VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1647/2015

CATCHWORDS

Domestic Building Contracts Act 1995 – no-fault termination under s.41 - assessment of reasonable price for work carried out upon termination under s.41(5) - reasonable price assessed at less than total paid before termination - whether overpayment recoverable by owner – s.53 – orders that can be made when "fair" to do so – to be "fair" an order must have some legal basis - s.53(2)(b)(iii) - no restitution available in absence of vitiating factor – s.53(2)(f) - claim for refund - whether section intended to limit builder's rights so as to require repayment of excess - statutory interpretation – implicit that an assessment under s.41(5) to be followed by a readjustment of the parties' rights in accordance with the assessment – order for refund under s.53(2)(f)

APPLICANT	Ms Wenli Shao
RESPONDENT	A.G. Advanced Construction Pty Ltd (ACN: 089 153 597)
WHERE HELD	Melbourne
BEFORE	Senior Member R Walker
HEARING TYPE	Hearing
DATE OF HEARING	18 November 2019
DATE OF ORDER	6 January 2020
CITATION	Shao v A.G. Advanced Construction Pty Ltd (Building and Property) [2020] VCAT 14

ORDER

1. Order that the respondent pay to the applicant $127,780.00.
2. Costs reserved.

R Walker
Senior Member

APPEARANCES:

For Applicant	Mr N. Phillpot of Counsel
For Respondent	Mr C. M. Fenwick of Counsel

REASONS

Background

1 This proceeding concerned a major domestic building contract ("the Contract") for the construction by the Respondent ("the Builder") of a large house for the Applicant ("the Owner") in North Balwyn between late 2013 and 2015.

2 The construction took much longer than anticipated and the parties fell into dispute over various matters. The Contract was eventually terminated by the Owner pursuant to s.41 of the *Domestic Building Contracts Act* 1995 ("the Act"). That section enables an Owner to bring a contract to an end in some circumstances when the costs blow out or the work has not been completed within one and a half times the construction period specified in the contract.

3 It provides as follows:

> "41. Ending a contract if completion time or cost blows out for unforeseeable reasons
>
> (1) A building owner may end a major domestic building contract if—
>
> (a) either—
>
> (i) the contract price rises by 15% or more after the contract was entered into; or
>
> (ii) the contract has not been completed within 1½ times the period it was to have been completed by; and
>
> (b) the reason for the increased time or cost was something that could not have been reasonably foreseen by the builder on the date the contract was made.
>
> (2) For the purposes of subsection (1), any increased time or cost that arises as a result of a prime cost item or a provisional sum or that is caused by a variation made under section 38 is to be ignored in calculating any price rise or increase in time.
>
> (3) To end the contract, the building owner must give the builder a signed notice stating that the building owner is ending the contract under this section and giving details of why the contract is being ended.
>
> (5) If a contract is ended under this section, the builder is entitled to a reasonable price for the work carried out under the contract to the date the contract is ended.
>
> (6) However, a builder may not recover under subsection (5) more than the builder would have been entitled to recover under the contract."

The original proceeding

4 Following termination of the Contract, the Owner commenced this proceeding seeking damages from the Builder for alleged breaches of contract and the Builder counterclaimed for monies that it claimed to be owed and for damages.

5 The matter came before me for hearing in March 2017 and, after a lengthy hearing, I ordered the Builder to pay to the Owner $93,153.00 and reserved the costs.

6 For the reasons accompanying the order, I determined that:

(a) the Contract had been validly terminated by the Owner pursuant to s.41;

(b) the termination being on a "no-fault" basis, neither party was entitled to damages from the other as a result of the termination;

(c) a reasonable price for the work carried out by the Builder under the Contract to the date the Contract was ended was $912,920.00, being the value the work would have had if not defective, which I found to be $1,006,073.00, less the cost to the Owner of rectifying the defects in the work, which I assessed at $93,153.00;

(d) the Builder had already been paid by the Owner $1,040,700.00, which was more than the value of the work, so it was not entitled to receive any more from the Owner under sub-section (5);

(e) notwithstanding that the Contract was terminated pursuant to the section, the Owner was still entitled to claim damages for defective workmanship, the breaches having occurred before termination;

(f) apart from the defective workmanship, the Builder was not otherwise in breach of the Contract;

7 Although I noted that the total amount paid by the Owner to the Builder exceeded the amount that I had assessed as being the reasonable price of its work, I pointed out that neither Clause 20 of the Contract, nor s.41, provided for any refund to be made to the Owner in such a circumstance.

8 No claim had been made in the proceeding by the Owner for repayment of any excess, whether by way of an order for restitution under the power contained in s.53(2)(b)(iii) of the *Domestic Building Contracts Act* 1995 or otherwise.

The appeals

9 On an appeal to the Supreme Court by the Builder, an associate judge in the Trial Division set aside the order that the Builder pay to the Owner $93,153.00 but made no further orders.

10 As to the overpayment, although she said that the Owner may have been entitled to a restitutionary order to recover the amount by which the payments made by the Owner to the Builder exceeded the assessed reasonable price for the work it had carried out, she declined to make any order in that regard and declined to remit the matter back to the Tribunal to determine such a claim.

11 Upon a further appeal by the Owner, the Court of Appeal granted the appeal in part and varied the order made by the associate judge by adding an order remitting the matter back to this Tribunal to determine whether

any, and if so, what amount is due from the Builder to the Owner by way of refund of money paid under the Contract.

12 Following the determination of the appeal, the Owner filed and served Proposed Amended Points of Claim, dated on 12 June 2019, articulating the following claim:

> "13. Further or in the alternative, on or about 20 August 2015, the Applicant terminated the Contract pursuant to section 41 of the Act.
>
> 14. By reason of the Applicant terminating the Contract pursuant to section 41 of the Act, the Respondent is entitled to the reasonable price for the work carried out under the Contract to 20 August 2015.
>
> 15. Pursuant to section 41(6) of the Act, the Respondent shall not recover more than its entitlement under the Contract.
>
> 16. As at 20 August 2015, being the date of termination pursuant to section 41 of the Act:
>
> (a) the Respondent had completed up to fixing stage as defined by the Contract;
>
> (b) the Respondent's entitlement to recovery under the Contract was $1,096,909.00;
>
> (c) the reasonable price of the work carried out under the contract as determined by section 41(5) of the Act was $1,006,073.00;
>
> PARTICULARS
>
> The applicant refers to and relies upon:
>
> Buildspect Consulting Report dated 5 September 2015; and
>
> Senior Member Walker's reasons dated 21 June 2017.
>
> (d) the applicant had paid the respondent the sum of $1,040,700.00.
>
> 17. As a consequence of the matters contained herein, the applicant has overpaid the respondent in the sum of $34,627.00.
>
> PARTICULARS
>
> Amount paid $1,040,700.00
>
> Less reasonable value of the work ($1,006,073.00)
>
> Balance owing to owner $ 34,627.00
>
> "18. In the circumstances, pursuant to section 53(2) of the Act, the respondent has been unjustly enriched by this overpayment and it is fair that the applicant be reimbursed to the sum of $34,627.00.
>
> 19. Further, and in the alternative, by reason of the matters contained herein and the particulars thereto, the respondent performed the work the subject of the contract at the request of the applicant.

20. By the respondent performing the works the subject of the contract, a benefit was conferred on the applicant, such benefit being the construction of the property.

21. The value of the works performed by the respondent was in the sum of $1,006,073.00, of which the applicant has paid the greater sum of $1,040,700.00.

22. In the circumstances, it would be unfair and unjust for the respondent to retain the full amount of the payment from the applicant when benefit of the works performed by it do not match the payments received from the applicant and therefore, the respondent is liable to pay the applicant the sum of $34,627.00."

13 The prayer for relief was amended to claim:

> "Damages in the sum of $93,103.00 pursuant to Senior Member Walker's reasons dated 21 July 2017";
>
> Refund of $34,610;"

14 On 13 June 2019, I gave directions to the effect that the Points of Claim were amended in accordance with the foregoing draft and for the filing and service of Points of Defence. I also fixed the matter for hearing of argument as to what orders should be made.

15 The Points of Defence that were subsequently filed, dated 7 August 2019, did not join issue with the factual allegations in the Amended Points of Claim but said, in substance, that the payments made by the Owner were made pursuant to valid contractual obligations in circumstances where the basis for those contractual obligations has not wholly failed and that, in the circumstances, the Owner was not entitled to a refund of money paid under the Contract or any relief.

The further hearing

16 The matter came before me for further hearing on 18 November 2019. Mr Philpott of counsel appeared for the Owner and Mr Fenwick counsel appeared for the Builder. After hearing submissions, I informed counsel that I would provide a written decision.

What I am to decide

17 The relevant paragraph of the order referring the matter back to me was as follows:

> "The matter is remitted to the Tribunal under s.148(7)(c) of the Victorian Civil and Administrative Tribunal Act 1998, constituted, if possible, by Senior Member R Walker, to determine whether any, and if so what, amount is due from the plaintiff to the defendant by way of refund of money paid under the contract."

The claim for damages

18 The claim for damages for defective workmanship was determined in favour of the Builder in the first instance by me. That determination was overturned on appeal by the associate judge in the following terms:

> "The order of the Tribunal made on 21 June 2017 ordering the plaintiff to pay the defendant the sum of $93,153 be set aside."

19 In the reasons accompanying the order, the learned Associate Judge said:

> "62. The appeal should be allowed, and the order requiring the builder to pay the owner $93,153 be set aside, noting that only an order of VCAT can be the subject of an appeal, not the reasons of the Senior Member…. The question remains as to what follows from the issue raised in the letter to the parties of 11 December 2017 concerning the Senior Member's factual findings that the reasonable price of the works was $917,802.20, but that the builder had been paid $1,040,700, some $122,898 more than the sum to which he had been entitled. I consider that the owner may have been entitled to a restitutionary payment of the overpayment pursuant to s 53 of the Act, but having regard to the submissions of the parties made on 31 January 2018, I do not propose to make any orders in that regard."

20 The use of the adjectival form "restitutionary" would suggest that her Honour was not necessarily referring to a claim in restitution in the strict sense. The word used by the Court of Appeal was "refund". Whichever term is appropriate, I am asked by the Court of Appeal to determine whether any, and if so what amount, should be paid back to the Owner by the Builder from the money that it has received under the Contract.

21 In assessing the reasonable price of the work, I started with the assessed value the work would have had if it were free from defects, and deducted the cost of rectifying the defects that I found. The Court of Appeal did not take issue with that approach. It said (at paras 444-45):

> "44 It may be accepted that, if an owner has recovered the amount required to rectify defects by way of a deduction from the amount of the 'reasonable price', then that owner could not thereafter claim the same amount by way of damages. But that is not because the right to terminate under s 41(1) and the right to damages are inconsistent rights. It is because it would be unjust for the owner to recover a second time that which has already been allowed as a deduction from the amount owing to the builder under s 41(5).
>
> 45 The rights are not inconsistent because there will not necessarily be such a deduction allowed in every case. For example, there might be major defects apparent shortly after the start of work. The defects might be fundamental and very costly to rectify. If the cost of rectifying identified defects exceeds the reasonable value of the work done, the reasonable price for that work will be zero. Yet the owner will not have been fully compensated for the cost of rectifying the defects. There is no reason why, having pursued the right of termination under s 41, the owner would be disentitled to seek recovery of the balance by way of damages.

22 To assess a reasonable price for work, it is necessary to take into account the cost of rectifying any defects. However, if that is done, the same amount cannot also be awarded as damages for defective workmanship, otherwise the owner would recover same amount twice.

23 Mr Fenwick submitted that the claim in the prayer for relief for damages of $93,153.00 for defective workmanship has been judicially determined. He also submitted that it falls outside the terms upon which this proceeding has been remitted to the Tribunal. He acknowledged in discussion that the amount of $93,153.00 could be the subject of a claim for a refund, although he did not acknowledge that a refund could be obtained for the reasons which follow.

24 Mr Philpott acknowledged that the claim for damages had been judicially determined but said that the same amounts were due by way of refund or restitution. Although the claim for restitution in the prayer for relief was said to be only for $34,610.00, he said that the claim for a refund or restitution applies to the whole of the overpayment and argument proceeded on this basis.

25 In view of what has been said on appeal, it does not appear to be open to me to take the course which seems to me to be the most logical one that is, to make an award of damages and reduce the award to take account of the proportion of the defects sum that was set off in the course of assessing the reasonable price.

26 I think that, if the amount of the overpayment is to be awarded to the Owner, it must be either as a refund or by way of restitution.

Power to award refund or restitution

27 The Tribunal's power to order restitution or a refund is found in s.53 of the *Domestic Building Contracts Act* 1995, the relevant parts of which are as follows:

> "(1) VCAT may make any order it considers fair to resolve a domestic building dispute.
>
> (2) Without limiting this power, VCAT may do one or more of the following—
>
> …….
>
> (b) order the payment of a sum of money—
>
> ……
>
> (iii) by way of restitution;
>
> …….
>
> (f) order the refund of any money paid under a domestic building contract or under a void domestic building contract;"

28 I accept Mr Fenwick's submission that this section is a machinery provision setting out the types of order that the Tribunal is empowered to make, and that it can only be "fair" to make an order of the nature described in any part of the section if to do so would be in accordance with the evidence and the law (see *Versa-Tile Pty Ltd V 101 Construction Pty Ltd* [2017] VSC 73 at paras. 9 and 10 and the cases there cited. There are a number of decisions by this Tribunal to a similar effect).

29 For an order for restitution or a refund to be made, it must be established that the Owner has a legal entitlement to such an order. As has already been observed, no express provision was made under either Clause 21 of the Contract or s.41 of the Act that the Owner should receive a refund of any overpayment if the reasonable price of the work done should be assessed at a lower figure than the total the Builder has been paid already.

30 The two grounds raised in argument were restitution and a refund based upon the operation of a number of sections of the Act.

Restitution

31 The ground for a claim for restitution is unjust enrichment.

32 Mr Fenwick complained that no qualifying or vitiating factors to support a claim for unjust enrichment had been pleaded. As to the necessity for such a pleading, he referred me to the decision of Edelman J in *Hightime Investments Pty Ltd v Adamus Resources Ltd* [2012] WASC 295, where the learned judge said, in regard to an inadequate pleading of unjust enrichment in the case before him, (at para 183 -*citations omitted*):

> "183 This was the extent of the pleading of unjust enrichment. No qualifying or vitiating factor was pleaded. In a joint judgment of the High Court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*,…Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ explained that recovery in unjust enrichment 'depends on the existence of a qualifying or vitiating factor falling into some particular category'. To the submission that it was not necessary to identify some separate 'unjust factor', the court said that '[t]his creates a form of liability which is potentially extraordinarily wide'.
>
> 184 The need for an 'unjust factor' was recently reiterated by French CJ, Crennan and Kiefel JJ. Although not excluding the possibility of novel unjust factors, their Honours said that a claim based on unjust enrichment….
>
> > depends upon enrichment of the defendant by reason of one or more recognised classes of 'qualifying or vitiating' factors; the category of case must involve a qualifying or vitiating factor such as mistake, duress, illegality or failure of consideration, by reason of which the enrichment of the defendant is treated by the law as unjust.
>
> 185 This is not merely a semantic point. The presence of an unjust factor is an indispensable requirement to demonstrate the facts upon which a plaintiff relies for a claim that a defendant had no 'right to retain' the benefit and was unjustly enriched…. The unjust factor may also affect the availability or scope of defences, such as change of position, which rely upon pleading facts which fall within established and developing rules concerning circumstances which reduce or extinguish a defendant's duty to make restitution by 'any matter or circumstance which shows that his or her receipt (or retention) of the payment is not unjust'.... In the absence of a properly pleaded claim for unjust enrichment, counsel for the defendant understandably protested that his ability to cross-examine effectively was impaired

without an understanding of the basis of the plaintiff's claim for unjust enrichment....”

33 I was also referred a number of passages in the text: Edelman and Bant, *Unjust Enrichment* (2nd Edition 2016), including the following (at p. 138 and 139):

> “The requirement that an enrichment be unjust is a requirement both that there is an unjust factor and that the defendant should have no juristic reason to retain the enrichment.
>
> The need for an unjust factor requires that the plaintiff plead and prove a reason for restitution arising from some imperfection or defect in the plaintiff’s decision to enter the transaction that enriches the defendant. Common examples of such reasons are mistake, illegitimate pressure, failure of consideration or undue influence. Others involve a complete lack of intention to enter the impugned transaction that enriches the defendant. This requirement on unjust factor is essential for the transparency of this area of law as well as to permit a defendant to know the case which he or she is called upon to meet: ‘it both highlights, rather than suppresses, the need for normative justification.’ Unjust factors are all the possible matters between the plaintiff and the defendant by which the plaintiff’s intention to make a transfer is imperfect. If the plaintiff has a perfect intention to enter the transaction that enriches a defendant then there can be no claim for restitution based on unjust enrichment. If restitution is to be ordered in such a case it must be based on some legal wrongdoing, or based upon reasons of policy, external to the party.
>
> ……
>
> The second requirement to show an enrichment is unjust focuses not upon the plaintiff, but upon the defendant. It preserves the coherence or integrity of the law. It requires that restitution be refused if, despite the existence of an unjust factor, a defendant has the right to retain an enrichment for some other juristic reason, such as because it was a gift that has not been rescinded, or conferred under a contract or other legal obligation. Once the defendant pleads some juristic reason, the onus is upon the plaintiff to disprove the existence of, avoid, or prove reason to disregard it.”

34 Mr Fenwick submitted that no unjust factor had been pleaded. The money paid to the Builder was paid by the Owner pursuant to a contractual obligation without any mistake or other vitiating factor. Moreover, it was received by the Builder as such and so the Builder had a contractual right to retain the payments, unless there was some provision in the Contract requiring a repayment or the Contract was void or voidable or the consideration had wholly failed, which was not the case.

35 Mr Fenwick submitted that the Contract was not an entire contract and that the amounts paid to the Builder by the Owner were amounts to which it was entitled at the time they were received and the mere fact that the work was not completed does not entitle the Owner to recover any of the amounts she has paid. He referred me to the provisions of the Contract regarding the

making of progress payments according to the stages set out. He said that each such payment became due upon completion of the relevant stage and that there was no provision in the Contract for a subsequent assessment of the value of the work or for repayment of any of the amounts that had previously been paid. Consequently, the obligation in regard to each payment was closed upon the payment being made.

36 In support of his argument, he referred me to a number of comments made to counsel by members of the High Court during submissions in the recent appeal of *Mann & Anor v. Paterson Constructions Pty Ltd* [2019]HCA 32 which concerned the same standard form contract as that used in the present case. In the course of those exchanges, Keane J said, after referring to a number of terms of the contract:

> "So that is each payment of moneys due and payable at the completion of each stage with no provision for a subsequent assessment of the value of the work, no provision contemplating a taking of accounts and the consequences of a taking account in favour of the owner so as to require reimbursement from the builder. How can one possibly construe this contract as providing other than payments that are made out and out in favour of the builder and the obligations in relation to that payment being closed upon payment being made?"

37 In the course of his judgement in that case, GagelerJ, in considering the entitlement of the builder to various categories of work, said (at para 62):

> "Category (2): work for which the Builder has accrued a contractual right to payment
>
> There can be no doubt about the outcome in relation to work done within category (2). The result of the builder's acceptance of the owners' repudiation is that the builder still has in respect of that work the same accrued contractual right to payment under the contract as the builder had up until the time of termination of the contract… The builder can enforce that accrued contractual right in a common law action in debt…".

38 He also referred me to the following passage in the majority judgement in the same case of Nettle, Gordon and Edeman JJ (para 172):

> "172 It follows from what has been said that, where, under a contract for work and labour, a party is entitled to payment upon completion of *any* part of the work (which is to say that the obligation to complete that work is "infinitely divisible"…), where the contract expressly fixes a price for services, and where the contract is terminated by that party's acceptance of the other party's repudiation of it, the party so terminating the contract will have an accrued right to payment under the contract for that part of the work that has been done…."

39 In the present case, I accept that the Contract was not an entire contract and consequently, as payments fell due and were made by the owner, the Builder became absolutely entitled to them. There was no express provision in the Contract entitling the Owner to recover back any of the amounts that she had paid. Once the conditions upon which the Builder was entitled to

receive a payment were fulfilled, it was entitled to receive and retain each payment unconditionally.

40 Consequently, at the time that each payment to the Builder was made:

(a) there was no vitiating factor in the payment or receipt of the money. It was paid by the Owner to the Builder in satisfaction of a legal entitlement that the Builder had under the terms of the Contract. There was no mistake. The Owner was aware that she was making a payment to the Builder under the Contract and the Builder was aware that it was being received as such.

(b) having lawfully received money to which it was entitled at the time of receipt, there is no factor that would make the retention of it unjust. It was "…conferred under a contract or other legal obligation". Having received each payment according to the terms of the Contract that then prevailed, the Builder is entitled to retain it unless the law requires it to be returned.

41 Since the requirements for a claim in restitution are not satisfied, the claim must fail.

Refund

42 Mr Philpott said that it was clear that the Builder had received more than s.41(5) said it was entitled to receive and that consequently, it was "fair" within the meaning of s.53(2)(f) of the Act that the excess be repaid to the Owner. He said that the only basis for refusing to repay the excess would be if it could be said to be unfair to order it do so.

43 It is not for the Builder to justify the retention of the money but rather, for the Owner to demonstrate that, on a proper interpretation of the legislation, she is entitled to receive it back.

44 In paragraphs 54 -55 of the judgement, the Court of Appeal said:

> "54 The written submissions filed in response to the request made on behalf of the associate judge both addressed the possibility of restitution as requested, but the exchange of submissions revealed that the parties had different understandings of the basis for any possible restitution. The respondent addressed the requirements for establishing a claim in unjust enrichment. The associate judge accepted those submissions and found that there could be matters of fact, potentially involving the credibility of witnesses, which would need to be decided if such a claim were to be advanced. The applicant did not address the question of unjust enrichment but appears rather to have founded her submissions on restitution of moneys had and received.
>
> 55 Be that as it may, there was no claim made in the Tribunal of either description. Nor was there a claim for a 'refund' under s 53(2)(f) of the Act. It is not apparent to us, on the materials before us, what defence the respondent might have to a claim for a refund of the $127,780 said by the applicant to have been overpaid. But equally it is not obvious that there could be no such defence. That is a result of the matter not having been run at the Tribunal. Like the associate judge,

> we do not feel equipped in the circumstances to determine such a claim ourselves."

45 There is no guidance to be found in these passages as to what the basis of a claim for a refund of the $127,780.00 would be, beyond a general indication that it was not obvious to the court what defence the Builder would have to such a claim.

46 Mr Fenwick criticised the Owner's pleading of the claim for a refund, saying that the relevant passages in the Amended Points of Claim set out no cause of action of all. However, this is not a court of pleading. The Tribunal is required to conduct each proceeding with as little formality and technicality as the justice of the case permits (*Victorian Civil and Administrative Tribunal Act* 1998 s.98). It is quite clear, and has been throughout, that the Owner is claiming to have refunded to her the amount by which she has over-paid the Builder, albeit, the amounts making up the claim were not overpayments at the time they were made.

47 Mr Philpott submitted that s.41(5) sets out and fixes the Builder's entitlement upon a termination under the section, with the qualification in subsection (6) to the effect that the Builder cannot receive more than it would have been entitled to receive under the Contract.

48 Mr Philpott sought to support his argument for a refund by reference to s.27(2) of the Act, which provides:

> "A building owner may still dispute any matter relating to work carried out under a domestic building contract even though the building owner has paid the builder in relation to the work."

49 He submitted that the overriding principle in s.27 cannot be negatived by the terms of the contract by reason of s.132, which prevents any attempt by the party to contract out of the protection afforded by the Act. Consequently, he said that the payments already made can be disputed under the section. He said that that included disputing the value of that work.

50 Certainly, by reason of this section, the making of any payment does not prevent an owner from disputing any matter relating to the work with respect to which the payment was made, but there must be some basis for the dispute. I think Mr Fenwick is correct in saying that the effect of s.27 is that a payment made by an owner does not amount to a waiver of rights in regard to any future dispute concerning the work for which payment was made.

51 However, I think Mr Philpott is right in saying that, until termination, the Contract governed the rights of the parties but upon termination under s.41, the rights of the parties were amended by the section and the contractual mechanism in s.41(5) then operated to determine what the Builder was entitled to.

52 The wording in both subsection (5) in subsection (6) is expressed in terms of what the builder is entitled to. Nothing is said in the section about what

then happens once the reasonable price has been determined. There is no express provision in s.41 itself that provides for a refund of any overpayment to the Owner. However, that is not the only obvious omission from the section.

53 First, it is nowhere stated in the section that the amounts that the Builder has already received from the Owner are to be taken to be payments made in satisfaction or partial satisfaction of the assessed "reasonable price" that the Builder is entitled to receive, but it can hardly be supposed that an owner would have to pay again for the same work, particularly having regard to the fact that this is consumer protection legislation. Quite obviously, although the section sets up an entitlement for the builder to be paid, payments already made by the owner must then be credited against that entitlement. That is not explicitly stated but it is implicit in the legislative scheme.

54 Secondly, it will be a very rare case indeed where a contract is determined under s.41 and the payments previously made to a builder are found to add up exactly to the "reasonable price" assessed under the section. But if the builder had been paid less than that, it is the clear intention of the subsection that it is entitled to be paid the extra needed to ensure that it receives the "reasonable price" to which it is entitled. That is not expressly stated but again, it is implicit.

55 The final omission is the situation in the present case namely, that the Builder has received more than the "reasonable price" the section says it is entitled to receive. In such a case, it cannot be supposed that, simply because subsection (5) speaks of a builder's entitlement and not an owner's entitlement, the Owner would be in a less advantageous position than the builder would have been in if the positions had been reversed.

56 I think it is implicit in the legislative scheme of s.41, and the parliament has intended, that there is to be an assessment under subsections (5) and (6) then a readjustment of the rights of the parties in accordance with that assessment, having regard to the amounts that have already been paid. No other interpretation of the legislation would make any sense.

57 Parliament did not need to include in s.41 a power to order a refund because that power is already found in s.53(2)(f). The entitlement to a refund is, on a proper construction, created by the former section and recovery is ordered under the latter section.

Conclusion

58 I have already found that the Builder has been paid $1,040,700.00 and the reasonable price for the Builder's work was (*after correcting an obvious error in the original reasons*) $912,920.00.

59 Consequently, the Builder has been overpaid $127,780.00 there will be an order that the Builder pay that sum to the Owner.

60 The costs of this further application shall be reserved.

R Walker
Senior Member