

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP178/2015 AND
BP569/2015

CATCHWORDS

Contract for building works; delay in works; delay in invoicing; quantum meruit

APPLICANT	Mr Nicholas Joel Mackinlay
RESPONDENT	Ms Sue Tonkin
WHERE HELD	Geelong
BEFORE	R Buchanan, Member
HEARING TYPE	Hearing
DATE OF HEARING	5 May 2015
DATE OF ORDER	5 May 2015
DATE OF REASONS	17 July 2015
CITATION	Mackinlay v Tonkin (Building and Property) [2015] VCAT 1100

ORDERS

BP178/2015

The respondent must pay \$4,531.80 to the applicant. This amount is a balance after the sum of \$2,000.00 awarded to the respondent in proceeding BP569/2015 has been deducted.

BP569/2015

The applicant's claim is proved in the sum of \$2,000.00. No monies are payable under this order, because the sum of \$2,000.00 has been allowed for in the Tribunal's orders made today in proceeding BP178/2015.

R Buchanan
Member

APPEARANCES:

For Applicant In person

For Respondent In person

REASONS

[The following is a transcript of reasons for decision delivered orally on 5 May 2015. Headings have been added and the transcript has been edited for clarity and ease of reading.]

- 1 This case involves a claim and counterclaim between Mr Nicholas Mackinlay and Ms Suzanne (“Sue”) Tonkin. The case arises out of work carried out by Mr Mackinlay on a weatherboard Victorian house owned by Ms Tonkin in Riley Street, Geelong. The works go back to 2011. Mr Mackinlay is a painter and a decorator with a background in the building industry – he has been a painter and decorator for 10 years and worked in building before that.

Interior works

- 2 In 2011 Mr Mackinlay provided a quote to Ms Tonkin to paint and plaster inside Ms Tonkin’s house for \$9,284, inclusive of GST.
- 3 Subsequently, after a discussion with Ms Tonkin, Mr Mackinlay agreed that he would also sand and coat with tung oil the floors in four heritage rooms at the front of the house. He also discussed with Ms Tonkin and carried out the installation and painting of quad around the floor perimeter of the four rooms that he had sanded.
- 4 All of this work was finished in about August 2011. Mr Mackinlay said that he rendered an invoice for the total amount of the interior works. He was paid, on his evidence, for the interior plastering and painting work, but was not paid for the balance of the works, namely the work on the floors. Mr Mackinlay said that he invoiced again a month or so later and tendered in evidence a separate invoice, for the floors. Mr Mackinlay said that he had not been paid for the floor works.
- 5 The fact that events go back to 2011 clearly stems from the fact that Mr Mackinlay organised for his girlfriend to move into the property with her son. As a result, there was a relationship of landlord and tenant between Ms Tonkin and Mr Mackinlay’s girlfriend, which lasted for a long period of time, until early this year.

Exterior works

- 6 Mr Mackinlay also quoted to paint the exterior front of the house. His quoted amount was \$2,684. The quotation had on it the following words:
“Paint the front of the house all surfaces well sanded and washed, cracks filled etc, bare timber reprimed and two coats paint, 15 year solar shield applied.

Weather board and window repairs can be done at an hourly rate of \$35, estimate \$420 plus materials.

This quotation price \$2,684 including GST.”

- 7 The plain reading of that quotation is that the price for the job of painting was going to be \$2,684 and if the owner asked Mr Mackinlay to do so, he was prepared to do weatherboard repairs (which were underneath the gable) and window repairs at a rate of \$35 per hour, for which works he gave an estimate of \$420 plus materials.
- 8 Mr Mackinlay said that he then proceeded to paint the exterior and also repair the weatherboards and window. He bought weatherboards for the job; the boards had to be specially milled to get a pencil edge on them. He also had a single sash made for the front lounge room window. The invoices from the suppliers for those items totalled \$511.
- 9 Mr Mackinlay began the works on the defective weatherboards (that he had to replace underneath the gable), but did not complete them until recently. I gathered from his evidence that the reason for his not having rendered the invoice earlier was that he had not completed the works.
- 10 The evidence of the parties was that at some point Ms Tonkin expressed a desire to sell the property. Mr Mackinlay was aware of that and I presume that was what prompted him to complete the work on the weatherboards. The evidence suggested that the work on the front of the house was a job which Mr Mackinlay, busy with plenty of other things, just did not get around to finishing, that he saw no need to press on and did not feel the need to complete it. Nevertheless Mr Mackinlay ultimately did complete the work, it was done and Mr Mackinlay rendered an invoice for the works. Ms Tonkin has not paid that invoice.
- 11 The essential principle that the law applies to such situations is that if the work is done, the labourer is entitled to a reasonable fee for his work. In the present case, the social elements of the dealings between the parties were fraught, because they were muddled up between a mixture of business, landlord and tenant and personal relationships. As a result, while the works probably dragged on longer than they would have done, if Mr Mackinlay had applied himself in a professional fashion, to the extent that there is a dispute now, it probably exists because Mr Mackinlay allowed things to drift.
- 12 Mr Mackinlay’s evidence was that he was not paid to do the floors, but he allowed that to drift (for three years) and did not pursue Ms Tonkin. On the one hand one might say he was compassionate, on the other hand one could say that he was the author of the dispute; by allowing things to drift on, people obtain unclear ideas about what their responsibilities are and clarity is difficult over a three year period.
- 13 Be that as it may, the law applies itself strictly to problems such as the present and there is a legal answer this dispute. The legal answer is that if

work is done at the request of an owner and it is done reasonably competently, the worker is entitled to be paid.

Defects

- 14 Evidence was given by Mr Mackinlay's father, a retired architect, that the outside work had been competently done. He acknowledged that there was a defect at the left hand end of the veranda, which had been missed.
- 15 Evidence was produced by Ms Tonkin in the shape of a report letter dated 23 February 2015 from Mr Colin Watson from Watson Young Architects, which listed a number of misses and defects and estimated that it would take a week to fix them at a cost between \$2,000 and \$2,500. Mr Mackinlay senior effectively agreed with the opinion of Mr Watson, whose opinion I will accept. Mr Mackinlay junior gave evidence, which I accept, about his current charges, \$40 to \$45 an hour, and at that rate the amount of \$2,000 to \$2,500 allowed by Mr Watson appears to be reasonable. I therefore find that there are deficiencies in the works and that an allowance for the price claimed should be made, based on Mr Watson's opinion.
- 16 In summary, while Mr Mackinlay was paid for interior plastering and painting, he was not paid for work on the floors or for repairing and painting the exterior front of the house. In addition, there are defects for which an allowance must be made.

The floors

- 17 Ms Tonkin said that when the invoice was rendered for the interior plaster, painting and floors, Mr Mackinlay had asked only to be paid for the interior plaster and painting. The amount that he originally invoiced for the interior plaster and painting was slightly higher than the quoted amount, but the parties adjusted that, reached agreement and Ms Tonkin paid that agreed amount. She feels that she has discharged her obligations. It seems to me, however, unrealistic for Ms Tonkin to conclude that Mr Mackinlay ever was doing anything to allow Ms Tonkin to reasonably understand that she would not at some stage need to pay for the floors. The fact that Mr Mackinlay let things slide encouraged Ms Tonkin in that belief, but the reality is that the work was done on the floors, the quoted price was \$2,600, (not \$2,800 as claimed in the invoice) and Mr Mackinlay is entitled to be paid.
- 18 Mr Mackinlay said that the quote for \$2,600 was supposed to be without GST, but in fact \$2,600 plus GST is more than \$2,800. All of Mr Mackinlay's other quotes were plus GST and I therefore think that he is mistaken.

Quad

- 19 Quad was asked for. The figure claimed of \$352 to supply quad and to paint it with three coats of paint is reasonable and I will allow \$352.

Exterior painting

20 The exterior was painted. There are deficiencies in the works.

Exterior repairs

21 Slightly more contentious is the claim made for exterior repairs and installing the sash. The claim by Mr Mackinlay is \$903 for weatherboards and \$492.80 for the sash. The raw material costs for these were \$511. Ms Tonkin's claim (that these were all covered by the estimated amount of \$420) clearly does not withstand examination. Evidence was given by Mr Mackinlay that he has told Ms Tonkin as he went along that the work was more extensive than he had thought and it would cost more. But he did not ever quote a price and therefore all he is entitled to is a reasonable amount for materials and the time involved. I have not been assisted by any evidence about what would be a reasonable amount of time to order and install the weatherboards and the sash window. In the absence of such evidence I think that an allowance of approximately 10 – 11 hours would be reasonable, a long worker's day. Accordingly, I will reduce the amount claimed for labour.

22 The claim for exterior repairs included \$44 for work on the decorative baseboard at the front. No evidence was led by Mr Mackinlay that this was ever separately quoted. He quoted for painting the front. The baseboards are at the front. I see no logical reason why a special claim should be made for the baseboards, even if there was more work entailed.

23 Accordingly the allowances that I will make are as follows. The amount claimed by Mr Mackinlay is \$7,275.80. From that amount I will make the following deductions:

- \$200 for the overclaim for the floors.
- Overclaim for labour in relation to the weatherboards and the sash. I will deduct a figure of \$500 from the labour.
- \$44 claimed for work on the decorative baseboard.
- \$2,000 for the defects identified by Mr Watson in his report.

Accordingly the balance of the claim which I will allow to Mr Mackinlay is \$4,531.80.

24 On Ms Tonkin's claim I will record the amount in her favour that I have set out above (\$2,000 for defects), but I will make a notation in the order that no amount is payable under that order. I will make an appropriate notation in the order on Mr Mackinlay's claim saying that the amount awarded to him (\$6,531.80) has been reduced by the amount awarded to Ms Tonkin. Accordingly the amount payable under Mr Mackinlay's order will be the reduced sum of \$4,531.80 and there will be only one monetary order to be enforced.

25 Both of the parties have issued applications in this Tribunal. In addition, they have both been put to some expense. In view of the fact that there have been claim and counterclaim, and in view of the fact that to some extent the parties both contributed to the situation they got themselves into, I find that it would be unfair to make an award of Tribunal fees to either party and I will not make an allowance for any costs of either party associated with preparation for the hearing.

R Buchanan
Member