

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING & PROPERTY LIST

VCAT REFERENCE NO. BP628/2017

CATCHWORDS

Architect's claim for unpaid invoices; Respondent's set off and counterclaim for misleading and deceptive conduct under the ACL in the provision of architectural services; Respondents alleged they were induced to spend unnecessary funds; sections 18 and 29 of ACL discussed; Respondents failed to adduce any evidence of any inducement or misleading or deceptive conduct on the part of the Applicant; claim proven and set off and counterclaim dismissed.

APPLICANT	Nettle Architects Pty Ltd
FIRST RESPONDENT	Jeremy Jilla
SECOND RESPONDENT	Ros Jilla
WHERE HELD	Melbourne
BEFORE	Member B Thomas
HEARING TYPE	Hearing
DATE OF HEARING	14 November 2017
DATE OF FILING WRITTEN SUBMISSIONS	18 December 2017
DATE OF ORDER	21 February 2018
CITATION	Nettle Architects Pty Ltd v Jilla (Building and Property) [2018] VCAT 256

ORDER

1. The respondents must pay the applicant the sum of \$4,032.83 and reimburse the applicant the filing fee of \$209.00, a total of \$4,241.83.
2. Costs reserved.

BW Thomas
Member

APPEARANCES:

For Applicant

Ms Wendy Nettle, Director

For Respondents

Mr Jeremy Jilla

REASONS

BACKGROUND

- 1 The architect claims the sum of \$4,032.95 for two unpaid invoices for architectural services provided to the owners:
 - 14 February 2017 - invoice #16 – 3403/3 - \$2,963.00; and
 - 23 March 2017 - invoice #16 – 3403/44 - \$1,069.83.
- 2 The respondents by way of set off and counterclaim, seek damages for deceptive and misleading conduct on the part of the applicant, in the sum of \$9,000.00. However, the total of the heads of damage claimed is \$9,800.00.
- 3 The hearing took place on 14 November 2017. The applicant was represented by its director, Ms Wendy Nettle. The respondents were represented by Mr Jeremy Jilla.
- 4 Ms Nettle was the only witness for the applicant. Mr Jilla gave evidence on behalf of the respondents.
- 5 As both parties sought to rely on documents they were not in a position to produce, I ordered the applicant at the conclusion of the hearing to file and serve Final Submissions and any documents on which it relied and the respondents to file and serve Submissions in Reply and any documents on which it relied. Both parties complied with these orders.
- 6 The architect's submission comprised a folder containing:
 - Reply to Jilla Defence Claims;
 - Response to Counterclaim;
 - Reply to Jilla email dated 14 November 2017; and
 - a Chronology and 70 referenced documents.
- 7 The owners' submission comprised a document entitled Respondent's Final Submission with attachments.

THE CHRONOLOGY

- 8 Ms Nettle met with Mr Jilla on 10 November 2016. The owners' brief was to develop a design to renovate and extend their house; specifically a proposal to "push the boundaries in order to obtain concessions from their neighbours", who were rebuilding their own residence.
- 9 On that day, a letter was sent to the respondents setting out the architect's fees as:
 - Measured drawing of existing conditions: \$2,000.00 - \$3,000.00 plus GST; and

- 2 – 3 schematic designs for changes to the rear living room roof, ceiling, windows and doors, the layout of the steps to the rear upper garden, and revised layouts for the ensuite walk-in robe and the bathroom, laundry: \$5,000.00 - \$7,000.00 plus GST.

The letter also quoted hourly rates for a Principal/Director, Architect/Senior Building Practitioner, CAD Operator/Draftsperson, the Interior Designer and Support Staff, and requested signed authority to proceed.

- 10 Ms Nettle sent Mr Blamey of the architect's office to undertake the site measure. On 14 November 2006 Ms Nettle advised Mr Jilla by text message that, as the respondents were building on the boundary, a survey by a land surveyor may be necessary. On 16 November 2016 a set of drawings showing the existing floor plan and elevations were provided to the owners, together with invoice #16 – 3403/1 for \$2,876.50. By an email to Ms Nettle dated 18 November 2016, Mr Jilla disputed the time taken for the site measure and rejected the invoice. Ms Nettle agreed to reduce the fee to \$2,000.00 including GST. These fees were paid by the owners.
- 11 In an email to Ms Nettle dated 21 November 2016, Mr Jilla reduced the scope of the original brief and proposed a fee of \$1,500.00 for only one design option. Ms Nettle replied that she was not prepared to work with the owners on that basis.
- 12 On 9 December 2016, at the respondent's request Ms Nettle agreed to continue with the brief on condition that the owners' fees would be invoiced on a time basis, to which Mr Jilla agreed by an email of that date.
- 13 On 13 December 2016, a set of drawings showing Proposed scheme 1 were provided to the owners. On 14 December 2016 a set of drawings showing revised wall heights on the northern and the southern boundaries, marked Proposed scheme 2, were provided to the owners, together with the architect's invoice #16 – 3403/2 for \$4,180.00. On 15 December 2016, Ms Nettle was advised that agreement had been reached between the respondents and their neighbours as to the heights and length of the proposed walls on the common boundary.
- 14 On 15 December 2016, Mr Jilla copied Ms Nettle into an email he sent to Hansen Partnership, the neighbours' planning consultant, detailing his concerns regarding the proposed agreement, and advising he would seek Ms Nettle's views regarding those concerns.
- 15 On 19 December 2016, a revised roof design, marked Proposed scheme 3, was provided to the respondents. On 20 December 2016, for the purpose of lodging an application for a planning permit for the owners' proposed building works, Mr Blamey requested the neighbours' architect to provide a drawing showing the existing conditions of their property. This was provided on 10 January 2017.
- 16 On 23 January 2017, Mr Blamey requested a quotation from JCA Land Consultants for a site survey of the respondent's property, to be included in

the planning permit application. The quotation was provided that day. On the same day, Mr Jilla provided a copy of a survey plan of the neighbours' property he had obtained from the Stonington Council.

- 17 On 24 January 2017, the neighbours' architect advised Mr Blamey that, in view of the respondents' intention to appeal the issue of a planning permit regarding the neighbours' proposed building works, it was likely that the neighbours would object to the height and length of the proposed wall on the respondents' northern boundary.
- 18 On 2 February 2017, Ms Nettle had a further meeting with the owners at which, in view of the failure to reach any agreement with the neighbours as to their proposed building works, they discussed how the council would/might assess the proposed boundary wall, the proposed change in the rooves on the respondents' house, and an option for a second story.
- 19 On 3 February 2017, JCA Land Consultants provided a copy of the Survey Report to the owners, but not to the architect.
- 20 In an email to Ms Nettle dated 8 February 2017, Mr Jilla provided his response to "the Phase 1 low costs easy to Implement Solutions AND Phase 2 Plans to be Developed by Nettle Architects for submission for Building Permit Application by Council."
- 21 On 14 February 2017 Ms Nettle replied:

My understanding when I left the last meeting with you was that you wish to proceed with the ensuite and dressing room as designed.

Also enlarging the spare bedroom and to incorporate the laundry in the now reduced bathroom.

In the rear the first thing you were to do was to move the location of the TV set and to try relocating some furniture.

....

Would you clarify what we are to prepare now.

If you are serious about doing the second-storey extension. It should be planned now because of structural implications.

With our workload, we can proceed with Phase One, but we would have difficulty in producing Phase Two for a number of months.

I look forward to hearing from you shortly.

- 22 On 14 February 2017, the architect's invoice #16-3403/3 for \$2,963.00 was provided to the owners.
- 23 On 2 March 2017, Ms Lynne Cox of the architect's office emailed Mr Jilla as follows:

Please find attached a further copy of Invoice #3 which was due for payment on 21/2/17.

I understand you are requiring further work to be done, however (sic), the outstanding invoice must be paid prior to further work been undertaken.

- 24 On 10 March 2017, Mr Jilla sent Ms Nettle a text message requesting a cost estimate for Stage I works. On 14 March 2017, Mr Jilla was requested by text message to attend the architect's offices to discuss rough costings. He did not reply.
- 25 On 23 March 2017, the architect's invoice #16 – 3403/44 for \$1069.83 was provided to the owners.
- 26 On 18 April 2017, Ms Nettle wrote to the owners as follows:
- We await your written reasons outlining your concerns regarding how this office has handled your project.
- When we have those, I suggest will we make a time to meet in my office and discuss any concerns that you have raised.
- I note you have not responded to our request for payment of your outstanding accounts by Easter. Please attend to this matter.
- 27 On 24 April 2017, Mr Jilla responded that –
- a \$2,000.00 paid for the site measure and existing conditions drawings should be refunded because they were inaccurate and contained a disclaimer that they could not be used for construction;
 - b \$4,180.00 paid for the design concept and drawings should be refunded because it was misrepresented that the drawings form part of the application to council for a permit to be completed by 16 January 2017;
 - c \$3,760.00 paid to JCA Land Consultants for the land survey was wasted because it was not submitted to Council as part of the permit application; and
 - d The respondents did not accept responsibility for any fees invoiced after 21 December 2016, as a compliant permit is not been obtained.

THE PARTIES' SUBMISSIONS

- 28 The architect contends that it is to be paid its invoices for
- \$2,963.00 because this invoice is for additional services provided to the owners after 2 February 2018; and
 - \$1,069.83 because this invoice is for the costings requested by Mr Jilla.

Unpaid invoices

- 29 The applicant says –

- In an email to Ms Nettle dated 9 February 2017, the respondents requested the applicant to undertake further design services. This was after payment of invoice #16 – 3403/2 for \$4,180.00. In accordance with the instructions in that email, the applicant proceeded with roof design and floor plan changes. In addition, Mr Jilla requested the applicant to consider building a second storey to the property; and
- The respondents also requested an indication of costings if the project was broken into stages. The costings were held back pending payment of the applicant’s 14 February 2017 invoice. The architect’s 23 March 2017 invoice was for the preparation of those costings.

The Counterclaim

30 The owners allege that “deceptive and misleading conduct and misrepresentation by Ms Nettle induced them into incurring excessive costs which they were led to believe would generate a design schematic and approved Planning Permit Application for the renovation and extension of their residence “that would be compliant in all respects with Victorian Building Regulations and ALL the requirements of Stonnington Council”. In particular, they were “induced” by the Applicant into making three payments contrary to The Trade Practices Act. Specifically, they rely on s52 (Misleading and Deceptive Conduct) entitling them to damages under s82 (Damages).

31 The 3 payments were the:

- \$2,000.00 paid to the applicant to measure the existing floor plan of the respondents’ house; the
- \$4,180.00 paid to the applicant to prepare “design schematic” for approval by the respondents, and then for submission “in fully compliant Permit Application format” to the Council by 21 January 2017; and the
- \$3,760.00 paid to JCA Land Consultants for a survey to be included in the “Council Planning Permit application”.

Finding: The \$2,000.00 payment

32 The applicant says:

- The plans were accurate drawings of existing conditions with a Plan Note to confirm the dimensions on site;
- The fees charged were not excessive, and were within the industry range;
- The fees charged were in accordance with the applicant’s letter of 10 November 2016; and
- The note “Preliminary Not to be used for construction” is to protect an architect from an owner claiming damages for materials ordered off

the plans without checking dimensions on site first. In old houses, room sizes can vary by 50 mm or more from one side to the other, which is particularly relevant to the respondent's house, as the existing walls have been battened and plastered over in the past.

Finding: The \$4,180.00 payment

33 The applicant says –

- Any building works at the respondents' property requires the issue of a planning permit by the Stonnington Council. Therefore, Part 4 of the Building Interim Regulations (Siting) does not apply;
- The Stonnington Planning Scheme (Standard A11 – Walls on boundaries) gives the Council discretion to allow a greater length of wall on the boundary. Council gave planning approval to the respondents' neighbours for the construction of a 33.73m wall on the boundary with the respondents' property;
- The approved wall is only 0.53m greater in length than shown on the applicant's schematic design for the respondents' property. Therefore, it is reasonable to conclude that an application for a planning permit for the respondents proposed scheme would be successful;
- Mr Jilla was advised in early discussions of the possible non-compliance of the wall, but as stated in his email to Ms Nettle of 9 December 2016, he required –

Boundary wall heights on Northern and Southern Boundary Walls of up to 3.6 metres notwithstanding that council Building Regs limit boundary wall height to no more than 3.2 metres

Finding: The \$3,760.00 payment

34 A site survey is required for an application for a planning permit. The fees paid to JCA Land Consultants were a necessary expense to proceed with the planning application.

DISCUSSION

35 Although the owners did not provide written authority as requested in the applicant's letter of 10 November 2017, Mr Jilla instructed the architect to proceed and, by his email to Ms Nettle of 9 December 2018, agreed to time based billing of fees.

Counterclaim

36 The owners did not provide evidence that the measurements as shown in the existing site measure plans were inaccurate. The architect produced an email from another architect whom the owners had consulted, confirming that applicant's fees for the site measure were in accordance with industry rates, and further that the disclaimer on the plans was a check mechanism putting the builder on notice that dimensions must be verified.

- 37 In any event, in view of Mr Jilla’s email of 9 December 2016 that he required the walls on the Northern and Southern boundaries to be 3.6m in height, a site measure and survey was obviously necessary.
- 38 As to the owners’ Counterclaim, the heads of loss and damage listed in paragraph 31 above total \$9,810.00. No explanation is given as why the quantum of the counterclaim is only \$9,000.00.
- 39 In relying on section 52 of the *Trade Practices Act 1974* (the TPA), the owners appear to be ignorant of the *Australian Consumer Law*. The *Competition and Consumer Act 2010* (the CCA) replaced the TPA. Schedule 2 of the CCA is the Australian Consumer Law (the ACL). The *Australian Consumer Law and Fair Trading Act 2012 (Vic)* confers jurisdiction on the Victorian Civil and Administrative Tribunal in respect of claims under the ACL.
- 40 Section 18 of the ACL provides that a person must not in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive. Section 29(1) provides that a person, must not in trade or commerce, in connection with the supply of services or in connection with the promotion by any means the supply of services, make a false or misleading representation that the services are of a particular standard, quality or grade. There is a substantial overlap between sections 18 and 29.
- 41 Clearly the applicant is a trader and the respondents are a consumer within the meaning of the ACL. The High Court has held that conduct is misleading or deceptive “if it has a tendency to induce error. That is to say there must be a sufficient causal link between the conduct and the error on the part of the person exposed to it.” (*Attorney- General (NSW) v World Best Holdings Ltd* 2005) 63 NSWLR 557, [121]). Whether conduct is misleading or deceptive or likely to mislead or deceive is a question of fact.
- 42 Section 236 of the ACL provides that if a person suffers loss or damage because of the conduct of another person or corporation, and the conduct contravened sections 18 or 29, that person may recover the amount of loss or damage from that other person or against the person involved in the contravention.
- 43 The respondents claim that Ms Nettle’s “deceptive and misleading conduct and misrepresentation” induced the owners into incurring excessive costs by which the owners were led to believe that the architect would provide a schematic design for the renovation and extension of their residence for which the Stonnington Council would issue a planning permit.
- 44 In particular, the owners allege that the applicant undertook that a “design schematic ... would be submitted in fully compliant Permit Application format by January 21st ‘17”, or that the owners “instructed ‘Nettle’ to complete and submit to Council a compliant Planning Permit Application no later than Jan 21st 2017”. Attachment 4 to “Jilla’s Defence claims Set Off for a counterclaim of \$9,000.00 on Nettle Architects” is said to be

evidence of Ms Nettle's inducement to the Respondents to spend a further \$4180.00 for this purpose. However, Attachment 4 is simply the architect's Invoice #16-3403/2 dated 14 December 2016.

FINDINGS

- 45 Other than making the allegation, the respondents have not produced any evidence that Ms Nettle engaged in misleading or deceptive conduct in her dealings with them, or that she made a false or misleading representation as to the architectural services she would provide. Neither have they produced evidence that they were "induced" into incurring fees. In any event, I do not consider that the issue of inducement is relevant to a breach of sections 18 or 29 of the ACL.

PROPOSED ORDERS

- 46 The owners must pay the applicants' invoices #16-3403/3 and #16 – 3403/44.
- 47 The owners' Setoff and Counterclaim is dismissed.
- 48 As the architect succeeded in its claim, the respondents must reimburse the applicant the filing fee of \$209.00.
- 49 Neither party engaged legal practitioners, so it is unlikely that either incurred costs properly understood. However, as a matter of caution, I will reserve the question of costs.

BW Thomas
Member