision benefitted from the variations claimed by Crawford Engineering?*

- 31 I find that, apart from the fact they have not been approved in writing by Newvision as required by Clause G, Invoices 344 and 1047 should have been covered by Crawford Engineering's quotation, Newvision therefore has not received any benefit from these invoices.

*Is Crawford Engineering entitled to claim interest on unpaid invoices?*

- 32 Invoice 1048 appears to be a claim for interest payable by Newvision for its failure to pay invoices 319, 339, and 344 pursuant to Crawford Engineering's Terms and Conditions. Mr Crawford said that the entitlement of Crawford Engineering to levy interest was pursuant to clause 2.4 which reads –

The Customer is liable for all reasonable expenses (including contingent expenses such as debt collection commission) and legal costs (on a full indemnity basis) incurred by C.E. for enforcement of obligations and recovery of money is due from the Customer to C.E.

The first notification Newvision had of Crawford Engineering's Terms and Conditions was on receipt of Invoice 317, to which the Terms and Conditions were attached. However, Clause 2.4 does state that Crawford Engineering is entitled to charge interest on unpaid invoices. In any event, under the Subcontract Agreement an invoice is not payable until Newvision is satisfied that the works the subject of an invoice have been completed in accordance with the Subcontract Agreement (Clause G). Therefore, I find that this invoice is not payable by Newvision.

- 33 I accept that that Invoice 319 has not fallen due for payment because the works the subject of this invoice do not comply with the Subcontract.

### **CONCLUSION**

34. Therefore I find a sum of \$2345.61 is due to Newvision calculated as follows –

Crawford Engineering claims accepted	\$19,118.39
Paid by Newvision	\$14,000.00
	\$5,118.39
Less cost of rectification	\$7,464.00
Balance due to Newvision	\$2,345.61

- 34 I will order the applicant to pay the respondent the sum of \$2,345.61.

BW Thomas  
**Member**