

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP2/2016

CATCHWORDS

Excavation for retaining wall; repudiation; failing to complete works in a reasonable time; failing to complete when notified of danger of collapse; whether applicant entitled to refund of amount paid.

APPLICANT	Sewinderpal Dhaliwal
RESPONDENT	Michael Arrow trading as M & R Fencing ABN: 40 182 620 083
WHERE HELD	Melbourne
BEFORE	F Marks, Member
HEARING TYPE	Hearing
DATE OF HEARING	26 February and 28 April 2016
DATE OF ORDER AND REASONS	3 June 2016
CITATION	Dhaliwal v Arrow (Building and Property) [2016] VCAT 924

ORDER

1. The respondent must pay the applicant \$18,200.
2. The respondent must reimburse the applicant the applicant's filing fee of \$575.30.

F Marks
Member

APPEARANCES:

For Applicant	Mr S Dhaliwal, in person
For Respondent	Mr M Arrow, in person

REASONS

- 1 The applicant is the owner of land in Mernda ("**site**"). The respondent is an excavator and builds retaining walls. On 8 September 2015 the respondent agreed to excavate and construct five concrete retaining walls and two sets of stairs for the applicant on the site on which the applicant intended to construct his home
- 2 The agreed price for the works was \$26,000. The terms of payment required a 50% deposit on booking the works, 20% on the day the respondent started the works and 30% on completion of the works. The applicant paid the respondent \$18,200. The applicant made the first payment of \$7,000 on 9 September 2015, the second payment of \$5,000 on 11 September 2015. He made a further cash payment of \$5,200 shortly after the respondent started the works.
- 3 On or about 13 September 2015 the respondent started excavating the site and drilling holes for the purpose of installing piers required for the retaining walls. It was not disputed that the holes which were to be drilled for the piers were to be 400mm in diameter. The respondent delivered the piers to be used in the construction of the retaining walls.
- 4 On or about 17 September 2015 the respondent stopped work and left the site due to inclement weather. At the time the respondent stopped work he had drilled the holes, excavated the slopes for the stairs and put approximately five piers into the holes. No concrete had been poured.
- 5 By late October 2015 the respondent had not returned to complete the works. On 21 October 2015 the applicant forwarded the respondent a text from the developer of the land which included the site. The text raised concerns about the applicant being responsible should neighbouring properties be damaged by the collapse of the earth walls due to the lack of retaining walls. The developer suggested the installation of a temporary retaining wall to eliminate the risk of the earth walls collapsing.
- 6 Following further discussions with the applicant, the respondent agreed to return to complete the work. However by early November 2015 the respondent had not returned to complete the works. On 13 November 2015 the applicant's solicitors sent the respondent a letter of demand seeking a refund.
- 7 In or around late November 2015 the applicant engaged Davnic Excavations to provide a quotation to complete construction of the retaining walls. It is not disputed that the applicant entered into a contract with Davnic Excavations who has carried out further excavation of the site and constructed the retaining walls for the applicant. It is not disputed that a part of the retaining walls constructed by Davnic Excavations is located closer to one of the site boundaries than the proposed retaining wall which was to be constructed by the respondent.

- 8 When Davnic Excavations came to the site to take the necessary measurements it found the respondent's holes drilled for the piers to be only 300mm in diameter, the distance between holes to be inconsistent and the holes to be out of alignment. Consequently Davnic Excavations used a couple of the holes drilled by the respondent and compacted about 25 holes previously drilled by the respondent.
- 9 The applicant claims that the respondent has repudiated the contract and that he has accepted the repudiation and validly terminated the contract. The applicant also claims that the respondent's works are defective because the respondent's holes had a diameter of 300mm instead of the requisite 400mm, were out of alignment and that the distance between the holes was inconsistent. The applicant claims that the respondent's work does not comply with the ARX Consulting Engineers typical sleeper retaining wall specifications.
- 10 The applicant claims by way of damages a refund of \$18,200 which he has paid to the respondent.
- 11 The respondent denies the applicant's claim. He claims that at all times he has been ready and willing to return to the site to complete the excavation work and build the retaining wall. He claims that the ARX specifications for the construction of a timber retaining wall were not relevant and could not be used for the construction of a concrete retaining wall.
- 12 The issue for determination is whether the respondent has repudiated the contract. A further issue is whether the respondent's excavation and drilling work is defective and whether the applicant is entitled to a refund of \$18,200.
- 13 I find that the respondent has repudiated the contract and evinced an intention not to be bound by the contract by stopping work on or about 17 September 2015 and not returning to the site to complete the work within a reasonable period.
- 14 However, even if that conduct were not repudiatory, I find that by failing to immediately complete the works when requested to do so on 21 October 2015 following notification of the possibility of the earth wall collapsing on the site due to the lack of a retaining wall, the respondent repudiated the contract. I find that the applicant accepted the respondent's repudiation and validly terminated the contract.
- 15 I find that the applicant is entitled to a refund of \$18,200 from the respondent.
- 16 Having found that the respondent repudiated the contract there is no requirement for me to make any further finding in relation to the alleged defective work. However having heard the evidence given by witnesses for each of the parties I find that the respondent's works were defective having regard to the following:

- a photographs taken by the applicant in November 2015 showing the diameter of the holes drilled by the respondent to be approximately 300mm and not 400mm;
 - b the evidence of Mr David Ancrum, Managing Director of Davnic Excavations, which I accept, that Davnic Excavations was unable to use the holes drilled by the respondent for the installation of piers, due to the distance between the respondent's holes being inconsistent and the holes not being in alignment;
 - c the fact that Davnic Excavations was required to compact approximately 25 holes for the installation of piers and redrill most of the holes due to the issues set out in paragraph (b) above.
- 17 I make these findings, irrespective of the fact that I accept that the respondent was not required to follow the ARX specifications for the construction of a timber retaining wall.
- 18 I am satisfied that the applicant did not receive any benefit from the respondent's work.
- 19 I will make the orders that the respondent must pay the applicant \$18,200 and must reimburse the applicant the applicant's filing fee of \$575.30.

F Marks
Member