

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D197/2010

CATCHWORDS

Contract for brick-laying, parties to contract, terms, alleged breaches, alleged losses not incurred by respondent, expert evidence – failure to file and serve report in accordance with orders, failure of expert to report in accordance with Practice Note 2.

APPLICANT	Steven Alexander Kalkbrenner
FIRST RESPONDENT	Ugur Ofli (struck out from proceeding 10/12/2010)
SECOND RESPONDENT	Ahmet Ofli (struck out from proceeding 10/12/2010)
THIRD RESPONDENT	Bayram Ikiz (struck out from proceeding 10/12/2010)
FOURTH RESPONDENT	Quality Building Concepts PTY LTD (ABN 26 128 998 970)
WHERE HELD	Melbourne
BEFORE	Senior Member M. Lothian
HEARING TYPE	Hearing
DATES OF HEARING	9 December 2010 and 25 January 2011
DATE OF ORDER	7 February 2011
CITATION	Kalkbrenner v Quality Building Concepts Pty Ltd (Domestic Building) [2011] VCAT 158

ORDERS

- 1 The Respondent must pay the Applicant \$9,456.40 without delay.
- 2 I direct the Principal Registrar to provide a certified copy of these orders to the Applicant.

SENIOR MEMBER M. LOTHIAN

APPEARANCES:

For Applicant

Mr S Kalkbrenner in person

For Respondent

Mr M Ofli, Director

REASONS

- 1 The Applicant is a bricklayer who undertook work for the Respondent builder at 7 Thomas Street, St Albans. The Applicant claims \$9,856.40 for laying 10,263 bricks to the garages of the three units the Respondent was building, \$150 for fitting three doors, \$400 for repairing the rebate to the concrete slab and \$200 for brick cuts, at a dollar a cut. The claim is in accordance with the Applicant's tax invoice to the Respondent of 31 December 2009.
- 2 The Respondent has not paid the Applicant anything and defends the claim on the basis that the work is sub-standard and also caused the Respondent delays. Two of the three units have been sold. Unit 2 still belongs to the company which originally owned the land, which is not the Respondent.

THE CORRECT RESPONDENT

- 3 The Applicant commenced proceedings against Mr Ugar Ofli, Mr Ahmet Ofli and Mr Bayram Ikiz. Mr Ugar Ofli, known as Mike, is a director of the Respondent.
- 4 On 9 December 2010 I found that the correct Respondent was Quality Building Concepts Pty Ltd, to whom the Applicant directed the invoice of 31 December 2009. The parties agree that there was no contract in writing of any type. The Applicant gave evidence that he had a telephone call from Mr Mike Ofli and met him and Mr Ikiz on site in early December 2009. The parties disagree about whether Mr Ikiz was present, but Mr Ikiz's presence or absence does not make any difference to the outcome of the proceeding and I make no finding about whether he was there.
- 5 The Applicant said that the first time the Respondent's name was mentioned was when Mr Ofli asked him to use it on the invoice. Mr Ofli said that whenever he contacts a tradesman, or a person he intends to contract with, he introduces himself as "Mike from" and gives the appropriate company name.
- 6 The evidence is weak from both the Applicant and Mr Ofli about the day on which the contract was formed. The most compelling evidence about who the Applicant contracted with was the tax invoice, and it was for this reason that I found the true respondent was Quality Building Concepts Pty Ltd.
- 7 I note that parties who contract with proprietary limited companies are often concerned that the company might not have resources to meet an amount they are ordered to pay.

THE CONTRACT

- 8 The parties agree that the Applicant was entitled to be paid 80 cents per brick laid, with all materials to be provided by the Respondent. The Respondent disagrees that the Applicant was entitled to any other sums, and there was no evidence from either party about precisely what was discussed

when the contract was entered, except for the price of laying the bricks and that the Applicant would be paid when his work was completed.

- 9 I find that it is reasonable that the Applicant be paid extra for installing the entry doors to the garages and find \$50 a door reasonable. I accept the Applicant's evidence that work had to be done to rectify the slab rebate and allow \$400 for this item. I am not satisfied that in this proceeding an extra sum is reasonable for brick cutting, and do not allow the claimed amount of \$200. It follows that, but for alleged breaches, the Applicant is entitled to \$9,656.40 from the Respondent.
- 10 I find that it is an implied term of the contract between the parties that the Applicant would lay the bricks in accordance with standard of workmanship of a reasonable brick-layer. If the Applicant were found to have breached that obligation, the Respondent would be entitled to nominal damages without having to prove that it has suffered a loss. For the Respondent to be entitled to substantial damages (or a substantial deduction from the amount otherwise payable to the Applicant), it must prove not only that the Applicant breached the contract, but also that it has suffered a loss. The measure of loss is the amount that would be necessary to put the party not in breach into the position that it would have occupied if the breach had not occurred.
- 11 An exception to the principle that a party to the contract must have suffered the loss is found in an English case which influences Australian decisions - *Alfred McAlpine Construction Ltd v Panatown Ltd* [2000] 3 WLR 946. A majority of the House of Lords accepted the formulation of Lord Griffiths in *St Martins Property Corporation Ltd v Sir Robert McAlpine Ltd* [1994] 1 AC 85, where he said at 97:

... who actually pays for the repairs is no concern of the [person] who broke the contract. The court will of course wish to be satisfied that the repairs have been or are likely to be carried out but if they are carried out the cost of doing them must fall upon the [person] who broke his contract. [Emphasis added]

ALLEGED BREACHES BY THE APPLICANT

- 12 When the parties were in dispute in early 2009, both were legally represented. On 22 January 2010 the Respondent's solicitors wrote to the Applicant, offering to pay either \$9,356.40 "upon completion of the bricklaying work" or \$8,400 "within 7 days". The letter complained of failure to finish all the work, alleged delay in the works of four to six weeks, breaking a large number of bricks and not cleaning up. It was also alleged that nine courses of bricks in the garages were not straight. The letter concluded:

If our client's offer to pay you a lump sum of \$8,400.00 in 7 days is accepted, then please let us know as soon as possible so that payment arrangements can be made. Alternatively, you will be paid \$9,356.40 when the bricklaying on site is completed.

- 13 The Applicant's solicitors responded on 2 February 2010, demanding payment in full of \$9,856.40, interest and costs "currently fixed at \$350.00" within seven days.
- 14 These letters are before me because they were annexed to the Respondent's defence of June 2010.
- 15 On 14 January 2011 the Respondent delivered amended Points of Defence to the Tribunal. The Respondent complained again of failure to complete the work contracted for, delay, breaking a large quantity of bricks, failure to clean up, poor work by the apprentice and brick courses not straight. The Respondent complained that there were extra charges for which there were no written variations – a failing for which both the builder and the bricklayer can be criticised. It also alleged that the poor cosmetic appearance of the brickwork has caused losses of "approx. \$30,000 each unit".

Quality of work

- 16 All photographs of the work in progress and the completed work show that the Applicant's brickwork is, with very minor exceptions, of good quality. Further, Mr Mike Ofli admitted that the Respondent had not spent any money to fix the allegedly defective work, even though another bricklayer was engaged in mid January 2010.
- 17 The Respondent has never owned any of the units. There is neither evidence of a current claim against it by the owners of any of the units, nor that any work the Respondent alleges is defective will be fixed. I am not satisfied that the Respondent has suffered any substantial loss by reason of the alleged defects, or that the alleged defects fall within the exception described by Lord Griffiths.

Expert report by John LoBartolo trading as The House Inspector

- 18 On 9 December 2010 I ordered, among other things, that if the Respondent wished to rely on any expert report, it must send the report to the Tribunal and to the Applicant by 4:00 pm on 14 January 2001 [sic]. I also ordered that any such report must be prepared in accordance with VCAT Practice Note 2: Expert Evidence.
- 19 The Respondent did not comply with this order, but wrote on its amended Points of Defence "To be forwarded prior or at the hearing". It was not entitled to do that, particularly as it did not seek the agreement of the Applicant.
- 20 The Respondent provided a copy of Mr LoBartolo's report to the Tribunal at the commencement of the hearing and the Tribunal arranged for a copy to be provided to the Applicant at the same time. The Applicant urged me not to rely on Mr LoBartolo's report and said that if I were to do so he would need to obtain his own expert report. Mr Mike Ofli said that the Applicant's expert visited the site but did not file a report. Mr Ofli said I should

conclude that the Applicant's expert was unlikely to support the Applicant's evidence that the brick work was built properly. I do not draw that conclusion, but might have been willing to do so if the Respondent had filed its report as ordered.

- 21 Mr LoBartolo's report makes no mention of VCAT PN2 and does not comply with the Practice Note. An important aspect of any expert report is the expert's acknowledgement that his or her first obligation is not to the person who engages them, but to the Tribunal. The expert must report fairly and independently, rather than being the mouth-piece for the person who engaged them. Mr LoBartolo failed this test on a number of occasions:

... the Client ... finds the job in parts unacceptable

... the brickwork under construction is poor by Mr Ofli's reckoning.

The Client is a person who takes pride in his product.

- 22 The failings of this report could be because of inexperience in writing reports for courts and tribunals. Primarily because the report was late and accepting it would necessitate a further adjournment, but also because it does not comply with the Practice Note, I do not take it into account, except for a list of items the Respondent says are defective, and for the photographs it contains.

The alleged defects

- 23 The alleged defects were discussed at length by the parties and in the alternative to paragraph 17 I find:

Finished height of the work

- 24 The relationship between the Applicant and Mr Mike Ofli seems to have been a difficult one. This might explain why, when the Applicant sought Mr Ofli's advice about the finished height of the parapets at the front of the garage, Mr Ofli did not simply provide the advice, rather than relying on the carpenter working on site, who I note was not designated the site foreman.
- 25 I am not satisfied that any inaccuracy concerning the finished height of the brick-work was attributable to the Applicant and I make no allowance for it.

Brick courses not matching the courses on the units

- 26 As the Applicant said, the brick work on the units was undertaken after the garages were built, and the work was done by a bricklayer other than himself. It was for the subsequent bricklayer to match the Applicant's work, not the reverse. I make no allowance for this item.

Brick pier between the door and window of Unit 2

- 27 There is a very narrow and potentially vulnerable brick pier between the door and window in the garage of Unit 2. Although the pier looks vulnerable the Respondent has not given evidence that it has failed in any

way. There is also conflicting evidence about whether it was constructed by the Applicant or a subsequent brick-layer.

- 28 I consider this claim, at best, premature. Should actual damage develop later for which the Respondent is alleged to be liable, it might then have a claim against the Applicant.

Garage boundary walls alleged to be unsightly

- 29 Mr Mike Ofli said that the previous owner of the neighbouring property complained about the quality of the brick work facing his property. However there are no photographs of the brick work, no evidence was given for the Respondent that it did any work or incurred any cost repairing the walls and there is no evidence that the neighbouring purchasers have complained. I am not satisfied that this work is defective and I make no allowance for it.

Perpend

- 30 A few of the brick perpend were constructed out of line. The Respondent has not demonstrated a loss arising out of this very minor defect, but I allow nominal damages for this item of \$100.

Brick cleaning

- 31 I note this was not a matter complained of in January 2010 and the photographs do not clearly show whether the material on the relevant bricks is mortar or plaster from the adjacent ceiling. It would also be surprising that a builder would allow a ceiling to be constructed before washing down nearby bricks. I am not satisfied that this is a fault for which the Applicant is responsible and I make no allowance for it.

Alleged losses on the sale of the units because of defects

- 32 There is no evidence about the price the units could have achieved if the brick-work had been perfect. A simple comparison between this site and another is insufficient, even if the Respondent could show that it suffered a loss or was entitled to claim a loss on behalf of another company. It would be extraordinarily unfair to enable a developer to use a potentially worthless company to engage tradespeople, but still enable such a worthless company to recover on behalf of the developer.
- 33 I also remark that it is hard to believe that an experienced builder would fail to rectify defects which its director alleges caused losses to the property owner of approximately \$120,000.

Delay

- 34 The Respondent failed to prove the dates upon which the Applicant agreed to start and finish the work, or that the Applicant unreasonably delayed the work. There is no allowance for this aspect of the Respondent's claim.

Waste of materials

- 35 Mr Mike Ofli supported his evidence by reference to his site diaries. The only criticism of the Applicant in the diaries of 2009 and 2010 was that he wasted mortar and that he mixed half bricks in with the mortar. The latter apparently arose out of the insistence of Mr Mike Ofli's father, Mr Ahmet Ofli, that the Applicant should use the discarded halves of cut bricks. The parties agreed that Mr Ahmet Ofli sometimes placed these contentious half-bricks back on the scaffold on which the Applicant and his men were working.
- 36 I am not satisfied that excessive numbers of bricks were wasted, but accept that excessive mortar was wasted on two occasions, in accordance with Mr Mike Ofli's diary, 21 and 22 December 2009. In the absence of better evidence, I allow the Respondent \$100 for wastage.

Failure to clean the site

- 37 I am not satisfied that the Applicant and his men failed to keep their work-areas clean and tidy. There is neither reference to failure to clean in Mr Mike Ofli's diary, nor supporting photographs. I make no allowance for this item.

CONCLUSION

- 38 The Respondent must pay the Applicant \$9,656.40 less \$100 each for perpendents and for mortar wastage, a total of \$9,456.40. Payment must be made without delay.

SENIOR MEMBER M. LOTHIAN