VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. BP483/2015

BUILDING AND PROPERTY LIST

CATCHWORDS

Contractual interpretation: natural and ordinary meaning; context; contract as a whole. Amendment of contract price, impact on scope of works.

APPLICANT ON CLAIM	Junctions 90 Pty Ltd
RESPONDENT ON CLAIM	Jaye Morey
APPLICANT ON COUNTER CLAIM	Jaye Morey
RESPONDENT ON COUNTER CLAIM	Junctions 90 Pty Ltd
WHERE HELD	Melbourne
BEFORE	Member MJF Sweeney
HEARING TYPE	Hearing
DATE OF HEARING	11 June 2015
DATE OF ORDER	11 June 2015
DATE OF REASONS	17 July 2015
CITATION	Junctions 90 Pty Ltd v Morey (Building and Property) [2015] VCAT 1081

ORDERS

1. On the claim, the respondent Jaye Morey must pay the applicant Junctions 90 Pty Ltd the sum of $8,000.
2. Pursuant to s115B(1) of the *Victorian Civil and Administrative Tribunal Act* 1998, the respondent must reimburse the applicant the application fee paid by the applicant of $158.90.
3. On the counter claim, the counter claim by the applicant Jaye Morey is dismissed.

MEMBER MJF SWEENEY

APPEARANCES:

For the Applicant	Dina Malathounis, Director, in person
For the Respondent	Jaye Morey, in person

REASONS

INTRODUCTION

1 The applicant on the claim, Junctions 90 Pty Ltd, seeks payment of $8,000 for architectural and design services provided to the respondent, Jaye Morey, in respect of the property at 26 Edgerton Street, Hawthorn. The architectural and design services were provided by Ms Dina Malathounis, director of the applicant.

2 Ms Morey counter claims and seeks a refund of $4,000 being deposit monies paid by her to Junctions 90, claiming that the services provided did not satisfy her requirements. Unless otherwise indicated, for ease of reference, the parties shall be referred to as the applicant and respondent as recorded on the claim.

3 The applicant provided terms of an agreement for a proposed extension and renovation. The agreement was sent as a letter on 19 June 2014 with provision for the respondent to sign at the end of the letter and return. The terms included the scope of works which is described in paragraph 37 below. The scope of works included the construction of a first floor with balcony.

4 Under the heading 'Payment of Fees' an estimate of professional fees was provided. The agreement provided that fees are directly correlated to the construction cost (fees being 10% of such cost) so that an increase in the construction cost will increase the fees payable.

5 In clause 3.1 of the agreement, on an assumption of a total construction cost of $500,000, the total fee at 10% was stated as $50,000.

6 Clause 3.2 of the terms provided for stage payments. The earlier stage payments were for a deposit on signing, $5,000, Design Development, $5,000 and Planning Applications and Submissions, $10,000.

7 Following 19 June 2015, in the course of her review of the agreement terms, the respondent communicated to the applicant that she was uncomfortable with the estimated total construction cost of $500,000. The respondent desired to reduce the estimated total construction cost.

8 The respondent made amendments to the letter agreement dated 19 June 2015 by crossing out and writing in hand the total construction cost as $400,000, total stage payments as $40,000 and changing the earlier stage payments, referred to above in paragraph 6, to $4,000, $4,000 and $8,000 respectively. The respondent dated the agreement 27 July 2014 and returned it to the applicant by email on 3 August 2015. No amendment was made by the respondent to the scope of work. The deposit of $4,000 was paid.

9 The circumstances of the respondent's amendment of the total construction cost without making any amendment to the scope of works is discussed below.

10 About 11 November 2014, the applicant issued an invoice for a further $4,000 for the stage which included conceptual drawing options services.

11 On 1 December 2014 the respondent, through her solicitor, advised that she did not propose to proceed with the plans, that she has obtained no benefit from work undertaken and that the agreement is terminated.

12 The respondent submitted that the agreement under the heading 'Payment of Fees' and clause 3.1 and 3.2 means that the total cost of construction incurred sets the entitlement to fees. She submits that if no construction takes place, the entitlement to fees is therefore zero, regardless of any work undertaken by the applicant.

13 The proceedings arise as a domestic building dispute as that terms is defined in s54(1)(c) of the *Domestic Building Contracts Act* 1995.

14 The issues in dispute under the claim and counter claim are:

- Whether there is an entitlement to fees for services provided under the agreement where construction has not taken place
- On the claim and counter claim, whether the services provided, including plans delivered, failed to comply with the agreement's scope of works, entitling the respondent to a refund of deposit paid
- Whether services were provided by the applicant that were not requested or required by the respondent
- Whether services were provided in respect of fees charged for the Design and Development stage and for the Planning Applications and Submissions stage

Does an entitlement to fees for services provided arise under the agreement where construction has not taken place?

15 This issue arises out of the legal position stated by the respondent's solicitors, Goldsmiths Lawyers, contained in a letter dated 1 December 2014 sent to the applicant (respondent's submission). The legal position so stated is put by the respondent as her submission in respect of her defence and counter claim.

16 The respondent's submission quotes from the agreement as amended and dated by Ms Morey on 27 July 2014. The Tribunal refers to relevant terms of the original agreement, before any amendment, contained in the applicant's letter of 19 June 2014, referred to in paragraph 3 above, as follows:

> Payment of Fees
>
> Our fees are directly correlated to the construction cost and you therefore need to be aware that significant increases in the construction spend will increase the fee payable to us. To this end our fees are calculated assuming the total constriction cost outlined above and determined as 10% of that cost.

Based on this, our [Junction 90] total fee for the services outlined above will be $50,000 inclusive of GST.

The Lump Sum Fee (including GST)	$50,000
The Stages for Payment	
Deposit on signing of Agreement	$5,000
Design Development	$5000
Planning Applications and Submissions	$10,000
Working Drawings	$10,000
Project Specification, Tendering and Contract Negotiation	$10,000
Project Management	$10,000

Note that **Total Construction Cost** [sic] shall include all of the following:

(a) the final adjusted contract price payable to the building contractor under the building contract for the Works;

(b) the final adjusted contract price payable to other contractors and/or consultants engaged to carry out and complete the Works; …

17 The respondent's submission referred to the above terms as those terms were amended by the respondent on 27 July 2014. The amendments altered the total estimated construction cost to $400,000, the total fees payable to $40,000 and the Stages for Payment were amended in the manner referred to in paragraph 8 above.

18 The respondent's submission states: 'The total cost of construction incurred sets your entitlement to fees. If no construction takes place your entitlement is therefore zero regardless of any work undertaken.'

19 The applicant relies on a submission from its lawyers, Norton Rose Fulbright, contained in a letter dated 16 December 2014 (applicant's submission). The applicant's submission responds to the respondent's submission.

20 The applicant's submission make three points. First, the agreement clearly states that the total construction cost was $500,000, before the amendment by the respondent to $400,000. The $400,000 became the relevant figure and accordingly the lump sum fee became $40,000 with the stage payments revised accordingly.

21 Second, the applicant is entitled to be paid, based on an estimate of the construction cost. There can be no final adjusted contract price to set the 'total construction cost' until some period beyond the Stages for Payment in the agreement, at which time the building contract is finalised.

22 Third, the respondent's submission that if no construction takes place there is no entitlement to fees, ignores the way the agreement is drafted and the reality that no designer would be prepared to do all the work represented by

the Outline of Services and stage payments contingent upon the risk of the respondent actually engaging a builder to have the work performed.

23 In the Tribunal's view, the respondent's submission that the total cost of construction incurred sets the applicant's entitlement to fees to the effect that, if there is no construction the fee entitlement is zero, is misconceived.

24 The agreement under the heading 'Payment of Fees' refers to the calculation of fees as 10% of the construction cost with the express admonition that significant increases in construction costs will increase the fees payable.

25 There is no term that states that, until construction is commenced or completed, there will be no entitlement to fees. There is no reason in the construction of the relevant provisions of the agreement to depart from the well established rule of contractual construction, which is to accord a plain and ordinary meaning.

26 In *Southern Cross Assurance Co Ltd v Australian Provincial Assurance Association Ltd* (1935) 53 CLR 618 at 636, the High Court stated:

> The contract must be interpreted like any other contract, and the natural meaning of the language used must receive its effect unless, upon a proper application of the rules of interpretation, a contrary intention is found to be contained within the instrument.'

27 In *B&B Constructions (Australia) Pty Ltd v Brian A Cheeseman & Associates Pty Ltd* (1994) 35 NSWLR 227 at 234, Kirby P (as he then was):

> [I]f the written language of the agreement has a 'plain meaning,' evidence will not be admissible to contradict that meaning. The purpose of this rule, which is of great antiquity in our legal system, is by no means irrational. It is to hold parties to bargains reduced to writing which are unambiguously expressed.

28 Again, Lord Hoffman in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 at 913 held that the 'rule' that words should be given their natural and ordinary meaning reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents.

29 In the Tribunal's opinion, on a reading that gives a plain and ordinary meaning, there is no room for the assertion that the wording of the agreement under 'Payment of Fees' and sub clauses 3.1 and 3.2 can admit of the meaning advanced by the respondent, namely, that no entitlement to payment arises until the construction is commenced or completed.

30 However, even if the Tribunal is wrong in this opinion, and the language could be said to also bear another meaning, such as that advanced by the respondent, the Tribunal is of the view that the context of the agreement does not permit the construction sought to be given by the respondent.

31 In the construction of contracts, the importance given by the courts to context is substantial. In *Hospital Products Ltd v United States Surgical*

Corp (1924) 35 CLR 14 at 22, Gibbs CJ stated that 'it is trite to say' that the meaning of particular words in a contract must be determined in the light of the context provided by the contract as a whole.

32 The context of the present agreement is one where in sub clause 3.2 agreement effort has been expended in describing with particularity 'The Stages for Payment'. Five of the six stages for payment, totalling $30,000 out of $40,000, occur at a time prior to commencement and/or completion of construction.

33 The respondent's construction of the contract is one that does not flow from the context of the agreement prescribing progress payments. As the agreement states, the fees are directly correlated to the construction cost. They are calculated as a percentage rate of those construction costs. They are due and payable at multiple points in time specified as 'The Stages for Payment'.

34 The plain and ordinary meaning is clear. The context supports a plain and ordinary meaning and leaves no basis to give a different construction. Moreover, there is no proper basis to imply a term, such as may be inferred from the Respondent's Submission, which is inconsistent with the plain and ordinary meaning.

35 The applicant, as a matter of contractual construction and subject to the findings below, is entitled to payment upon completion of services in the manner and at the times contemplated under sub clause 3.2 of the agreement.

Did the services provided, including plans delivered, fail to comply with the agreement's scope of works, entitling the respondent to a refund of deposit paid?

36 The respondent complains that the concept plans delivered by the applicant do not comply with the agreed scope of works as specified in the agreement. In particular, the respondent complains that the plans do not provide for a first floor. Following from this is that the plans do not allow for views to the west and provide western ventilation. As a result, the applicant is not entitled to payment and the respondent is entitled to a refund of her deposit paid.

37 The Scope of Works are described in the agreement as:

> Design & Documentation for an extension / renovation include as a minimum addition
>
> - Ground floor
>
> - Provision of specification on the renovation of existing part of the home to be retained
>
> - Creation of new family room inclusive of new kitchen
>
> - Outdoor entertaining area, partially covered

- First floor
    - Creation of master bedroom, ensuite, sitting area and balcony/verandah area

38 When the respondent altered the construction cost to $400,000 and made consequential alterations to the total fees and stage payments, no amendment was made by the respondent to the scope of works when the respondent returned the signed agreement to the applicant by email on 3 August.

39 On or about the time in late July when the respondent altered the total construction cost and consequential fee terms, Ms Malathounis for the applicant gave evidence that the respondent enquired if she would still be able to achieve the upstairs balcony and works for the reduced cost.

40 Ms Malathounis's evidence is that she advised the respondent that she could not achieve a first floor for that cost. A first floor treatment would require a minimum construction cost of $450,000.

41 Ms Malathounis, in cross examination, said that in late July she thought that the respondent may alter the construction cost in agreement to around $450,000, thereby keeping open the possibility for doing a first floor treatment but that she was surprised that when the agreement was sent on 3 August the respondent had altered the construction cost to $400,000.

42 In further cross examination, Ms Malathounis said that, with the price altered to $400,000, the concept proposals would have to be limited to one which had no first floor but, at best, an upper mezzanine type level.

43 The evidence of Ms Morey on these discussions and her witness Mr Wayne Motton did not engage on the question of the impact that a materially reduced construction cost might have on the scope of works under the agreement. Their evidence did not contrary the evidence of Ms Malathounis about likely impact of a materially reduced construction cost on the scope of works which included a first floor.

44 In the Tribunal's opinion, the evolution of the original agreement sent to the respondent and the alteration by the respondent of the estimated construction cost is crucial to understanding why the applicant did not produce in the first two concept proposals any first floor. The second concept proposal contained a mezzanine, but not a first floor.

45 It must be trite to observe that materially reducing the construction cost must have an impact on the scope of works and finishes that can be expected. If in the negotiation process the applicant agreed to provide concept designs to include a first floor for the lower price of $450,000, or even $400,000, and accept lower fees, then that would be the bargain to which the parties should be held.

46 However, on the evidence, the Tribunal finds that Ms Malathounis for the applicant had been at pains to communicate that whereas something might

be able to be achieved for a first floor for $450,000, no first floor could be considered at a construction cost of $400,000.

47 The evolution of discussions involving several reduced construction cost cases was twinned with discussion about the impact on reduced outcomes, particularly concerning providing for a first floor. The Tribunal finds that the respondent was advised by Ms Malathounis and was sufficiently aware that a first floor could not be provided for a construction cost of $400,000.

48 The agreement as altered by the respondent as to construction cost and fees payable to the applicant but without alteration of the scope of the works does not represent the concluded bargain of the parties. It does not represent agreement that the applicant would undertake the original scope of works to include a first floor concept design at the reduced cost of construction as amended by the respondent.

49 The Tribunal is reinforced in this view by the fact of delivery by Ms Malathounis of what in the evidence was referred to as 'Option C', a third concept design proposal. The Option C concept proposal was sent to the respondent by email on 12 October 2014. It shows a full first floor. The email clearly states that 'if staging works is an option, perhaps we could start there and work back to the extent needed, as opposed to the other two [proposals] which were about trying to get a finished outcome from the beginning'.

50 For the above reasons, the Tribunal is satisfied, on the balance of probabilities, that the agreement of the parties, resulting from the amendment by the respondent of the total construction cost, was that the first floor was excluded from the scope of works by reason of that amendment. The Tribunal finds that the respondent knew that a first floor treatment could not be achieved for a construction cost of less than $450,000.

51 It follows that the services were provided in a manner consistent with the understanding between the parties that the amended total estimated construction cost did not accommodate the provision of a first floor. The services and drawings supplied by the applicant to the respondent reflected this understanding. On that basis, the respondent is not entitled on its counter claim to a refund of her deposit paid.

Were services provided by the applicant that were not requested or required by the respondent?

52 The respondent tendered an email sent by her to the applicant on Sunday, 12 October 2014 at 7.00 pm. The respondent's email states that she has spent quite some time pouring over the two plans previously sent by the applicant and that she would like more time to come up with other ideas.

53 The respondent in the email proposes that instead of the original agreed plan of exploring additional concepts and putting a concept to a builder to get a construction cost before the applicant departs on holidays for some

weeks, the process should be delayed until the applicant returns from holidays thus giving the respondent more time to think on ideas.

54 The respondent claims that the applicant, contrary to her request, proceeded to work up another concept proposal and deliver it to the respondent by email as an attachment. The concept proposal was the third proposal referred to as Option C which provides for a first floor.

55 The applicant's email attaching the Option C proposal was sent by email on Sunday, 12 October 2014 at 8.37 pm. That is, just over one and a half hours after the email request of the respondent to suggest taking more time.

56 The Option C proposal is a fully worked drawing showing for the first time the provision of a full first floor. Ms Malathounis stated that she worked on the plan on the Saturday and that the time taken to do such work was many hours. She said that if the suggestion was that she did the Option C in the one and a half hours after receipt of the respondent's email suggesting a delay, then this was simply not possible.

57 The Tribunal accepts that the preparation of the Option C concept proposal took place and was substantially if not totally completed prior to receipt of the respondent's 7.00 pm email. The Tribunal agrees with the applicant that it would not be reasonably possible to prepare the Option C proposal containing a first floor in any time like one and a half hours.

58 The Tribunal also accepts that the Option C proposal was undertaken in the context of the discussions that took place between the respondent and the applicant on the preceding evening of Friday, 10 October 2014. On the evidence of the respondent, the respondent on the Friday evening expressed disappointment in the first two concept proposals, largely due to the absence of a first floor.

59 Notwithstanding the position about an inability to achieve a first floor at the reduced construction cost, the Tribunal finds it reasonable on the part of the applicant to consider that her client was still strongly desirous of pursuing the first floor and that the development of a concept plan to reflect this (Option C) with caveats as to the cost of construction was required by the respondent.

60 The Tribunal finds that the respondent only sought to countermand the outcome of Friday evening's discussions and arrangements at a time when the work on Option C concept plan had already been completed by the applicant. The Option C concept plan was prepared in the context of the agreement between the parties and the Friday evening discussions between them.

Were services provided in respect of fees charged for the Design and Development stage and for the Planning Applications and Submissions stage?

61 The applicant claims full payment of $4,000 in respect of the Design Development stage and 50% payment, being $4,000, for works completed for the Planning Applications and Submissions stage, a total of $8,000.

62 The applicant issued an invoice to the respondent dated 10 November 2014 for $4,000 for professional services for 'conceptual drawing options'. The respondent claims that this is not a stage payment mentioned in the agreement. She further claims that the work was fundamentally inappropriate and useless and certainly not complete.

63 The applicant gave evidence of the services provided under the first invoice and that these services were done under the stage described in the agreement as 'Design Development'. These works included obtaining planning information from the Council, engage surveyor, consultation with council, prepare site response for council and a full neighbourhood description, prepare and present to client concept drawings.

64 The respondent's evidence was that the concept options presented to her were useless and inappropriate. The respondent's basis for this evidence has already been discussed above, particularly concerning the absence of a first floor in the first two concept drawings. The respondent was unable to point to services that the applicant failed to provide.

65 Whereas the expression used in the invoice 'conceptual drawing options' is not the same expression used in the agreement for a stage payment, Design Development, the Tribunal finds that the services in fact provided by the applicant are the services contemplated under the stage described as 'Design Development'. Further, this is expressly stated under the agreement's 'Outline of Services' point 3(a) to (e). These points include provision of concept sketches, budget considerations of anticipated construction cost, presentation and marketing (to council) of drawings. The applicant has provided the services and is entitled to be paid for the services in the Design Development stage.

66 The respondent also disputes that the applicant is entitled to any payment for services provided in the Planning Applications and Submissions stage. She stated that no services were provided under this stage.

67 Against this the applicant referred the Tribunal to point 4 under the 'Outline of Services' headed 'Planning Application and Submissions'. The services described under this outline (relevant to the stage payment) are appointment of consultants where appropriate, preparation and presentation of drawings for town planning approval, lodgement of application forms and completion of statutory advertising requirements.

68 The applicant stated that she had substantially completed the work required in the Planning Application and Submission stage and that her claim for 50% of the cost of this stage represented a discount to the work in fact completed. The applicant gave evidence that, in performing the services, the

works described in the different stages cross over such that the provision of services continues smoothly through the stages.

69 The applicant acknowledged that she had not sent an invoice for this stage as she would normally wait until the stage services were completed. She also stated that the completion of the stage and the sending of an invoice were prevented by the respondent's solicitor's letter terminating the agreement and claiming that no payments were entitled on the basis of the argument, discussed above, that as construction works had not bee started or completed there is no entitlement to payment.

70 On the balance of probabilities the Tribunal accepts that the applicant has performed not less than 50% of the services contemplated under the stage 'Planning Applications and Submissions'. The respondent's evidence seeking to contrary the applicant was largely based on asserting a general lack of entitlement based on the solicitor's construction of the agreement rather than being able to point to absence of services provided under the stage. The applicant is entitled to be paid for 50% of the stage 'Planning Applications and Submissions'.

CONCLUSION

71 The Tribunal finds for the applicant on its claim in the sum of $8,000. It dismisses the respondent's counter claim.

72 The Tribunal finds that the applicant has failed to prove a contractual entitlement to payment of interest on sums outstanding under the terms of the agreement and dismisses that part of the applicant's claim.

MEMBER MJF SWEENEY