VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO.BP1607/2015
VCAT REFERENCE NO.BP1126/2016

CATCHWORDS

DOMESTIC BUILDING – Repudiation of contract – relevant principles discussed; Cancellation of contract under s 11(3) of the *Domestic Building Contracts Act 1995* – whether fair to allow a building owner to avoid a contract, if the contract is partially performed – whether monies paid under contract which has been avoided are to be repaid – s 53 of the *Domestic Building Contracts Act 1995*; Restitution – whether any benefit derived through part performance of a contract should be taken into account if monies are ordered to be repaid; Evidence – lack of documentary evidence supporting oral evidence as to loss of future earnings.

APPLICANT	Homayoun Shahabadi
RESPONDENT	Sunwise Constructions Pty Ltd (ACN 163 980 514)
WHERE HELD	Melbourne
BEFORE	Senior Member E Riegler
HEARING TYPE	Hearing
DATE OF HEARING	24 October 2016
DATE OF ORDER AND ORAL REASONS	24 October 2016
DATE OF WRITTEN REASONS	23 November 2016
CITATION	Shahabadi v Sunwise Constructions Pty Ltd (Building and Property) [2016] VCAT 1953

REASONS

INTRODUCTION

1. On 24 October 2016, I heard and determined two separate applications, both filed by the Applicant against the Respondent. Both applications concerned a contract for the construction of a pool enclosure on the Applicant's property by the Respondent. Even though the facts and circumstances underpinning each application were the same, the heads of damage claimed by the Applicant differed between the two applications. In the first application, the Applicant claimed for the return of monies paid to the Respondent and reimbursement of miscellaneous expenses. In the second application, the Applicant

claimed loss of earnings or profit by reason of the works not progressing.

2. Orders and oral reasons were pronounced at the conclusion of that hearing. In proceeding BP1607/2016, being the claim for return of monies paid to the Respondent, the Respondent was ordered to pay the Applicant $25,500 on the Applicant's claim, plus $575.30, being reimbursement of the application filing fee. In proceeding BP1126/2016, the Applicant's claim was dismissed.

3. On 10 November 2016, the Applicant wrote to the Tribunal and requested written reasons, which I now provide.

4. In accordance with the principles succinctly set out by Bromberg J in *Negri v Secretary, Department of Social Services*,[1] it is permissible for me to provide a more elaborate exposition of the same reasoning underpinning my oral reasons given on 24 October 2016.

BACKGROUND

5. This proceeding and the related proceeding BP1126/2016 comprise applications made by the Applicant against the Respondent in respect of the construction of a pool enclosure over an existing swimming pool located on the Applicant's residential property in Wantirna South.

6. It is common ground that the parties entered into a contract for the construction of an aluminium framed pool enclosure. It is also common ground that the approved engineering drawings and building permit did not strictly accord with the terms of the contract, in that the engineering drawings contemplated that the structural components of the frame would be made from steel, rather than aluminium.

7. The discrepancy between the terms of the contract and the approved engineering drawings stems from the fact that an earlier design contemplated that the structural frame would be made from steel. This earlier design had its genesis in a quotation provided by the Respondent in early 2015, in which he had offered to undertake the work for $81,000. Attached to that quotation was a concept drawing, which depicted the proposed pool enclosure structure.

8. However, the Applicant did not accept that quotation. Instead, he decided to construct the pool enclosure himself – as an owner builder, rather than engage the Respondent to construct the works. Accordingly, he retained his own architectural draftsperson to prepare architectural drawings. These were based on the concept sketch that had previously been developed by the Respondent, and was part of its quotation.

[1] [2016] AATA 179.

9. In or around September 2015, the Applicant obtained consent from the Building Practitioners Board to construct the works as an owner-builder.[2] He then contacted a private building surveyor in order to obtain building approval. It was at this point that the Applicant again sought assistance from the Respondent. This ultimately culminated in the parties entering into a contract, whereby the Respondent would undertake the building works, including finalising the building permit application, for the same price as previously quoted; namely, $81,000.

10. The terms of the contract provided that the Respondent would be responsible for finalising all design documents in order to obtain the building permit on behalf of the Applicant. To that end, the Respondent engaged an engineering firm to finalise the engineering design.

11. The design of the works under that contract was slightly different to what had first been discussed between the parties; in that, the structural frame was to be made from aluminium, rather than steel as originally contemplated. Other than that, the design of the works was to be in accordance with the architectural drawings which the Applicant had previously commissioned. Regrettably, those architectural drawings did not describe any structural members being made from aluminium.

12. Mr Elkin, the director of the Respondent, who appeared on its behalf, said that he had instructed his structural engineer to design the frame to be made from aluminium. However, the drawings ultimately produced by that engineer depicted the framing members made from steel. No doubt this oversight was caused, in part, by the fact that the architectural drawings did not specify that any of the structural members were to be made from aluminium.

13. Mr Elkin said that he did not think that it was of any great significance because when he had previously discussed the project with the Applicant, the Applicant was of two minds as to whether the structural members were to be made from aluminium or steel. Consequently, this discrepancy between the engineering drawings to what was specified in the contract; namely, that the works would be constructed entirely of aluminium, was not brought to the Applicant's attention prior to the works commencing. Further, it does not appear that a copy of the approved engineering drawings were provided to the Applicant prior to the works commencing.

14. Not long after the works had begun, steel columns were erected by contractors engaged by the Respondent. It was at this point that the Applicant raised concern over the use of steel, rather than aluminium. Despite attempts to resolve the dispute, the Applicant ultimately adopted the position that the works had to cease until the discrepancy

[2] Pursuant to s 25 of the *Building Act 1993.*

was resolved. A meeting between the parties was held on 3 December 2015, which was recorded by agreement between the parties. According to Mr Elkin, three options were put to the Applicant in order to progress the works. These were:

(a) the works would continue with the current design;

(b) the works would continue with the current design but all steel members would be encased with aluminium cladding to give the appearance of aluminium framing; or

(c) the works would be redesigned with an aluminium frame. To that end, the Respondent had already received confirmation from its structural engineer that the frame could be constructed entirely from aluminium. Preliminary sketches were produced at that meeting evidencing that.

15. Mr Elkin said that the Applicant had agreed that the works should continue with the current design; that is, constructed entirely with a steel frame. Mr Elkin also said that the parties had resolved another issue which had been raised during the course of that meeting on 3 December 2015. This concerned the concrete paving around the existing swimming pool and whether it should be uplifted or left in situ. Mr Elkin said that this dispute was resolved on the basis that the paving was to remain, as it was thought that the process of uplifting the paving might damage the concrete shell of the existing swimming pool.

16. According to Mr Elkin, despite agreement being reached as to the scope of the works to be undertaken, the meeting did not resolve all issues in dispute. In particular, he said that the Applicant would only allow works to continue if the contract price was reduced by $6,000 to $75,000. He did not agree to this and as a result, the meeting ended without finalising any agreement.

17. The Applicant concedes that he agreed that the works could continue with its current approved design but said that he would only do so if a credit was given to him because that design was less expensive to build than what was required by the contract. He also said that the scope of work had been reduced because the Respondent was no longer required to uplift the paving around the pool. Therefore, he felt that a $5,000 or $6,000 discount was appropriate.

18. The disagreement as to what credit should be given to the contract price led to an impasse between the parties which ultimately resulted in the Applicant treating the contract at an end and issuing these proceedings. As indicated above, two separate proceedings have been issued by the Applicant against the Respondent.

19. In the first proceeding, the Applicant claims $46,000, which represents the amount that the Applicant has paid to the Respondent prior to the contract coming to an end, plus miscellaneous expenses. In essence, the Applicant contends that he lawfully brought the contract to end by reason of the Respondent failing to perform its obligations under that contract. As a consequence, he claims reimbursement of the full amount that he paid under that contract ($40,500), plus expenses and costs.

20. The second proceeding is underpinned by the same facts and circumstances, the only difference being that the Applicant claims under a further head of damage; namely, loss of earnings or profit. According to the Applicant, this claim arises because he had intended to use the swimming pool for private swimming lessons, catering predominantly for students of his own ethnic background. The Applicant contends that the failure to complete the swimming pool enclosure has deprived him of earning $196,000 up until 30 September 2016, which he now claims from the Respondent.

THE ISSUES

21. The central issue in this proceeding concerns how the contract came to an end. If the Applicant lawfully brought the contract to an end, on the ground that the Respondent repudiated its obligations under the contract, then he may be entitled to damages so as to put him into a position had the contract been properly performed, which may also include consequential damages such as loss of earnings or profit. On the other hand, if the Applicant did not have a legal right to bring the contract to an end, as result of the Respondent repudiating its obligations thereunder, then his claim for damages may be left without legal merit.

HOW WAS THE CONTRACT ENDED?

22. The form of the written contract entered into between the parties does not comply with s 31 of the *Domestic Building Contracts Act 1995*. It does not contain any information as to when the work is to start or finish, there are no details of the required insurance, nor does it have any of the conditions which that Act requires to be incorporated into a major domestic building contract.

23. The contract simply compromises a single page document entitled *CONTRACT/AGREEMENT*, two pages of *Project Specifications* and the architectural drawings originally commissioned by the Applicant. There are no terms in the contract which would allow one party to unilaterally end the contract if the other party is in breach of the contract.

24. Accordingly, the question arises whether the Applicant was entitled to end the contract, based on the Respondent's breach. That question falls to be determined by reference to existing contract law. In essence, the Applicant must demonstrate that the Respondent repudiated its obligations under the contract and that the Applicant then elected to terminate the contract based on that repudiation. In *Koompahtoo Local Aboriginal Land v Sanpine Pty Ltd*, the High Court discussed the concept of repudiation as follows:

> The term repudiation is used in different senses. First, it may refer to conduct which evinces an unwillingness or an inability to render substantial performance of the contract. This is sometimes described as conduct of a party which evinces an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the party's obligations. It may be termed renunciation. The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it.[3]

25. Therefore, the contract can only be unilaterally cancelled by one party if the other party has fundamentally breached its obligations under the contract and the innocent party has elected to end the contract. In other words, the breach must be fundamental. It must go to the very root of the contract.

26. In my view, the facts, assessed objectively, do not demonstrate that the Respondent has repudiated the contract. In particular, at the meeting on 3 December 2015, the Respondent conceded that the approved engineering drawings and the building permit did not accord with the *PROJECT SPECIFICATIONS*, as that document specified that the frame was to be an *aluminium box framed structure*. However, it is not in dispute that the Respondent agreed to remedy that discrepancy and build the pool enclosure so that the structural framing was made entirely from aluminium, in compliance with the contract. A sketch drawing from the structural engineer was produced at that meeting to demonstrate that this could be done. It is not contended that the Respondent refused to build the pool enclosure in accordance with what the parties had agreed. Similarly, there is no evidence suggesting that the Respondent refused to uplift the concrete paving surrounding the existing swimming pool. Indeed, the evidence before the Tribunal is that the parties agreed that this aspect of the works was no longer required.

27. However, the Applicant did not agree to reinstate access to his property for the works to continue, in accordance with any of the options which

[3] (2007) 233 CLR 115 at 135 [44] (citations omitted).

the Respondent had put forward. Moreover, I find that the Applicant had agreed to leave the as-constructed works in accordance with what had been designed and approved by the building surveyor; namely, for the framing material to be made of steel rather than aluminium. It was only after that agreement had been reached that the Applicant then sought a reduction of the contract price. In my view, there was no obligation on the Respondent to agree to reduce the contract price.

28. The Respondent's obligation was to build the pool enclosure in accordance with the contract; namely, with an aluminium frame. Therefore, and having regard to the Respondent's uncontested evidence that it had agreed to amend the engineering drawings and building permit so as to allow the construction to continue with an aluminium frame, I find that the Respondent's breach of contract was not fundamental. In other words, the Respondent had agreed to remedy that breach and complete the building works in accordance with what had originally been agreed. However, it was prevented from doing so as a result of the ongoing dispute regarding how much money should be paid under the contract. In those circumstances, I do not find that the Respondent had not disavowed itself of its obligations under the contract, such as to constitute a repudiation of that contract.

29. Therefore, I am not persuaded that the Applicant was permitted to unilaterally cancel the contract based upon the Respondent's breach. His only right was to insist upon performance. By depriving the Respondent from altering the design to accord with the contract, and by denying the Respondent access to carry out the work in accordance with the contract, the Applicant was, himself, in breach of the contract. In those circumstances, it was not lawful for the Applicant to cancel the contract based upon the Respondent's breach.

30. Nevertheless, I find that the Applicant was entitled to end the contract through another mechanism other than by the common law. In particular, the amount of money demanded and received by the Respondent for the deposit payable under the contract was contrary to s 11(1) of the *Domestic Building Contracts Act 1995* (**'the Act'**). That provision provides that a deposit of no more than 5% is permitted where the contract price is $20,000 or more. In the present case, the amount of deposit far exceeded 5% of the contract price.

31. Section 11(3) of the Act further states:

> If a builder does not comply with sub-section (1), the building owner may avoid the contract at any time before it is completed.

32. Therefore, there exists another avenue under which the Applicant may avoid the contract. It is a statutory right which sits separate to any right under contract law. Accordingly, I find that the Applicant's conduct

amounted to him exercising his right under s 11(3) of the Act to avoid the contract.

CAN THE APPLICANT BE REPAID THE MONIES PAID UNDER THE CONTRACT?

33. Section 11(3) of the Act is silent as to what happens where monies are paid in contravention of s 11(1). Nevertheless, s 11(5) of the Act provides:

> If a court finds proven a charge under sub-section (1) against a builder, it may order the builder to refund to the building owner some or all of the amount the building owner has paid the builder under the contract.

34. Therefore, in order to obtain an order which would require a builder to refund a deposit paid in contravention of s 11(1), a court must first find proven a charge under subsection (1). Only after a court finds a charge proven under that subsection, may the court order the builder to refund to the building owner some or all of the amount the building owner has paid to the builder under the contract.

35. However, given the context in which the word 'court' appears in s 11(3) of the Act, I do not consider that the Tribunal falls within the definition of a 'court', for the purpose of s 11 of the Act. Therefore, the Tribunal would not have power to order a refund of the deposit paid under that subsection, even if a court found a charge proven under subsection (1). Such an order could only be made by a court, such as the Magistrates' Court, County Court or the Supreme Court.

36. That then leaves the question whether the Applicant is able to recover any monies paid to the Respondent in circumstances where the contract has been cancelled under a statutory right to do so. As I have already indicated, s 11(3) says nothing about refunding any monies paid under the contract.

37. Nevertheless, s 53 (1) of the Act states:

> The Tribunal may make any order it considers fair to resolve a domestic building dispute.

38. In my view, s 53(1) of the Act gives the Tribunal some discretion in tailoring an order which it considers fair to resolve a domestic building dispute. However, that discretion or power cannot be exercised in a vacuum and without regard to the common law and equitable principles. That said, I am of the opinion that the law of restitution permits an order to be fashioned which would require that some of the monies paid to the Respondent be repaid to the Applicant.

39. In particular, I find that the Respondent would be unjustly enriched if it were permitted to retain all of the monies paid by the Applicant in circumstances where only a small amount of work was actually undertaken on site. In forming that view, I am mindful of Mr Elkins' evidence that some of the materials required for the works have already been purchased and are being stored in readiness to be installed or erected. Therefore, the work which is apparent on site may not reflect what has actually been undertaken.

40. The fairness of this approach stems from the fact that the contract was ended pursuant to a statutory right to do so, rather than by reason of one party repudiating its obligations thereunder. Although it is true that the Applicant could have taken steps to seek performance of the contract, by accepting the Respondent's offer to return and complete the project using an aluminium frame, the Applicant says that by that stage, he had lost confidence in the Respondent's ability to undertake the work, given that it had allowed the engineering design to be completed in contravention of the terms of the contract.

41. The Respondent says that it has spent $43,407.48 in constructing the works and a further $17,222.97, which it categorises as holding costs for the materials which it has purchased but held pending resumption of work. It is not clear whether the amount said to have been incurred as holding costs represents the cost of the materials for this project alone or whether it also includes materials for other projects.

42. Mr Elkins said that some of the materials which the Respondent has purchased are able to be re-used. Some are not. Some of the amounts which represent the $43,407.48 represents labour and administrative costs. The amount attributable to materials alone is $31,735.76, according to the *Schedule of Costs* provided by the Respondent.

43. As I have indicated, some of the materials are able to be re-used. In particular, the Respondent says that some of the roof and wall panelling, valued at $15,601.70 can be re-used.

44. In my view, it would not be fair to order that the Respondent repay the whole of the deposit monies in circumstances where the Applicant has received some benefit for the work undertaken by the Respondent. In particular, the foundations and the steel columns have been erected in readiness for the remaining framing materials and cladding to be installed. According to Mr Elkin, those foundations would not need to be altered if the frame were changed to aluminium or if the steel columns were left and merely clad with powder coated aluminium boxing to give the appearance of an aluminium frame.

45. Consequently, I am of the view that the fairest way to resolve this domestic building dispute is to order that the Respondent reimburse the

Applicant the full amount paid of $40,500, less $15,000, which I find represents the approximate value of the benefit received and held by the Applicant by reason of the work undertaken by the Respondent. I have calculated this amount by reference to the *Schedule of Costs* prepared by the Respondent, which sets out its expenditure on this project. Using that *Schedule of Costs* and doing the best I can with the evidence before me, I have added those amounts which I consider represent work which has already been undertaken and have excluded those amounts which represent materials which are yet to be installed and held by the Respondent in storage. This amount of $15,000 also includes costs associated with preparing and obtaining approval of the design documents, together with some labour costs. It does not include the administrative costs or profit of the Respondent.

46. Moreover, given that the contract was cancelled by the Applicant pursuant to a statutory right, as opposed to the Respondent having repudiated its obligations thereunder, I find that the Applicant is not entitled to be reimbursed for his own expenses following termination.

LOSS OF EARNINGS CLAIM

47. As indicated above, the Applicant's second claim relates to loss of earnings, as a result of the contract not being performed by the Respondent.

48. The Applicant gave evidence that he was poised to commence swimming lessons after the completion of the works, which was anticipated to be in December 2015. Therefore, he said he would have started his swimming lesson business in January 2016.

49. The Applicant conceded that he had no bookings but was confident that swimming classes would have been filled, having regard to his experience as a swimming athlete. He said that he currently works as a swimming coach at two other external swimming pools. He also said that he had contacts within the local Persian School and was certain that he would be able to build up a business which would have seen 10 coaching sessions per day, with 20 students in the morning session and 30 students in the afternoon session, operating seven days a week. In other words, 50 students per day, seven days a week. According to the applicant, that would equate to $800 per day. He claims this amount over the period January 2016 to September 2016, which equates to $196,000.

50. In my view, the Applicant's claim for loss of earnings or profit is unsustainable for a number of reasons.

51. First, the reason why the contract was not performed arises from the Applicant's decision to avoid the contract. As indicated above, the Respondent gave evidence, which I accept, that it would have revised

the approved drawings so that an aluminium frame would have been constructed in accordance with the terms of the contract. Mr Elkins said that at the time when he had a discussion with the Applicant, the building work could have been completed within four weeks, had the Respondent been given the go-ahead. That would have meant that the works would have been completed either before or sometime during January 2016, which would have fitted in with the Applicant's business plan. However that did not occur and I find that this is because the Applicant elected to treat the contract at an end. It is not because the Respondent refused to perform the contract or that it had repudiated its obligations thereunder. Therefore, I find that there is no basis in law to award damages for loss of profit or earnings, having regard to the manner by which the contract was ended.

52. Second, even if it were found that the Respondent is legally responsible for the delay in not having the works completed, nothing has been done by the Applicant since the contract came to an end in December 2015. In my view, it ill behoves the Applicant to claim loss of profit in circumstances where he has failed to take any steps to mitigate his loss.

53. Third, I find that there is insufficient evidence to substantiate the loss of profit or earnings claim. In particular, no supporting documents were adduced to support the Applicant's evidence as to future profits. No witnesses were called to verify that there were students willing to enrol in the proposed swimming school. No business plan was produced to show how profit was to be derived, taking into consideration expenses and other factors. In essence, the evidence in support of this aspect of the Applicant's claim was confined to what the Applicant said during the course of the hearing.

54. Therefore, for the reasons which I set out above, the Applicant's claim for loss of earnings or profit is dismissed.

SENIOR MEMBER E RIEGLER

APPEARANCES:

For the Applicant	Mr Homayoun Shahabadi in person
For the Respondent	Mr W Elkin, director