

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. D494/2013

CATCHWORDS

Domestic building, contract for plumbing with either the builder, the owner or both, offer, acceptance, agency, joint and several liability, without prejudice offers inadmissible.

APPLICANT	Mr Keith Francis
RESPONDENT	Mr Kitchener Crespin
SECOND RESPONDENT	Mr Spencer Bitcon
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATE OF HEARING	29, 23 and 25 May 2016 with submissions received from the Second Respondent on 14 June, the First Respondent on 22 July and the Applicant on 3 August 2016.
DATE OF ORDER	8 September 2016
CITATION	Francis v Crespin (Building and Property) [2016] VCAT 1498

ORDERS

- 1 The second respondent must pay the applicant \$23,255.25.
- 2 Interest and costs are reserved with liberty to apply until 26 September 2016.
- 3 **If any party applies for interest or costs, I direct the Principal Registrar to list the hearing before Senior Member Lothian with an estimated hearing time of two hours.**

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant	Mr R. Rozenberg of Counsel
For the First Respondent	Mr J. Sutton of Counsel
For the Second Respondent	Mr A. Kirby of Counsel

REASONS

- 1 The only issue in this proceeding is with whom the applicant, Mr Francis, contracted – Mr Crespin, who Mr Francis has identified as the builder, Mr Bitcon who is the owner, or as submitted by Mr Francis, both. Mr Crespin and Mr Bitcon are, respectively, first and second respondents.
- 2 Mr Francis was the plumber who undertook work at Mr Bitcon’s home. An interlocutory hearing in proceeding D700/2013 found Mr Crespin was the Builder who contracted with Mr Bitcon. An issue in that proceeding was whether the builder was Mr Crespin personally, or a company of which he is a director, Advaland Pty Ltd. Mr Crespin continues to insist that it was not he, but Advaland who contracted with Mr Bitcon.
- 3 There is no counterclaim or cross-claim in this proceeding. All claims between Mr Bitcon and Mr Crespin are the subject of proceeding D700/2013, which also concerns other parties.
- 4 Mr Francis’s claim is for \$23,255.25, interest and costs. This sum was the first instalment claimed by him and all parties agree he has not been paid for this invoice. The second instalment claimed was \$6,985 which was paid by Mr Alan Gaskell, Mr Bitcon’s stepfather. The parties agree that no money was paid to Mr Francis by Mr Crespin or Advaland.
- 5 Neither of the respondents criticise the quality of Mr Francis’s work nor the amount sought by him. Each of the respondents say that they are not liable to him.
- 6 The contract between Mr Bitcon and Mr Crespin provides background to the contract involving Mr Francis, but does not conclusively determine with whom he contracted. It is possible that the contract between Mr Bitcon and Mr Crespin is inconsistent with the contract between Mr Francis and whoever he contracted with. For example, the contract between Mr Bitcon and Mr Crespin could require Mr Crespin to provide the plumber’s services¹ whereas Mr Francis’s contract could be with Mr Bitcon. It is also possible that Mr Crespin was the builder in the contract with Mr Bitcon but Advaland contracted with Mr Francis.
- 7 Mr Francis has undoubtedly provided consideration to whoever he contracted with, as it was in the eventual interests of both Mr Bitcon and Mr Crespin to have the plumbing completed so that building work could be completed. The issue is to whom he made the offer and who accepted the offer.
- 8 I am satisfied that neither Mr Bitcon nor Mr Crespin ever said to Mr Francis: “you are contracting with me”. I am also satisfied that there was

¹ It is noted that exhibit KC-18 to the affidavit of the Builder of 9 September 2016 did require the Builder to supply “roofing” and various other plumbing items, although “roofing” has “12600” beside it, which is not normally seen in a fixed price contract unless the item is a prime cost or provisional sum.

never a three-way conversation where the issue of with whom Mr Francis was contracting was resolved. I am satisfied that Mr Crespin told Mr Francis that Mr Bitcon would pay him.

HISTORY

- 9 I do not need to find, and make no finding, as to the nature of the contractual relationship between Mr Bitcon and Mr Crespin at the time Mr Francis was engaged. The relationship between them might have been relevant if Mr Francis had been engaged after the contract between Mr Bitcon and Mr Crespin was terminated, but there is no suggestion this occurred.
- 10 I remark that at the commencement of the building contract, it appeared to be a fixed-price contract that included plumbing. If the appearance is correct and the building contract had continued in an orderly way Mr Crespin would have engaged a plumber as a subcontractor to himself and payments relating to the plumbing work would have been made without distinguishing between the plumbing component and any other part of the works. Mr Bitcon would not have been entitled to know what the arrangements for work and payment were between Mr Crespin and Mr Francis.
- 11 In answer to my question, Mr Crespin said that when Mr Bitcon allegedly experienced financial difficulties it was agreed that plumbing would be Mr Bitcon's responsibility rather than Mr Crespin's, but this was not recorded in writing and the comprehensive cross-examination of Mr Bitcon on this point by Mr Sutton, Counsel for Mr Crespin, did not produce any useful admissions. I note Mr Bitcon's answers to Mr Sutton's cross-examination that he had paid between \$60,000 and \$100,000 more than he was obliged to under the building contract, although I note that Mr Bitcon and Mr Crespin disagree about the extent of variations under their contract.
- 12 I understand that a building contract was entered into between Mr Bitcon and Mr Crespin some time in late 2010 – it is unnecessary for me to decide precisely when.
- 13 The parties agree that Mr Bitcon contacted Mr Francis in around mid November 2012 and arranged a meeting on-site. I accept Mr Francis's evidence that he was introduced to Mr Bitcon by a mutual friend, Mr Murray Spaulding.
- 14 The parties agree that the site meeting was held on 14 November 2012. They also agree that only Mr Crespin and Mr Francis attended the meeting but there is disagreement about whether it was contemplated that Mr Bitcon would attend either as well as, or instead, of Mr Crespin, or whether it was always intended that Mr Bitcon would not be present. In his affidavit of 19 April 2016 Mr Francis said:

[Mr Bitcon] explained that he was building a house and urgently needed a plumber to do all the plumbing and roofing works and asked

me if I was able to do both aspects of the job. [Mr Bitcon] asked me to go out to his property, being the job site, and assess the job and quote all works required. Because of this conversation, I anticipated that [he] was meeting me on site to go through the scope of works, but instead [Mr Crespin] met me on site and he explained the scope of works with me. ... [He] briefed me on all the plumbing and roofing works required and asked me to quote the job as soon as I could as the roofing and wall cladding needed to be done before Christmas.

- 15 I note this is not entirely consistent with Mr Francis's evidence in his affidavit of 3 September 2013 where at paragraph 5 he stated, among other things:

[Mr Bitcon] asked me to meet [Mr Crespin] at the site address to inspect the site and provide a quote to [Mr Crespin]. I discussed with [Mr Bitcon] a preliminary outline of the works to be undertaken at the site address.

- 16 It is also not entirely consistent with the evidence given in response to cross-examination by Mr Kirby of Counsel for Mr Bitcon where Mr Francis said that he expected both Mr Bitcon and Mr Crespin to be present at the first meeting.

- 17 I accept Mr Francis's evidence that he received an email from Mr Crespin dated 16 November 2012 headed "20 Staunton Lane – Advaland". The contents of the email were:

Hi Keith,

Great meeting you the other day. Here are the plans for Staunton.

I look forward to getting your quote.

Have a great weekend.

- 18 I accept Mr Francis's evidence in his affidavit of 3 September 2013 that on or about 3 December 2012 he commenced working at the site address.

- 19 I accept Mr Francis's evidence that:

- (a) the plumbing was complete before the second invoice;
- (b) he addressed both the invoices to Mr Bitcon on the instructions of Mr Crespin; and
- (c) he sent the first to Mr Crespin to enable Mr Crespin to seek payment from the Owner. The first invoice was dated 17 December 2012 and was addressed "To Spencer". There are two versions of the second invoice both dated 17 January 2013. One was addressed "To Spencer Bitcon" and the other "To Advaland", although the latter was sent on 18 January 2013.

- 20 There was evidence given by both Mr Bitcon and Mr Crespin about whether the amount included in the invoice was part of an amount paid by Mr Gaskell to Mr Crespin. This is relevant to proceeding D700/2013, and I make no finding, except to say that I accept the evidence of both Mr Bitcon

and Mr Crespin that this amount was included in a payment sought by email of 20 December 2012, which stated:

Hi Alan [Gaskell]

I have attached a list of the invoices I have received from the allied trades, could you please organise payment tonight thanks.

I am sending a copy of the invoices for your records.

Kitch Crespin

I remark that if Mr Bitcon or Mr Gaskell looked at Mr Francis's invoice, they would have seen that it was addressed to Mr Bitcon.

- 21 I accept Mr Crespin's evidence that he left the site in early January 2013.
- 22 I accept Mr Francis's evidence that by the time he sent his second invoice for \$6,985 on 17 January 2013, he was aware of a dispute between Mr Bitcon and Mr Crespin and therefore sent the invoice directly to Mr Bitcon.
- 23 I accept the evidence of Mr Francis and Mr Bitcon that the second invoice was paid by Mr Gaskell on about 1 February 2013. Under cross-examination by Mr Rozenberg of Counsel for Mr Francis, Mr Bitcon said he arranged for payment of Mr Francis's second invoice because Mr Francis was upset about not being paid for the first invoice and added:

Yes, I paid the second; I had already paid the first. [To the Builder]

OFFER

- 24 The parties all agree that Mr Bitcon was the person who first identified Mr Francis as a potential plumber for the building works. This fact alone does not determine who contracted with Mr Francis. Subcontractors can be suggested or even nominated to builders by owners and they remain subcontractors to the builder. On the other hand, it is possible for owners to engage separate contractors in the midst of fixed-price contracts. For example it is not unusual for an owner to use their own floor tiler.
- 25 Mr Francis's first offer appeared to be to "Advaland" which is consistent with the name of the company of which Mr Crespin is one of two directors. The offer was to undertake all plumbing work for \$48,389.
- 26 The offer was not accepted by Mr Francis or Mr Crespin.
- 27 I accept that Mr Francis sent quotation Number 1495788 "To Advaland" dated 19 November 2012 and on that date it was emailed to Mr Crespin at EMAIL ADDRESS REDACTED.² The quotation was for \$48,389.00. All parties agree it was not accepted, although aspects of the work quoted for were done in accordance with part of the quotation. I also accept his evidence that on 26 November 2011 he sent a copy of the same quotation to Mr Bitcon at EMAIL ADDRESS REDACTED.³

² Email address redacted pursuant to s 80 *Victorian Civil and Administrative Tribunal Act 1998*.

³ Email address redacted pursuant to s 80 *Victorian Civil and Administrative Tribunal Act 1998*.

- 28 I accept Mr Francis's evidence given under cross-examination by Mr Sutton that he emailed the quotation to Advaland because Mr Crespin gave him his card when they met on site and at that point Mr Francis only had that email address. I also accept his evidence in chief that neither Mr Bitcon nor Mr Crespin corrected him when he addressed the quotation to Advaland. I accept his evidence that if he had been told to correct the quotation he would have done so.
- 29 The aspect of the quotation which was the subject of further negotiation was the roof plumbing work. The parts of the quotation which are reflected in the first invoice are for below ground sewer works for \$1,940, rough in hot and cold water for \$2,800, internal sewer stacks for \$2,800 and cut water lines in bathrooms and set up in all taps and cisterns for \$1,650.
- 30 I find that rather than there being a simple offer, unequivocally accepted, Mr Crespin negotiated with Mr Francis, either on his own behalf or on behalf of Mr Bitcon, for Mr Francis to undertake work partly on a lump sum basis and partly on an hourly basis. I accept Mr Francis's evidence that the final agreement was to undertake plumbing work other than roof plumbing in accordance with the quotation and to undertake roof plumbing at an hourly rate.
- 31 I find that Mr Francis offered to undertake plumbing work to Mr Bitcon's home, rather than making an offer to either Mr Bitcon or to Mr Crespin. The offer could have been accepted by either.

ACCEPTANCE

- 32 The issue of acceptance turns on whether Mr Crespin accepted Mr Francis's offer on his own behalf, Mr Crespin accepted on behalf of Mr Bitcon or Mr Bitcon accepted Mr Francis's offer personally.
- 33 Although the acceptance is regrettably confusing, its date appears to have been 21 November 2012. On that date Mr Francis had conversations with both Mr Bitcon and Mr Crespin. I accept Mr Crespin's evidence that on that date he and Mr Francis "resolved" the scope of the plumbing works, Mr Crespin sought to negotiate "a cheaper price for Spencer" and that Mr Crespin told Mr Francis he needed to "check with Spencer". This is consistent with Mr Francis's evidence that Mr Crespin said he:
- ... had to go over all costings with [Mr Bitcon] and make sure [Mr Bitcon] was happy with the quotation before [Mr Francis] could proceed with the works.
- 34 I accept Mr Bitcon's evidence in paragraph 7(h) of his affidavit of 24 March 2016 that he confirmed to Mr Francis that he wanted the plumbing work to be charged on an hourly rate and:
- I just told [Mr Francis] I wanted the plumbing work to start as there had already been considerable delay in the building works.

35 I accept Mr Francis's evidence in his affidavit of 19 April 2016 that Mr Bitcon telephoned him on about 21 November 2012 and told him that he was happy with the price and asked Mr Francis to proceed, noting that Mr Bitcon's evidence is that he telephoned Mr Francis to thank him for quoting, but did not say "Go ahead" or "It's good to go".

36 I accept Mr Francis's evidence that Mr Bitcon told him he had discussed Mr Francis's price with Mr Crespin and that the price was fair and the roofing work should be done on an hourly rate. I accept Mr Francis's evidence that in the course of the discussion Mr Bitcon asked him to start immediately. This is consistent with Mr Francis's evidence in his affidavit of 3 September 2013 where he stated at paragraph 10:

On or about 21 November 2012, after speaking to [Mr Crespin] regarding the pricing of my original quotation, I subsequently spoke to [Mr Bitcon] who confirmed that he wanted the labour to be charged at an hourly rate. I was of the belief that it was not until [Mr Bitcon] authorised the quotation and agreed for me to undertake the work that I was to commence the works at the site address.

37 Paragraph 10 of Mr Crespin's affidavit of 19 August 2013 recites a string of text messages between Mr Bitcon and Mr Crespin on 21 November 2012 at 12:25pm. They are as follows:

Mr Crespin to Mr Bitcon:

Hi mate, I just had a really good chat with Keith the Plumber and he will be happy to work on an hourly rate and we supply the materials!

Mr Bitcon to Mr Crespin:

Think it will work out though?

Mr Bitcon to Mr Crespin:

I mean work out much cheaper ...

Mr Crespin to Mr Bitcon:

Yep, he said \$60 for him and \$40 for apprentice plus I'd go and help to speed things up.

Mr Crespin to Mr Bitcon:

Shit loads cheaper!

38 I asked Mr Bitcon why this conversation was relevant to him. His response was:

Crespin negotiated to lower the rate for me.

I then asked Mr Bitcon why this was relevant in a fixed-price contract. His response was:

The less money, the less we [Mr Bitcon and Mr Crespin] had to argue about.

- 39 Whether deliberately or inadvertently, Mr Bitcon and Mr Crespin had drifted away from the strict division of responsibilities typical in a fixed-price contract. I am therefore not satisfied that the existence of a fixed-price contract eliminated the possibility that Mr Bitcon might engage one or more of the tradespeople directly.
- 40 On the balance of probabilities I find that Mr Bitcon's telephone call to Mr Francis on about 21 November 2012 telling him that Mr Bitcon was happy with the pricing method and saying that he wanted the works to start amounted to acceptance of the contract upon which Mr Francis was entitled to rely.

Joint and several?

- 41 I note the submission for Mr Francis that the promise to pay was made by both respondents. Further, under cross-examination both respondents agreed that Mr Francis should be paid for the work done. I am not satisfied that in the absence of any evidence of a document or conversation to this effect, or of an arrangement such as a joint venture, any of the three parties expected that the respondents would be jointly and severally liable to Mr Francis.

AGENCY?

- 42 At paragraph 9 of the Points of Claim Mr Francis pleads:
- [Mr Crespin] instructed [Mr Francis] to provide the invoices addressed to [Mr Bitcon] and [Mr Crespin] would forward the invoices for the Works to [Mr Bitcon] for payment.
- 43 Mr Francis pleads relevantly at paragraph 9(b) of his point of defence:
- By giving the alleged instruction, and by [Mr Francis] agreeing to abide by the alleged instruction, then a relationship of principal and agent arose, with [Mr Francis] as principal and [Mr Crespin] as [Mr Francis's] agent.
- 44 There is no evidence to support the conclusion that Mr Francis intended to or actually engaged an agent to act on his behalf. I am not satisfied that Mr Francis was the principal in a relationship of principal and agent.
- 45 I find that if there was a relationship of principal and agent for the purposes of the plumbing contract, Mr Bitcon was the principal and Mr Crespin his agent in dealing with Mr Francis. That is a matter for the related proceeding D700/2013. However, if Mr Crespin was Mr Bitcon's agent, Mr Crespin's statement to Mr Francis that Mr Bitcon would pay was made in that capacity, as were any instructions by Mr Crespin to Mr Francis concerning the work.
- 46 The issue of whether Mr Bitcon paid Mr Crespin the amount of the first invoice is therefore irrelevant to the outcome of this proceeding. If a principal pays an agent who fails to pass on payment to a third party, the third party has still not been paid. If owners pay a builder when they should

have paid a tradesperson direct, the debt has still not been paid to the tradesperson.

- 47 An agent who fails to pay on behalf of the principal may be liable to the principal, but this is not a matter for this proceeding.

OTHER MATTERS

Without prejudice evidence inadmissible

- 48 In the course of cross examination of Mr Francis, Mr Kirby attempted to adduce evidence by reference to a letter from Mr Francis's solicitors headed "Without prejudice save as to costs". I did not accept that letter into evidence. I was informed that the letter also appeared at exhibit SJB – 3 to the affidavit of the Owner of 20 August 2013. I have sealed that exhibit, and have not read it.

Issue estoppel

- 49 Mr Crespin submitted that on the basis of a decision by his Honour, Judge McNamara of 1 October 2013, I should consider that the question of whether Mr Crespin is liable has already been determined. Mr Crespin relies on the following passage:

In my view this application for summary dismissal [of Mr Francis's claim against Mr Crespin] is very finely balanced indeed. The arguments which have been put by Mr Cole to the effect that the involvement of Mr Crespin, neither in terms of the pleadings nor the affidavit material, is clearly framed in a manner which would render him liable in contract or restitution. If this proceeding stood alone I would find the submissions in this respect by Mr Cole very difficult to resist.

- 50 Mr Crespin's submission is that the claim by Mr Francis against him does now stand alone. Nevertheless, I cannot be satisfied that his Honour saw all the same materials and heard all the same evidence as I, and in any event he did not make a positive finding. I therefore find that there is no issue estoppel.

Mr Crespin's indemnity of Mr Bitcon

- 51 At paragraph 34 of Mr Bitcon's final submissions, he states that if he is found liable to Mr Francis, he should be indemnified by Mr Crespin. This is a matter for proceeding D700/2013.

CONCLUSION

- 52 I find, on the balance of probabilities, that the plumbing contract was between Mr Francis and Mr Bitcon. Mr Bitcon must therefore pay Mr Francis \$23,255.25.

53 Interest and costs are reserved with liberty to apply until 26 September 2016. I direct the Principal Registrar to list any such application before me with an estimated hearing time of two hours.

NOTE

54 I accept the evidence of Mr Francis at paragraph 21 of his affidavit of 3 September 2013 that:

I received instructions from both respondents and both respondents were involved in the payment of my invoices.

55 Although I have found the contract was between Mr Francis and Mr Bitcon, it was by no means immediately obvious who the contracting parties were. As the party in charge of the building process, or at least of coordinating it, Mr Crespin on his own behalf or on behalf of Advaland should have ensured that there was no confusion about who was contracting with Mr Francis. Mr Crespin even said, in evidence in chief on 23 May 2016, that Mr Bitcon told him NOT to discuss payment with Mr Francis. I do not make a finding concerning the accuracy of Mr Crespin's evidence about the conversation with Mr Bitcon, but I draw the necessary inference that Mr Crespin was prepared to accede to such an alleged request or order.

56 Mr Crespin's failure to avoid confusion over who was to pay Mr Francis, or worse, deliberately promoting the confusion, has substantially contributed to the length and complexity of this proceeding.

SENIOR MEMBER M. LOTHIAN