VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

domestic building LIST	vcat reference No. D486/2006
CATCHWORDS	
Claim for payment for work and labour done – Counterclaim lacking in merit – no evidence to support Respondent's defence on Counterclaim – indemnity costs.	

APPLICANT	M.B.C. Shotcrete Pty Ltd (ACN 115 412 087)
RESPONDENT	Bullion Building and Construction Pty Ltd (ACN 112 227 255)
WHERE HELD	Melbourne
BEFORE	Deputy President C. Aird
HEARING TYPE	Small Claims Hearing
DATE OF HEARING	2 October 2006
DATE OF ORDER	10 October 2006
CITATION	M.B.C. Shotcrete Pty Ltd v Bullion Building and Construction Pty Ltd (Domestic Building) [2006] VCAT 2040

Order

1 The Respondent shall pay the Applicant the sum of $19,076.75.

2 The Respondent shall pay the Applicant interest in the sum of $951.81.

3 The Respondent shall pay the Applicant's party/party costs of and incidental to this proceeding. In default of agreement such costs are to be assessed by the Principal Registrar on County Court Scale 'D'.

4 The Respondent shall pay to Mr Wayne Scott-Sutton the fees and allowances incurred in responding to the Summons to Appear fixed in the sum of $920.00.

DEPUTY PRESIDENT C. AIRD

APPEARANCES:	

For the Applicant	Mr B. Gillies of Counsel
For the Respondent	Ms E. Steel, director

Reasons

1 The Applicant was engaged by the Respondent as a sub-contractor to carry out shotcrete works. The Respondent had been contracted by the builder (who is not a party to this proceeding) to carry out the concreting works at the subject property. The Applicant initially instituted proceedings in the Magistrates' Court which it subsequently agreed to discontinue after the Respondent foreshadowed an application to the Tribunal under s57 of the *Domestic Building Contracts Act* 1995. The Applicant then made application to this Tribunal on 14 July 2006 seeking payment of the sum of $12,282.50 for the works which had been carried out. The Applicant also seeks damages of $4,232.25 for loss of profit on the balance of the contract works which it was unable to complete following termination of the Respondent's contract by the builder. In the Points of Claim interest from the date of each invoice is also sought. However, as I understand it, the claim for interest of $951.81 is now from February when the Statement of Account and copies of all invoices rendered were forwarded to the Respondent.

2 Following an unsuccessful mediation on 16 August 2006, various directions were made at a Directions Hearing on 31 August 2006, including the Respondent being granted leave to file and serve a counterclaim. The proceeding was set down for hearing on 2 October 2006 *'as if it were a small claim'*. The parties were granted leave to be represented by professional advocates at the hearing.

3 The Respondent filed a counterclaim on 15 September 2006 claiming the sum of $186,120.00 for the loss of two contracts which it alleges it lost as a result of the conduct of the Applicant. The amount claimed is the total contract price for those contracts. Although prepared by the Respondent's solicitors, the Points of Counterclaim suffer from a glaring lack of particulars and incomplete sentences.

4 At the hearing the Applicant was represented by Mr Gillies of Counsel and called Mr Maguire, the director involved in the negotiation and performance of the works as its sole witness. The Respondent was represented by Ms Steel, its sole director who advised the Respondent was not legally represented as neither she nor her solicitor considered representation necessary. The Respondent called Mr Michael Toumazou, who on his own evidence, was the Manager for the

Respondent at the relevant time, and Mr Joe Nassello who, on his own evidence, was a foreman/supervisor for the Respondent at the relevant time. Mr Wayne Scott-Sutton, the Commercial Manager for the builder, appeared in response to a Summons to Appear issued at the request of the Respondent. Both parties confirmed they were in a position to proceed with the hearing.

5 At the commencement of the hearing the Applicant sought leave to amend its claim to $14,844.50, the amount set out on the Statement of Account apparently forwarded to the Respondent in February 2006. Ms Steel conceded on behalf of the Respondent that this was the outstanding amount as set out on the Statement of Account. Being satisfied that the claim had been incorrectly calculated taking into account an invoice which did not apply to this project, and which was addressed to an entirely different entity rather than the relevant invoice which was tendered in evidence, I allowed the amendment.

The Applicant's claim

6 Mr Maguire gave evidence that he was first approached by Michael Toumazou sometime in October 2005 enquiring about prices for shotcrete work for a basement in South Road, Hampton. Mr Toumazou had obtained the Applicant's contact details from Mr Maguire's brother. Mr Maguire said he told Mr Toumazou that he had 20 years' spraying experience and that the Applicant's trimmers and finishers all had at least 5 years' experience. When told by Mr Toumazou that the walls were 3 metres high, Mr Maguire said he told him that scaffold would be required, the supply, installation, moving and cleaning of which was to be the Respondent's responsibility. Mr Maguire said he told Mr Toumazou that F82 mesh was required as anything less moves too much, and that the steel placement should be 50-60 mm from the face of the finished wall. In accordance with what Mr Maguire said was industry practice he was not shown any plans. Mr Maguire gave evidence that he explained to Mr Toumazou that it is not possible when shotcreting to achieve a finish equivalent to pre-cast panels – that the finish is equivalent to that of a footpath before a broom is passed over it.

7 Mr Maguire said that he was told by Mr Toumazou the work would be carried out over a period of time (specific dates were not discussed), which he said he told Mr Toumazou was acceptable to him providing the Applicant was paid progress payments.

8 It is common ground that work was carried out on three occasions: 15 November 2005, 16 December 2005, and 19 January 2006. Mr Maguire said he gave a handwritten invoice to whoever appeared to be in charge

on site on behalf of the Respondent at the completion of each day's work. This is denied by the Respondent. There is no evidence before me as to the Respondent's internal processes in relation to invoices rendered on site, and none of the Respondent's site representatives were called to refute Mr Maguire's assertions.

The works

9 Mr Maguire explained that in accordance with industry practice it was the Respondent's obligation to prepare the job for shotcreting. This included the installation of the steel, timber guides and frames. He said the installation of the steel was generally inadequate – on each occasion it was 'flapping in the breeze' and 'was all over the shop' and that when he expressed concern he was told by the Respondent's supervisor to do the best he could. During the second pour, the Respondent's workmen were walking along the top of the wall jamming in starter bars, although the accepted practice is to install them and tie them in before the placement of the concrete, or alternatively to drill and epoxy them in after the concrete has dried. Nevertheless with the exception of a couple of areas of gapping (the minor defects) he considered the work carried out by the Applicant to be of an acceptable standard in accordance with industry practice.

Was the Applicant requested to carry out rectification works?

10 The Applicant concedes that there were some minor defects in the works, where there were gaps in the coverage, which Mr Maguire said it was always intended would be rectified on return to site to complete the works. He denies having been requested at any time by any representative from the Respondent to carry out rectification works. Although Ms Steel submitted that there were significant defects and that the Respondent had been told by the builder that it would not be paying for the works because they were defective, there is absolutely no evidence to support this assertion. Mr Scott-Sutton gave sworn evidence and was most adamant that the builder did not have any complaints about the shotcrete works, and that its complaints in relation to the concreting works related to other defective works carried out by the Respondent where additional shotcreting had been carried out as the appropriate method of rectification.

11 Mr Nassello confirmed that the expectation and understanding was always that the minor defects would be rectified when the Applicant returned to site to complete the works. He said he had had a brief conversation with Sam, the builder's supervisor sometime after the third pour (i.e. after 19 January) who had expressed some concerns about the

shotcreting works not being up to standard and there might be a 'little problem with the work'. He said he had rung Mr Maguire to tell him about Sam's concerns but that they had only had a brief conversation (30-45 seconds) during which time Mr Maguire had confirmed that the 'gaps' would be rectified when the works were completed. He confirmed that he had not followed up with the Applicant, and that he had not heard anything further from the builder in relation to the shotcrete works. It was apparent that Mr Nassello did not consider any concerns expressed by the builder to be significant, and on his own evidence, he did not request the Applicant to carry out any rectification works other than rectification of the minor defects.

12 Interestingly, he said that it had also been brought to his attention by one of the Respondent's employees on site that there were some deflections in the steel – maybe up to 20-25 mm. This evidence is consistent with Mr Maguire's evidence that the installation of the steel was less than ideal.

The Applicant's claim for loss of profit

13 The Respondent's contract with the builder was determined by the builder in early February 2006. The Applicant was therefore unable to complete its works under the sub-contract agreement, and seeks payment of its loss of profit on the balance of the contract works. Mr Maguire gave evidence profit is calculated as 50% of the total price and the loss of profit was approximately $4,200.00. This was not challenged by the Respondent. As I am not satisfied the Respondent's contract with the builder was determined through any fault of the Applicant (as discussed below), I am satisfied that the Applicant is entitled to its loss of profits in the amount claimed of $4,232.25.

The counterclaim

14 As noted above the Respondent has lodged a counterclaim seeking payment in full of the contract price for the two contracts it says it lost as a result of alleged breaches by the Applicant of its agreement with the Respondent. Ms Steel confirmed in response to a question from me that they were claiming payment in full of the contract price, and not just the difference between the contract price and the amount the Respondent would otherwise have paid to a sub-contractor to carry out the works. It is difficult to understand how the Respondent could have suffered a loss to the extent claimed in circumstances where it is apparent that it engaged the Applicant to carry out the shotcrete works. It is apparent that the Respondent is in dispute with the builder and has not been paid for the shotcrete works (and possibly other concreting works). However,

that dispute does not concern me here, other than to note, that the failure by the builder to make payment for the shotcrete works does not of itself give the Respondent an entitlement to claim payment of the full contract price from the Applicant without deduction for the value of the works carried out by the Applicant. Even if I were persuaded the Applicant was in breach of its obligations, which I am not, the most the Respondent could hope to recover would be its actual loss about which there is no evidence before me, not the fill contract price.

15 Ms Steel expressed concern that Mr Scott-Sutton had not brought any site diaries with him to the hearing in response to the Summons to Appear which requires him

> to produce the following documents: pertaining to work done by Bullion Building and Constructions Pty Ltd and receipts and invoices relevant to rectification work done on job at …

16 I accept that it is not apparent that the production of the site diaries was being summonsed, and that there are no relevant receipts and invoices. I was not prepared to order Mr Scott-Sutton to produce the site diaries in circumstances where it was apparent that the Respondent was embarking on what can only be described as a 'fishing expedition', for evidence to support the assertion that it was terminated by the builder because of defective works carried out by the Applicant, and, perhaps, to assist it in relation to its dispute with the builder. Had production of the site diaries been summonsed I might well have set that part of the summons aside as being oppressive (*Lee v Angas* [1886] 22B241 at 247). The law is clear a summons requiring the production of documents to enable a party to determine whether it has a case (in this case, whether the Respondent really had a defence to the Applicant's claims on the grounds alleged), or where it has been reserved for some ulterior motive (in this case to obtain information in relation to disputes between the Respondent and the builder which are not relevant to this dispute).

17 It would not have made any difference at all if the site diaries had been produced and there had been any entries about the standard of the work carried out by the Applicant. There is no evidence of any formal demand for rectification of the shotcrete works having been made by the builder to the Respondent and, as noted above, Mr Scott-Sutton gave sworn evidence that the builder has no complaint with the shotcrete works.

18 It was not until after the Applicant's closing submissions, when Mr Gillies submitted there was no evidence to support the allegation that the Respondent's contract was terminated by the builder because of the Applicant's performance of the shotcrete works, that Ms Steel sought

leave to tender a copy of the 'Notice of Termination'. However this does not assist the Respondent. The Notice of Termination simply states:

> Pursuant to Clause 8 of the General Conditions of Contract for the above project, we hereby determine your Contract Agreement for the above project.
>
> Specifically the determination relates to Bullion Building and Construction Pty Ltd failing to proceed with the works with reasonable diligence or in a competent manner."
>
> As such we request your works on site cease, and that your company representatives vacate site **immediately** (sic).

19 Further, there is no evidence at all that the Applicant caused any delays in the works or that it failed to carry out the works as and when requested to do so by the Respondent, or that it failed to respond to any request to attend site on a particular day, or to carry out a specified stage of the works when requested to do so.

The Witnesses

20 I have no hesitation in accepting Mr Maguire's evidence. He impressed me as a truthful witness with a good recollection of the project and the difficulties experienced with the Respondent. He is obviously concerned that the Applicant has not been paid for the works that have been carried out. However, I have some reservations about the evidence given by the Respondent's witnesses (with the exception of that given by Mr Scott-Sutton). Although I swore in Ms Steel at the commencement of the hearing so that I could take into account anything that she said during the course of the hearing, it quickly became apparent that she had no direct knowledge of this project, and little real technical understanding, necessitating her asking Mr Maguire to explain the process of shotcreting (which she consistently referred to as 'shortcreting'). She made a number of allegations about which she had no direct knowledge and in respect of which there is simply no supporting evidence.

21 Mr Toumazou adopted what can only be described as a nonchalant, relaxed attitude to the giving of his evidence. He has a seemingly poor recollection of the events surrounding this project and, although Mr Nassello said that all major decisions were made by Mr Toumazou or Ms Steel, appears to have had little do with the project, other than negotiating the terms upon which the Applicant would be engaged to carry out the works. Although he denies there was any agreement that the progress payments would be made I accept Mr Maguire's evidence

that this was a term of the agreement. However, it does not impact on the Applicant's entitlement to be paid for the works.

22 Mr Nassello did little more than confirm that the works were carried out by the Applicant conceding that there were some difficulties with the installation of the steel by the Respondent, and that it was understood the Applicant would attend to rectification of the minor defects when it returned to complete the works. I am not persuaded that he telephoned Mr Maguire after the third pour to advise him of the builder's alleged concerns, but even if I were satisfied he did, his evidence would not assist the Respondent. He confirmed that he did not believe that it was a big issue, as demonstrated by his failure to request the Applicant to carry out any rectification works.

costs

23 Mr Scott-Sutton seeks an order for his costs of attending the hearing in response to the Summons to Appear. He indicated that his rate is $180.00 per hour, and he also seeks $20.00 for carparking. As noted above, the Summons was issued at the request of the Respondent and served by facsimile by Ms Steel, as affirmed by her in the Affidavit of Service. Summonses to Appear are issued under s104 of the *Victorian Civil and Administrative Tribunal Act* 1998. Section 104(4) which is relevant provides:

> A person who attends in answer to a summons is entitled to be paid the prescribed fees and allowances or, if no fees and allowances are prescribed, the fees and allowances (if any) determined by the Tribunal.

24 No fees and allowances have been prescribed, and I am satisfied that Mr Scott-Sutton is seeking payment of what are more appropriately described as 'fees and allowances' rather than 'costs'. No submissions were made by Ms Steel in respect of this application. However, as Mr Scott-Sutton appeared in response to a Summons to Appear issued at the request of the Respondent, the Respondent must be responsible for payment of his fees and allowances. Mr Scott-Sutton sought payment for the whole day. However, I note that he was excused before lunch. Any application for payment of his fees and allowances could have been made at that time, and accordingly, noting that the builder's office is in Cheltenham I consider five hours to be an appropriate allowance. I will therefore order the Respondent to pay Mr Scott-Sutton's fees and allowances fixed in the sum of $920.00.

25 The Applicant seeks its costs of this proceeding on an indemnity basis. Section 109 of the *Victorian Civil and Administrative Tribunal Act* 1998

provides that each party shall pay its own costs of a proceeding unless the Tribunal is satisfied it should exercise its discretion under s109(2) having regard to the factors set out in s109(3). In seeking indemnity costs the Applicant relies on s109(3)(a)(vi) and alleges that the conduct of the proceeding by the Respondent has been vexatious.

26 It is clear that indemnity or solicitor/client costs should only be ordered in exceptional circumstances. In *Pacific Indemnity Underwriting Agency Pty Ltd v Maclaw No 651 Pty Ltd* [2005] VSCA 165 Nettle JA said, when considering the meaning of 'reasonable legal costs':

> 'I also agree … that where an order for costs is made in favour of the successful party in domestic building list proceeding, the costs should ordinarily be assessed on a party/party basis … Of course there may be occasions when it is appropriate to award costs in favour of the successful client in domestic building proceedings on an indemnity basis. Those occasions would be exceptional …' [91-92]

27 Although the Respondent's defence and counterclaim were clearly lacking in merit, this is one of the matters to be taken into account under s109(3). Section 109(3)(c) provides that in deciding whether to exercise the Tribunal's discretion under s109(2) the Tribunal must have regard to:

> the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law; (emphasis added)

28 Whilst I am persuaded that this is an appropriate case for an order for costs in favour of the Applicant, I am not persuaded that those costs should be on an indemnity basis. The Respondent's conduct of the proceeding is as contemplated by s109(3)(c) and accordingly, I will order the Respondent to pay the Applicant's party/party costs of the proceeding. Considering the quantum of the Respondent's counterclaim and the Applicant's detailed Reply and Defence I am satisfied that in default of agreement such costs should be assessed on County Court Scale 'D'.

29 The Applicant also seeks an order that the Respondent pay interest in the sum of $951.81. Having regard to s53(3) of the *Domestic Building Contracts Act* 1995 I am satisfied it is fair to order the Respondent to pay interest, particularly in circumstances where it had sustainable reason for refusing to pay. The amount claimed was not challenged and I will allow it in full.

DEPUTY PRESIDENT C. AIRD