

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
CIVIL DIVISION
BUILDING AND PROPERTY LIST**

VCAT REFERENCE NO. BP947/2015

CATCHWORDS

Claim by sub-contractor – accounts not paid – claim of defects by builder – agreement of figure due – agreed amount not paid - accord and satisfaction – evidence – credibility of witnesses – amount counterclaimed already compromised

APPLICANT	Kevlar Carpenters Pty Ltd
RESPONDENT	Good Constructions Pty Ltd
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	23 October and 16 December 2015
DATE OF ORDER	17 December 2015
CITATION	Kevlar Carpenters Pty Ltd v Good Constructions Pty Ltd (Building and Property) [2015] VCAT 2040

Order

1. Order the Respondent to pay to the Applicant \$20,000.00.
2. The counterclaim is dismissed.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr J. Kvedaras, Director
For the Respondent	Mr N. Bazy, Solicitor

REASONS FOR DECISION

Background

1. The Applicant is a carpentry subcontractor. Its director is Mr J. Kvedaras. The Respondent is a builder.
2. The Applicant claims that it is owed \$20,000 by the Respondent, being the agreed balance of monies due for work carried out by it on six projects between May 2013 and October 2013.
3. The Respondent denies that it is indebted to the Applicant in any sum and says that, when allowances are made for defective workmanship and the cost of rectifying it are deducted, it is entitled to an order for damages against the Applicant of \$5,050.40.

The hearing

4. The matter came before me for hearing on 23 October 2015. The Applicant was represented by its director, Mr J. Kvedaras and the Respondent was represented by its solicitor, Mr Bazy.
5. I heard evidence from Mr Kvedaras on behalf of the Applicant and Mr Good and Mr Gibson on behalf of the Respondent. There was insufficient time to complete the hearing and the matter was adjourned to 16 December 2015 at 10 AM with three further hours allocated. The hearing was completed on that day and I informed the parties that I would provide a short written decision.

The Applicant's case

6. The Applicant's case is that carried out carpentry work as a subcontractor for the Respondent on various building sites over 2012 to 2013. According to Mr Kvedaras the Applicant was initially paid by the Respondent on time for its work but, from early 2013, payments started to be made late.
7. By the end of October 2013 Mr Kvedaras considered that the Applicant was owed a balance of \$84,793.50. He said that he made many approaches to Mr Good about payment but was told that the Respondent had not been paid by its clients or that they or he were on holidays.
8. According to Mr Kvedaras, a meeting took place on 14 November 2013 at which he produced a spreadsheet of what he claimed were the outstanding invoices at that time. The spreadsheet was tendered at the hearing. It details the amount and date of each invoice, the identity of the work site and the dates and amounts of the payments that had been made. The balance shown in this document is being owed to the applicant by the respondent is \$84,793.50.
9. Mr Kvedaras said that he discussed the contents of the spreadsheet with Mr Good. He said that there was also a discussion about various complaints by Mr Good and back charges that he wanted to make. Mr Kvedaras says that it was then agreed between them that, having regard to these complaints, the Applicant's claim would be reduced and the Respondent would pay to the

Applicant \$82,000. He said it was agreed that \$67,000 of this sum would be paid in 2013 and the balance of \$15,000 would be paid in 2014. He did not say how that last balance was to be paid or when.

10. Following this conversation the Respondent made the following payments:

19 November 2013	\$13,400
29 November 2013	\$13,400
9 December 2013	\$13,400
18 December 2013	\$13,400
26 May 2014	\$ 3,400
16 May 2014	<u>\$ 5,000</u>
Total	<u>\$62,000</u>

11. Mr Good then refused to pay any more and the Applicant brought this proceeding to recover \$20,000, being the balance of what it claimed was the agreed sum.

The Respondent's case

12. The Respondent's case is set out in a carefully drawn document entitled Respondent's Points of Defence and Counterclaim. No issue was taken in this document with the payments alleged to have been made but the Respondent denied that the agreed sum to be paid by it was \$82,000.00.

13. Mr Good alleges that there was a meeting in July 2013 at the Respondent's office and that, in consideration of the Applicant's defective and incomplete work known at the time, it was agreed that the Respondent would pay the Applicant the sum of \$76,614.60.

14. He claims that there was a further meeting in late September or early October at which it was agreed there would be a further reduction of \$9,729.00 to take account of water damage and other defects, reducing the outstanding balance to \$67,335.60.

15. The complaints of defects in the counterclaim related to two projects, one at McKinley Avenue and the other at Hillcrest Road. The McKinley Avenue complaints related to \$5,390.00 in regard to the water leaks and \$11,682.00 in regard to other alleged defects. The complaints in regard to Hillcrest Road amounted to \$2,593.00. These figures totalled \$19,665.00 and when the previous agreed credit of \$9,279.00 was deducted it left a balance of \$10,386.00. From this the Respondent deducted the balance of \$5,335.60 which it said it owed to the Applicant, leaving a balance of \$5,050.40 which it claimed as damages for defective work.

16. These figures were sought to be proven by the evidence of Mr Good. Mr Gibson also gave occasional evidence but did not say a great deal.

Who to believe?

17. The case really turns upon two issues, namely, whether the agreed balance due to the Applicant was \$82,000.00 or \$67,000.00 and secondly, the defects alleged in the counterclaim.
18. I am unable to reconcile Mr Good's evidence with the dates of the invoices and the payments the Respondent has made.
19. Mr Good's account suggests that the final balance was agreed upon as early as July 2003, subject to some later adjustments. That cannot be right because of the dates upon which the various invoices were rendered. After the beginning of August, invoices totalling \$54,021.00 were rendered and payments totalling \$39,963.00 were made. When I raised this difficulty with Mr Good he suggested that some invoices rendered by the Applicant were incorrectly dated but this is not mentioned in any of the emails or correspondence that passed between the parties. Further, it does not explain the subsequent payments the Respondent made.
20. The Respondent relies upon what purports to be a letter dated 9 September 2013 as corroboration for what Mr Good claims was the agreement. Mr Kvedaras denies ever having received this letter. Even if the letter were genuine it would not be reflective of the current state of indebtedness between the parties in July 2013 because of the work done, invoices rendered and payments made between July and September.
21. Further, because of the invoices rendered and payments made after 9 September 2013 it cannot be reflective of the final state of indebtedness between the parties without taking into account those additional invoices and deducting those additional payments.
22. I am satisfied that the letter of 9 September 2013 is not genuine. Since Mr Good swore that it was, this seriously affects the credibility of the Respondent's only substantial witness. For the same reasons, I am also not satisfied that there was any agreement entered into in July to the effect that a balance of \$76,614.60 was owed by the Respondent to the Applicant.

The defects claim

23. Turning now to the claimed defects, those that related to McKinley Avenue were substantiated by two defects inspection reports purportedly prepared by Venn Architects Pty Ltd and dated respectively 21 May 2013 and 22 May 2013. These reports comprise substantial lists of items of defective and incomplete work and are addressed by the architect to the Respondent as builder. Mr Good said that the items highlighted were the fault of the Applicant.
24. He gave evidence in regard to each of the highlighted items but did not seem to have much, if any, direct knowledge as to what it comprised. An hourly allowance has been hand written next to each and it is the total of these hourly allowances that is the subject of the defects claim.

25. Mr Kvedaras said in regard to each of these items that the Applicant was not responsible because by that stage it was employed on an hourly basis and only charged for the work that it had done. Accordingly, incomplete work could not be said to be a breach by it of its obligation to the Respondent. This was disputed by Mr Good but I find that Mr Kvedaras is a more reliable witness.
26. In regard to the complaints about the water leak Mr Good said that it was caused by a nail penetrating a copper pipe which formed part of the hydronic heating rough in. He said that the Respondent's carpenters took 32 hours to find where the problem was and then had to carry out rectification work. The claim is for 32 hours by a carpenter at \$55 an hour, \$280 for a contractor to fix the leak, \$430 for a skip for the debris, \$850 for a plasterer, \$680 per painter and \$900 for a joiner. The total of these figures is \$4,900.00 and with GST the amount claimed became \$5,390.00. Mr Kvedaras said that he was never informed about the alleged leak. Mr Good said that he was, but no email or other document was produced to support that. Since I do not regard Mr Good as being a truthful witness I prefer the evidence of Mr Kvedaras.
27. The Hillcrest Road complaints were set out in a document prepared by the Respondent entitled "Hillcrest Road List of Fixes". Some of the work described related to an extra stump that the engineer or building surveyor required to be inserted and the rest of it seemed to relate to the consequences of the floor dropping and to an attempt at jacking up the floor. When I questioned Mr Good about the work it transpired that it was all related to movement in the floor which was corrected by installing an additional stump at the direction of the engineer. I asked him why he considered that this was the responsibility of the Applicants when it was an extra stump, he said that the Applicant was responsible for the subfloor. I asked him whether the stump in question had been shown on the plans and I was not able to obtain a direct answer to my question. When Mr Kvedaras pressed him on the point I gained the impression that it was not asserted that the Applicant had failed to put in a stump that was shown on plans.
28. When this rectification work was carried out is unclear but the Applicant's invoices for Hillcrest Road were dated 18 March 2013 which is well before any discussion between Mr Kvedaras and Mr Good as to an amount to be paid. When I asked Mr Good why he had not pursued the Applicant for these costs much earlier, he said that he did not think it was worth pursuing at the time. I am not satisfied that it has been demonstrated that these items are defective or incomplete work by the Applicant.
29. Paragraph 2 of the Respondent's counterclaim states that the alleged agreement to pay \$76,614.60, which is said to have been made in July 2013, was in consideration of the defective and incomplete works that were known at the time. The schedule of defects prepared by Venn architects is dated May 2013 and so these alleged defects and incomplete works were, on the Respondents own version, taken into account in agreeing upon the amount to be paid.

Findings

30. Since I am unable to reconcile the account given by Mr Good with the dates on the invoices, the dates of payments and the dates upon which the work in each instance appears to have been carried out, I must conclude that his account of the meeting that he had with Mr Kvedaras and the purported letter of 9 September 2003 are both contrived and his evidence is not truthful. Accordingly, I prefer the evidence of Mr Kvedaras.
31. I am satisfied that it was agreed between the Kvedaras and Mr Good at a meeting they had in November 2013 that the Respondent would pay to the Applicant the sum of \$82,000. I am satisfied that this was to take into account the respective claims of both parties and so amounted to an accord and satisfaction.
32. I am satisfied that, instead of paying the agreed sum of \$82,000 it has paid only \$62,000 and so the claim for the balance of \$20,000 is established.
33. Since I am satisfied that the reduction of the Applicant's claim to \$82,000 was intended by the parties to take account of the various complaints that Mr Good had about the Applicant's work, the various complaints which form the counterclaim that is now brought by the Respondent have already been taken into account and have been the subject of agreement between the parties to reduce the amount of the Applicant's claim to \$82,000. Having agreed to compromise its counterclaim in this way, the Respondent cannot now bring a fresh claim relating to the same matters.

Order to be made

34. For the foregoing reasons there will be an order on the claim for the \$20,000.00 claimed and the counterclaim is dismissed.

SENIOR MEMBER R. WALKER