VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP161/2018 AND BP140/2018

CATCHWORDS

Claim by excavator for payment for landscaping and concreting works – counterclaim by owner of property for defective and incomplete works and credits - section 182 *Australian Consumer Law and Fair Trading Act* 2012 – failure by both parties to have agreed a scope of works and a price before commencement – failure to keep business records

VCAT Reference No. BP161/2018

APPLICANT	Jason Smith ABN: 56 494 702 549 t/as JNS Excavations
RESPONDENT	Arnold Chy

VCAT Reference No. BP140/2018

APPLICANT	Arnold Chy
RESPONDENT	Jason Smith ABN: 56 494 702 549 t/as JNS Excavations
WHERE HELD	Melbourne
BEFORE	Senior Member S. Kirton
HEARING TYPE	Hearing
DATE OF HEARING	10 April 2018
DATE OF ORDER	16 May 2018
CITATION	Smith v Chy (Building and Property) [2018] VCAT 758

ORDERS

Having heard and determined proceeding BP140/2018 and BP161/2018 together the Tribunal orders that:

1. In proceeding BP161/2018:

    a) the respondent (Chy) must pay the applicant (Smith) the sum of $3834.70.

b) No order as to costs.

2. In proceeding BP140/2018:

a) In light of the orders made in proceeding BP161/2018, this proceeding is dismissed with no order as to costs.

SENIOR MEMBER S. KIRTON

APPEARANCES:

For the Applicant	Mr J. Smith in person
For the Respondent	Mr A. Chy in person

REASONS

BACKGROUND

1. In February 2017 Arnold Chy engaged Jason Smith trading as JNS Excavations to carry out landscaping works at the property owned by him in Plenty. Mr Chy had previously used JNS Excavations to clear the site when building his house in 2015. There were two stages of work carried out pursuant to the 2017 engagement. The first, which was commenced in February and was largely completed by July 2017, was to level the backyard and place crushed rock and edging boulders in preparation for a tennis court to be built. These works will be referred to in this decision as "the tennis court works". The second stage, which was done between May and July 2017, was to construct a concrete driveway, path and associated drainage works at the front and side of the property. These works will be referred to in this decision as "the concreting works".

2. Two proceedings (BP140/2018 and BP161/2018) came before me for hearing, and with the consent of the parties these were dealt with as a claim and a counterclaim. These Reasons apply in both proceedings, although the orders made will differ between the two.

3. In this decision, for the sake of clarity, JNS Excavations will be referred to as "the applicant" and Mr Chy will be referred to as "the respondent". These descriptors do not infer anything other than that they are convenient names for the parties. Although Mr Chy's application was first in time, his claims are more in the nature of a response to the claim by JNS Excavations for monies owed, hence the choice of descriptors.

4. The claims made in each proceeding are as follows:

BP161/2018

5. Proceeding BP161/2018 was commenced by JNS Excavations and largely concerns the tennis court works. It seeks payment of monies allegedly due to it as set out in its tax invoice no. 444 dated 19 September 2017[1], being $12,732.50. This tax invoice is for three items of work relating to the tennis court works (items 1, 2, 3 in the table below) and two items relating to the concreting works (items 4, 5 below).

6. It should be noted that JNS Excavations originally made no other claims in respect of the concreting works, but by way of counterclaim or set-off to Mr Chy's claim in proceeding BP140/2018[2], it amended its claim to seek payment of a further amount of $11,640 which it says is outstanding

[1] Exhibit A3
[2] Document dated 12 March 2018

for the concreting works. It also seeks costs for the time spent in these proceedings.

7. A summary of the amounts claimed by JNS Excavations is as follows:

	Item claimed	Amount claimed
Per invoice no. 444		
1	Tip fees 31 loads $90 per load	$3069
2	Trucks and time to remove spoil 46.5 hours at $90 per hour	$4603.50
3	Excavator 30 hours at $90 per hour	$2970
4	Extra drains in concreting works	$1100
5	Top soil taken around backyard and pushed around front yard but not 100% spread	$990
By way of counterclaim or set off in BP140/2018		
6	Balance due for concreting works	$11,640
7	Costs	$3750

BP140/2018

8. Proceeding BP140/2018 was brought by Mr Chy and in it he makes claims for seven items. The first three are in respect of the tennis court works, which he says are defective and incomplete. The fourth, fifth and sixth items relate to the concreting works, and the seventh is for miscellaneous items including damage and costs. His claims are as follows:

	Item claimed	Amount claimed
1	Excavation, grading and removal of spoil from tennis court area due to work done defectively by the applicant	$1298
2	Supply and adjustment of placement of garden rocks	$1364

3	Supply of 50 mm crushed rock, compact, spread and laser grading of the tennis court area	$800
4	Driveway and rear path to be pressure washed and sealed	$3435
5	Credit for cement costs less than the agreed allowance	$7527
6	Credit for avoidable costs, including cement wastage and time	$1241
7	A nominal amount to cover damages to crossover, damage to render, staining of doors, replace broken fence rail, cost of stolen MBT expose agent, site clean and removal of rubbish, time spent dealing with Hanson and finding alternate contractors	$1000

THE HEARING

9. The parties presented their evidence during the course of one day on 10 April 2018 and at the end of the day I reserved my decision. I asked Mr Chy to send the Tribunal a legible copy of the text messages he had referred to in his evidence. He subsequently did this, but also sent other documents which had not been referred to in the hearing. I have had no regard to these other documents in making my decision as the documents were not tendered in evidence and have not been tested, and to do so would be unfair to the applicant.

10. Evidence was given for the applicant by Mr Jason Smith, his partner Ms Amanda Ciurlino, and by subcontractors engaged by the applicant, Mr Joshua Saw, Mr John Linton and Mr Richard Ajani. The respondent gave evidence on his own behalf and used the Tribunal's hearing room facilities to project his photographs and documents on a large screen[3].

THE LAW

11. As can be seen from the nature of the claims made in the claim and counterclaim, the dispute between the parties involves allegations of breaches of the agreement made to carry out both the tennis court and concreting works. It is a "consumer and trader dispute" within the meaning of Chapter 7 of the

[3] This is why the respondent's tendered documents were not given separate exhibit numbers

Australian Consumer Law and Fair Trading Act 2012 ("the ACLFTA") and the Tribunal accordingly has jurisdiction to make orders in this proceeding[4].

THE ISSUES FOR DETERMINATION

12. Before turning to the specific items in the claim and counterclaim, I will address the nature of the agreement between the parties, as my findings in respect of this issue impact on the specific items claimed. This decision is set out in the following order:

    a. The tennis court works – terms and scope

    b. The concreting works – terms and scope

    c. The 3 May 2017 invoice and its effect

    d. The payments made

    e. My findings in respect of the tennis court works claims

    f. My findings in respect of the tennis court works counterclaims

    g. My findings in respect of the concreting works claims

    h. My findings in respect of the concreting works counterclaims

    i. Reconciliation of all claims and counterclaims.

A. The Tennis Court Works - Terms and Scope

13. I have assumed that the tennis court runs north to south, with the south side being the high end of the property furthest from the house, and the north side being adjacent to the garage and alfresco area of the house.

14. The evidence of both parties revealed that they agree on the following matters in respect of the tennis court works:

    a. The parties knew each other from the work carried out at the property in 2015. At that time, the applicant had done the rough site cut and provided a gravel driveway, and had seen the respondent's plans for a future tennis court.

    b. In February 2017 the respondent asked Peter Bourke, who operates an excavating business called Just Digging, to do the tennis court works. Mr Bourke was unable to do so and recommended the applicant. The respondent was happy with the recommendation.

[4] I was not asked to consider whether these works were domestic building works within the meaning of the *Domestic Building Contracts Act* 1995 and have not done so. I am however mindful of the definitions of landscaping in section 5(1)(a),(b),(c) and (f) of that Act.

c. Mr Bourke phoned Mr Smith of the applicant from the site in February 2017. This was not unusual, as Mr Smith says that in his industry, it is common for excavators to share work amongst each other. Mr Saw explains that he, Mr Bourke and Mr Smith often distribute work between themselves, as each operate different size excavators

d. Mr Bourke[5] and Mr Smith gave evidence about the contents of that telephone call, while Mr Chy says he had not listened in.

e. Mr Chy then spoke directly to Mr Smith on the phone and he engaged the applicant to carry out the following works:

- to grade the site in preparation for a tennis court to be built by other contractors, including removing the spoil; and
- to supply and spread crushed rock to form a base for the proposed tennis court.

f. During that phone call, Mr Smith provided an estimate of $2000 for the excavation part of the works. However Mr Smith and Mr Chy disagree on what volume of work was included in the estimate of $2000.

g. The applicant commenced works on 21 February 2017 (having his excavator delivered to site that day) and he worked on site for three days from 22 to 24 February 2017[6].

h. During those three days, 17 truckloads of spoil was removed from the property. Mr Smith says he was able to dispose of six truckloads for free, but had to pay tip fees for the further 11 loads. The parties agree that the applicant told the respondent there would be a charge of $50 per truck to dispose of the spoil after the first six loads. The respondent says that he agreed and paid him $500 in cash to cover that. They disagree on what was included for the $50 per truckload, with the applicant saying it was to cover tip fees only and did not include labour and excavation and the respondent saying it was an all-in figure.

i. The applicant says that as at the end of February 2017, the tennis court had been roughly graded to achieve a fall of 1:100. The respondent denies that the works were complete at that time. Nevertheless, they do agree that the respondent then engage the applicant to carry out the concreting works, and those works commenced in or about April 2017.

[5] Written statement from Mr Bourke Exhibit A1
[6] Invoices from Low Loader Services Pty Ltd dated 28 February and 13 March 2017 Exhibit A2

j. While the applicant was carrying out the concreting works, it continued to carry out tennis court works. There is a live issue between the parties as to whether this was a second scope of work or was part of the original agreement. In any event, the applicant carried out further works to the tennis court area during July 2017.

k. Between February and July 2017, a total of 37 truckloads of spoil were removed from the proposed tennis court area[7].

l. At the respondent's request, in July 2017 the applicant provided further works, including supplying and installing edging boulders around the perimeter of the proposed tennis court. This involved him driving to a quarry near Mansfield to collect the boulders and then placing them on site. The respondent paid $2400 in cash to the applicant for the purchase of the boulders.

m. At about that time he also carried out extra work for the respondent, being the cutting in of a temporary driveway to allow the respondent's tennis court lighting contractor to access the proposed area to install light poles. This was done at no extra cost.

n. Once the excavation and levelling of the tennis court area was complete, Mr Smith arranged for one truck-and-trailer load of crushed rock to be brought to the site and to be spread over the area.

o. The applicant stopped work in early July, after having collected and installed the boulders from Mansfield, but before the supply and spreading of the crushed rock was completed.

15. The parties' evidence differs on the following issues:

a. whether $2000 was an estimate or a fixed price;

b. what work was to be included in the estimate of $2000 - whether it was only the February works or whether it was the whole job;

c. whether there were two separate scopes of work (being the initial one completed in February and a second scope of work requested in July), or whether it was all the one scope of works;

d. what they say was the amount the applicant was actually paid for these works.

[7] Based on the respondent's contemporaneous CCTV recordings, the Invoice of John Linton dated 30 July 2017 (exhibit A5) and the evidence of Mr Smith that he kept a note in his diary

The applicant's evidence

16. Mr Smith says that Mr Bourke told him in the initial telephone call that the work required by the respondent was to remove spoil and grade the area to a 1:100 fall finished level, and then to provide and spread crushed rock over the area as a base for concreting. Mr Bourke also said that he had estimated about six loads of spoil would need to be removed for this job.

17. Mr Smith says that he was familiar with the site and so did not need to visit before providing a quote for the works. He says that when he spoke to the respondent on the phone, he said to the respondent that he could do the work described by Mr Bourke for the price of $2000. He also said to the respondent that he should be able to dispose of the spoil for free which would save him having to pay tip fees. He was aware of a place that would take the six truckloads of spoil for free.

18. Mr Smith says that he based his estimated price on Mr Bourke's advice that there would be six truckloads of spoil to be removed and on his recollection of the site from 2015. Then, he had left the site with a rough scrape in the area of the proposed tennis court and with earth batters around the perimeter of the property. He understood that Besser block retaining walls would be built around the tennis court to retain the battered earth as that was in the 2015 design.

19. Mr Smith says that the scope of the work ended up being much larger than he had originally been told by Mr Bourke. One area of work that increased was the depth of the cut into the batters adjoining the tennis court. Mr Smith says he had allowed for the width of the tennis court plus an extra half metre, to provide room for the Besser block retaining walls allowed for in the design he had seen in 2015. However once he started work, the respondent told him that he was not going to use Besser blocks but instead use large boulders. This meant that the applicant had to excavate an extra one metre in width and length to allow for the rocks, drainage and backfill.

20. In February, after the first six loads of spoil had been removed, Mr Smith told the respondent he would charge him "an extra $50 per load". Mr Smith says that that amount was meant to only include the tip fees and not include his time or labour or materials or subcontractor costs. Ms Ciurlino says that Mr Chy should have known that $50 per load was not enough to cover all the costs, since Mr Chy had already had excavation work done by Smith and this cost a great deal more than $50.

21. Mr Smith says that at the end of the three days in February, he had completed grading the area for the tennis court to achieve a 1:100 fall from the highest corner to the lowest. The finished surface area the court was higher than the level of the existing garage and alfresco area. The

boulders and crushed rock had not yet been placed but he considered that the excavation part of the job had been completed.

22. I asked Mr Smith if he had sent an invoice for the February works and he said no. Ms Ciurlino said that the usual practice was for all the landscaping works to be completed before sending an invoice. Because he was working on-site doing the concreting works, no invoice had been sent. Mr Smith agreed and said that at the end of a job he would use his memory and the notes in his diary to work out what the final invoice would be.

23. The applicant was on-site in April and May 2017 carrying out the concreting works. Mr Smith says that the respondent asked him then to carry out further work to the tennis court area, to lower the overall level so that the north-west corner of the court (the end of the court closest to the house) would be level with the existing garage floor and alfresco area. He was not surprised by this request he says, because they had an ongoing relationship where scopes of work were being discussed and varied as they went along.

24. Mr Smith set up a laser level at the garage slab and measured the depth of excavation that would be required over the area of the tennis court. He said that allowing for 150 mm of crushed rock for the court base, he would have to remove a further 330 mm of spoil over the area of the court. He said to the respondent at that time that there would be "a hell of a lot more dirt to come out" and that there was a big difference between what he had quoted and what he was taking out. He did not tell the respondent how many truckloads there would be nor was there any discussion about the extra cost at that time. The reason given by Mr Smith for not discussing these costs was that there were ongoing works happening at the property and the respondent was well aware that far more spoil had been excavated than the initial estimate of six truckloads. He was also well aware that the applicant had spent three days on site in February and was being asked to spend further time excavating for the tennis court in June.

25. Because the applicant was busy with the driveway works, he engaged Joshua Saw to start the extra excavation of the tennis court area. In his evidence, Mr Saw told the Tribunal that he was on site for one day with an employee, working his 5 tonne excavator from about 7am until 2:30pm when they packed up because of rain. The applicant tendered an invoice sent from Mr Saw to it[8] which indicated that this work occurred on 3 July 2017, but the applicant disputed that was the correct date. Nothing turns on this question and so I need only accept that the work was carried out in late June or early July 2017.

[8] Invoice dated 3 November 2017, exhibit A4

26. Mr Saw says that he met the respondent at the garage and the respondent told him what the levels were to be. Mr Smith was not involved in setting the levels, because he was working on the concrete works. Mr Saw and his employee then shot the required levels and started excavating spoil over the area of the proposed tennis court and the adjacent boulder walls. Mr Saw says that his method of work is to do gradual cuts over the whole area and repeat these until the required depth is reached. In the one day he was there, the depth required was not achieved. He stockpiled the spoil on the site to be put into trucks and removed at a later time.

27. Mr Saw did not return to site again, but one of his employees was engaged sometime later to work with a bobcat spreading crushed rock over the area of the proposed tennis court and also to move soil for the garden bed at the front of the property.

28. The rest of the excavation of the tennis court area was completed by Mr Smith. He says that he finished removing the spoil and loaded it into trucks and arranged for it to be taken away and tipped. When prompted by Ms Ciurlino, Mr Smith agreed that he had spent about a week doing this work and had used his smaller 5 tonne excavator. He mostly used his own tip truck but thought he also used a truck owned by John Linton. There was some discrepancy about when or whether Mr Linton's truck was actually used but nothing turns on this.

29. The applicant stopped work in early July, because, Mr Smith says, he had not been paid. It then sent invoice No. 444 on or about 19 September 2017.

The respondent's evidence

30. Mr Chy says that the price quoted by the applicant over the phone was $2000. He says there was no discussion or mention between him and the applicant of the amount of spoil that would be removed for that price. He also says that he had not listened in to the telephone conversation between Mr Bourke and Mr Smith and so had no idea of how the estimate had been arrived at.

31. He says that when the applicant came to site, and saw that the scope of work was greater in scope than that he had quoted for, he had the opportunity to increase his price. Mr Chy says that Mr Smith did ask for more money and told him he would charge an extra $50 per load. Mr Chy says that he thought that meant $50 per load was the total figure that would be charged. He says that he paid the applicant $500 in cash at that time to cover the extra loads. He also conceded that he would be liable to the applicant for $50 per load for any loads above the ten he had paid for in cash and the six that had been disposed of for free.

32. The respondent disputed the applicant's evidence that he had originally asked only for a minimal amount of spoil to be removed as part of the grading and that he later asked for the court area to be lowered further. He says that from the beginning of the project, the applicant knew that the finished level of the area was to match the existing garage and al fresco area, and that it was the applicant who chose to carry out the work in two stages.

33. He tendered a photograph taken on 22 February 2017, the first day of the tennis court works, which showed that the applicant had commenced making deep cuts into the batters. The applicant agreed that the batter was removed during the February works. Mr Chy says this is inconsistent with the applicant's proposition that only a minimal amount of excavation was required at what he called the first stage of the works.

34. The respondent also tendered a photograph taken in April 2017 which showed that the works were nowhere near complete as that date. Mr Chy says this evidence is inconsistent with the applicant's statement that he had completed the slope in February and was later asked to drop the level further in July.

35. The respondent provided the Tribunal with an arithmetical equation to justify his proposition that the applicant should have known, from the commencement of the job, that far more than six truckloads of spoil would have to be removed. The length of the court platform is approximately 32 m and width is 17 m, making a surface area of 544 m^2. Simply to accommodate the tennis court base, before even allowing for the fall, an excavation of 300 mm deep was required. This equates to the minimum volume of spoil being removed is 163.2 m^3. A factor then needs to be allowed for 'soil swell' or 'bulking', which is the amount the spoil grows in size once excavated. It was submitted that this typically is a factor of 1.5 to 2 times volume of earth excavated. This would mean that the total volume of spoil to be removed would be somewhere between 244 m^3 and 326 m^3. The applicant's truck has a 10 m^3 capacity per load, meaning that somewhere between 25 and 33 trips would have been required. Consequently, the applicant should have known that far more than six truckloads would have been required, even without dropping the levels further.

36. Before setting out my conclusions in relation to the terms and scope of the tennis court works I will set out the evidence in respect of the concrete works, the May 3 invoice and the monies paid, as these all have a bearing on each other.

B. The concreting works - terms and scope

37. Both Mr Smith and Mr Chy gave evidence in relation to the concreting works. They are largely in agreement about the scope of the contract and the price of the works. They both said that while the applicant was on site for the tennis court works in February 2017, they discussed and agreed that the applicant would carry out concreting, drainage and related works for the purposes of building a driveway and path around the dwelling. The area of the concrete was to be 640m2.

38. The respondent says that he recorded the agreement following their discussions by sending a series of text messages to the applicant, at 10:44am on 23 February 2017[9]. The applicant denies having read those messages but does not disagree that the scope of works and included materials was as recorded.

39. The parties also agree that the price for this work was $55,000 including GST. This amount was to include the labour and materials set out in the respondent's text messages.

40. The text messages included a screenshot of the specification for the concrete, as follows:

    - colour back path - "Paradise Beach"
    - colour front driveway and path – "Golden Speckle".

    Both parties agree that they did not adopt that specification in their agreement, but instead they agreed that the applicant was to provide all of the concrete (back path and front driveway and path) in "Paradise Beach" finish. The respondent says that his alfresco area at the rear of the house had already been completed in "Paradise Beach" and he wanted to match that.

41. However in about June 2017, before the concreting works were commenced, the scope of work was varied, by agreement, to replace the finish of all the concrete from "Paradise Beach" with "Golden Speckle". The respondent says that this variation occurred because the supplier of the concrete increased the price of "Paradise Beach" between the time of the agreement and the supply of the concrete. He says that the applicant told him that he "doesn't have enough money for the Paradise Beach" at the increased price. The parties gave complimentary evidence that they tried other suppliers to find a solution, but that they were unable to find a satisfactory match. The respondent then instructed the applicant that he would accept the whole area to be concreted in "Golden Speckle".

[9] Exhibit R1

42. They also agree that the applicant commenced the concreting works in July 2017, but ceased work before the concreting works were completed. He says that he did so because he had not been paid.

C. The May 3 invoice

43. Ms Ciurlino, Mr Smith and Mr Chy all agreed that in May 2017, the respondent applied to his bank for a loan to cover the applicant's works. On 2 May 2017 at 2:04pm, the respondent sent a text message to the applicant in which he said:

> [The bank] want the following:
>
> Formal quote with scope of works and adequate detail of specifications like in the Signature Concrete quote.
>
> To include all amounts, outstanding balance and receipt of payments made to date (I've outlined that below)
>
> Certificate of currency for insurance (given its over $5k)
>
> $2k excavation, removal and grading of tennis court area with 1:100 falls in two directions
> - paid $2k ($0 balance) Feb 22 2017
> - status: work in progress
>
> $2.4k supply and placement of garden landscaping rocks (quantity equivalent to fill a truck and trailer) along the western and southern boundaries of the tennis court area
> - paid $1k ($1.4k balance Feb 23 2017)
> - paid $1.4k ($0 balance Feb 24 2017)
> - status: not started
>
> $1.3k supply, compact and laser grading of tennis court area with 50mm nominal thickness of road base
> - no payments made ($1.3k balance)
> - status: not started
>
> $50k exposed aggregate driveway in Paradise Beach with remainder of the Specifications as per 'Signature Concrete' referenced quote.
> - paid $2k ($48k balance) Apr 10
> - paid $3k ($45k balance) Apr 12
> - paid $4923.48 ($40,076.52) balance Apr 18
> - status: not started[10]

44. The respondent advised that these figures add up to $55,700, which when 10% GST is added, total $61,270.

45. Ms Ciurlino says that she had not seen that text message. She says that at Mr Smith's request, she prepared an invoice and sent it to the respondent in draft form. The amount claimed in the invoice was $61,270 and she says that she was told that figure by Mr Smith. Mr Smith says that he had

[10] Exhibit R1 text message 2 May 2017 2:04pm

obtained that figure from his diary, and that it was in his diary because Mr Chy had told it to him.

46. On 3 May 2017 at 10:49am, the respondent sent an email[11] back to the applicant in which he asked the applicant to redraft the invoice using specific wording and requiring the amounts that had already been paid to be listed. The respondent says that this format was required by his bank.

47. Ms Ciurlino prepared a new version of the invoice, adopting the format and amounts specified in the email sent by Mr Chy, and returned the invoice to him.

48. The wording of the invoice (which copied the wording specified in the email from Mr Chy) was as follows:

> Scope of works to be carried out at 1 Stacey Crt Plenty
>
> Level area in backyard for tennis court -
> including excavation, removal of spoil and grading of tennis court area with 1:100 falls in two directions.
>
> Supply and place landscaping garden rocks for retainer down one side and rear of court and spread top soil around rear yard.
>
> Prepare driveway and paths for drainage and concrete.
>
> Laser level and compact tennis court area with crushed rock once all areas are prepared.
>
> Pour concrete in aggregate "Paradise Beach" – thickness 100mm min
> * Total area approximately 640m2
> * Supply and fit drains, F82 mesh, bar chairs and construction joints
> * Surface spray with prime retarder and aliphatic alcohol
> * Following day, spray and remove surface to expose stone
> * Diamond saw cuts
> * Acid wash and detail
> * Apply 2x coats of premium sealer
> * Clean and tidy work site
>
> Amount $61,270 incl. GST
>
> Payments received
> $2000.00 Feb 22 2017
> $1000.00 Feb 23 2017
> $1400.00 Feb 24 2017
> $2000.00 April 10 2017
> $3000.00 Apr 12 2017
> $4923.48 Apr 18 2017[12]

[11] Exhibit A6
[12] Exhibit A7

D. The payments made

For the Concreting Works

49. As set out at paragraph 39, the parties agree that the price for the concreting works was to be $55,000 including GST. They also largely agree on the amount that the respondent has paid for the concreting works. The difference between them is $534.30. Mr Chy says that he has paid a total of $49,034.30, leaving a balance of $5,965.70 owing. He paid these amounts either to the applicant or to suppliers on behalf of the applicant. Ms Ciurlino says that she was unable to be sure exactly how much had been paid, but thought that $6,500 was still owing. Mr Smith explained his uncertainty by saying that some payments had been made in cash ostensibly for the concrete works, but he had applied them to the tennis court works. Mr Chy agreed that this had occurred on occasion, and gave the example of having paid $2,400 for the purchase and delivery of garden rocks and then having paid that amount again when it was time for the rocks to be actually purchased and delivered, as the monies had already been spent on other works.

50. Neither party has produced any supporting documentary evidence as to the cash payments made. I was shown some receipts for some materials but no bank statements or other receipts to prove the payments made in cash. I must make a finding on the amount paid, despite the lack of evidence, and I will accept the respondent's figure of $49,034.30 given the applicant's concession that it could not be sure exactly how much had been paid. It follows that I find that $5,965.70 is the balance outstanding under the agreement for the concreting works.

For the Tennis Court Works

51. In respect of the tennis court works, there is no agreement on how much was actually paid. The applicant is unable to say precisely how much has been paid and for which items of work.

52. Despite this, the applicant says that it ceased working because it was owed money. Mr Smith says that by September 2017, the respondent knew he owed the applicant $9500. He says that when it was time for him to provide the garden rocks from Mansfield, the respondent had already paid him $2400 for these but he had spent that money on other works. He asked Mr Chy for the $2400 again, and says he told him that he owed him $9500 anyway. He says that he showed Mr Chy the pages in his diary which recorded the amounts owing. I do not accept that Mr Smith kept records in his dairy which actually documented the time and amounts he had spent, or that he showed them to Mr Chy. He failed to produce the diary to the Tribunal and on the one occasion when he said he used his diary to come up with the amount for the May 3 invoice (see paragraph

45), he admitted that the amount was in his diary because Mr Chy had given it to him.

53. At one point in his evidence, Mr Smith said that he understood that the respondent would pay for materials and pay the applicant its labour costs, but that that arrangement became confused when the respondent made cash payments which the applicant applied to materials but which the respondent considered had been towards the labour costs. For example, Mr Smith said that the respondent handed the applicant $1000 with which it purchased the crushed rock; then however the respondent said this was payment of labour costs.

54. The respondent has provided a list of the payments he says he made, but with no supporting documentary evidence. These total $5,700. I find that he, like the applicant, treated the payments to be made on an informal basis. For example, at one point he was having difficulty raising enough funds to continue, and asked the applicant to use monies allocated for one task to another[13]. When the applicant told him that he would have to pay tip fees in February 2017, the respondent gave him $500 in cash, but has not apparently recorded the $500 cash payment in his list. A further example is that in May 2017 the applicant asked the respondent for $4000 so it could purchase a part for its truck, and the respondent gave him $3500, seemingly without any discussion on whether or how that would be applied to the agreed price for the works[14].

55. Nevertheless, I must make a finding on the amount paid, despite the lack of evidence, and I will accept the respondent's figure of $5,700, given it is the only evidence put before me. The onus is on the applicant to keep adequate business records, and if it does not, it wears the risk of not being able to recover amounts it alleges are due.

56. Accordingly, I find that the respondent has paid a total of $54,734.30 to the applicant for both works.

FINDINGS - THE APPLICANT'S TENNIS COURT WORKS CLAIMS

57. The genesis of these proceedings lies in the failure (by both parties) to adequately discuss and agree in advance on the cost of the works. While a fixed price had been agreed for the concreting works, there was no specific agreement between the parties in respect of the tennis court works.

58. Further, there was no formal structure agreed for when payments were to be made. No staged payment arrangement was discussed and no deposit was paid. As detailed at paragraphs 49 - 54 above, payments were made

[13] Exhibit R1 Text message 29 April 2017 11:01am

[14] Exhibit R1 Text messages 2 May 2017 11:42am, 3 May 2017 1:05pm, 1:09pm, 3:15pm. No evidence was led from either party of any verbal discussions about the truck repairs

on an ad hoc basis, with no records being kept by the applicant[15] and the respondent not always having funds available. It seems to me that both parties were working on the basis that cash would be handed over when asked for, and "it would all be sorted out at the end"[16].

59. Based on the circumstances surrounding the making of the May 3 invoice, I conclude that the agreement between the parties as at 3 May 2017 was that the applicant would be paid the sum of $61,270 for both the tennis court and concreting works. The respondent prescribed the amount of money due to the applicant for both scopes of work (by its text message and email), and the applicant agreed to that sum (by sending its draft and final invoices) and accordingly I find that this amount was the amount due under the agreement.

60. The question then is whether the agreement was varied subsequently to 3 May 2017, and if so, whether the applicant is entitled to further payment for the tennis court works.

61. I do not accept that the agreement was varied in respect of the tennis court works. I accept the evidence of the respondent that the applicant knew the required finished level of the court from February.

62. Mr Smith presented as someone who may be skilled at performing the physical works required on site, but his contract administration and record keeping skills leave a lot to be desired. He conceded in his evidence that the applicant originally estimated $2000 to do the works, but then increased that by $50 per load when he realised that more than six loads would be required. He then assumed that the respondent would know that he would be charged more again at the end of the job. He was then given the opportunity to revisit the amounts when the respondent asked him to prepare his invoice in May. Instead of doing that, he accepted the respondent's figures of $5,700 plus GST for the tennis court works. The wording of the invoice clearly indicates that the amount is for the complete tennis court works and includes "excavation", "laser level and compact … once all areas are prepared".

63. Further, the photograph taken in April 2017 shows that there were considerable works still to be done as at the date of the invoice (see paragraph 33); if the applicant considered that $5700 was not enough to complete the works, then it had the opportunity to say so as at 2 May 2017. Further, the arithmetic provided by the respondent (see paragraph 35) indicates that the applicant failed to turn its mind to the nature of the work required in February, and again in May. That is consistent with what I consider to be its poor business management skills.

[15] At least, none were produced in evidence
[16] Evidence of Mr Smith

64. Further, Mr Saw's evidence was that it was usual to do gradual cuts over the whole area and repeat these until the required depth is reached. That is consistent with how the works were carried out.

65. Accordingly, I find that the applicant is not entitled to payment for items 1, 2 and 3 of its tax invoice no. 444 dated 19 September 2017

FINDINGS - THE RESPONDENT'S TENNIS COURT WORKS COUNTERCLAIM

66. I will now address each of the respondent's claimed items in respect of the tennis court works in turn:

Grading not completed satisfactorily - $1298

67. The respondent says that these works have been carried out defectively and have not been completed. He showed a photograph of the site which showed puddles of water and says this is evidence that the grading was wrong. The applicant agreed that it had not completed the supply and spreading of the crushed rock but denied that the grading was incorrect. It says that the puddles could be the result of rain and/or a lack of drainage, and that drainage was not part of its works. I advised the respondent during the hearing that without any further evidence about the adequacy of the grading of the site I was not in a position to make any findings as to whether it was defective or not (based on one photograph). He conceded that he was unable to prove this item of his claim.

Supply and adjustment of placement of garden rocks - $1364

68. The edging boulders were supplied and placed around the proposed tennis court site by the applicant. The respondent says that the placement of some boulders had to be adjusted, as they were not placed in straight lines. The applicant says that the final placement had not been completed, and that would have been done after the drainage and backfilling behind the boulders was completed (which was not part of its scope of works).

69. The respondent says he had engaged a new contractor to complete this work at a cost of $1364. He provided a tax invoice from Accession Landscaping dated 2 November 2017[17] for this amount. The invoice states:

[17] Exhibit R1

"10 hours …[indecipherable]/tipper/excavator hire at $100/hour $1000
1 hours travel at $100/hour $100
1 tip $140
Total $1240
GST $124
Total plus GST $1364"

70. No-one from Accession Landscaping gave evidence. The applicant says in response that he had spoken to Accession Landscaping and was told that he had spent 2 hours moving the boulders – not the 11 hours which is claimed. The applicant says that had he completed the job, it would have taken him 1 to 2 hours to put the rocks into alignment.

71. It is obvious from the wording of its invoice that Accession Landscaping carried out more work than simply aligning the boulders. For example it includes tip fees and travel which would not have been required when moving boulders. Accordingly I do not accept the full amount of the invoice is the true cost of this item. I will allow the respondent 2 hours for this work.

72. Accession Landscaping have charged $100/hour plus GST, whereas the applicant's hourly rate is $90/hour plus GST. I must decide which is the appropriate rate to allow the respondent. In circumstances where the applicant did not complete the work because it says it was owed monies, and where I have found that no monies were in fact owed, I accept that the respondent was entitled to engage another contractor to move the rocks. Accordingly I will allow $220 for this item.

Supply of 50 mm crushed rock, compact, spread and laser grading of the tennis court area $800

73. This claim is for the cost to complete the crushed rock to the tennis court, to be carried out by a new contractor. The parties agreed this work is outstanding and the applicant agreed that the amount claimed is a reasonable price for the work.

74. Accordingly I will allow $800.

FINDINGS - THE APPLICANT'S CONCRETING WORKS CLAIMS

75. For the reasons set out at paragraph 59, I find that as at 3 May 2017 the agreement between the parties in respect of the concreting works was for a fixed sum of $55,000 including GST.

76. As with the tennis court works, the question is whether the agreement was varied subsequently to 3 May 2017, and if so, whether the applicant is entitled to further payment for the concreting works, being items 4 (extra plumbing pipes) and 5 (moving topsoil) of its claim.

Extra plumbing costs - $1100

77. Mr Smith's evidence was that he had allowed for 16 m of drainage in the original price, based on the agreed scope of works for the concreting. The applicant put in two extra strip drains, one at the back of the garage and one across the side path, to allow for better falls of the driveway. This meant that instead of 16 m, he installed 23 m of drains. Ms Ciurlino tendered photocopies of invoices for the extra materials, which totalled $261.45. She says there was also extra glue and labour required and the total claim was $700.

78. Mr Richard Ajani gave evidence for the applicant, that he was the concreter who boxed in the front drive and path, suggested the design requiring the extra drains and installed them. He also gave evidence that he had spent five days in total on this job at a rate of $500 plus GST per day.

79. The respondent agreed that the design of the drains had been altered, but disputed the amounts claimed. He also says that the drain behind the garage had simply replaced a drain shown in the original design and so no extra should be allowed for that work. Mr Ajani says that the new drain behind the garage was in fact longer than the one shown on the original design.

80. I accept that the requirement to install extra metres of drainage was not known as at 3 May 2017, that it was done at the respondent's request and for his benefit, and that the cost of doing this was $700 to the applicant. I will allow this amount.

Moving topsoil - $990

81. I accept that the applicant carried out this work and accept that it was not part of the original scope of works. There is no mention in the May 3 invoice of the spreading of topsoil. Mr Smith says in his evidence that he agreed to do this while he had a bobcat on-site. Mr Saw gave evidence that it was one of his employees who carried out this work, and that he charged the applicant for this.

82. No evidence was given as to the amount claimed. Mr Saw's invoice to the applicant notes 7 ½ hours on site on 17 July 2017 for "use of Posi track", which he says was part of this work. In the absence of any better evidence, I will allow the applicant two hours of labour at its rate of $90 plus GST for this item, being $198.

Balance of contract sum - $11,640

83. Further, the applicant claims for the balance of the payment due for the concreting works under the agreement. In its points of defence and

counterclaim, it says this amount is $11,640. During the hearing, Ms Ciurlino says that that figure is what the applicant owes its subcontractors on this job. It is not the amount that the respondent still owes the applicant. As set out at paragraph 50, I have found that the balance of the contract sum outstanding is $5,965.70 and I will make an allowance for the monies outstanding in the final reconciliation.

FINDINGS - THE RESPONDENT'S CONCRETING WORKS COUNTERCLAIM

84. I will now address each of the respondent's claimed items in respect of the concreting works in turn:

Driveway and rear path to be pressure washed and sealed - $3435

85. The respondent says that these works have not been completed and the amount claimed is the cost to complete by others. It is made up of the following items:

    a. $500 for pressure washing which was carried out by CS Pressure Washing, although the respondent was unable to provide any invoice or proof of payment for this work having been done.

    b. $1815.74 being the cost of sealer and other materials in accordance with receipts from Bunnings and Parchem[18]. The receipts show that 12 drums of sealer were purchased by the respondent.

    c. The balance of the claim is a nominal labour rate of 4 man days; the respondent says that he and his father actually carried out the work over two days.

86. The applicant's response to this claim is that he would have carried out these works had he completed the job and he would accept that $2000 was the reasonable cost of completing them, rather than $3435.

87. The applicant says that he would have used 8 drums of sealer had he completed this work, as 20 litres is sufficient for two coats over 100m2 and the area of concrete to be sealed is 640m2. I note that the specification (set out in the text messages from the respondent[19]) nominated only 2 drums of sealer as being included in the scope of works.

88. Accordingly I do not accept that the applicant is liable under the tennis court scope to provide 12 drums of sealer. His evidence was that he would have allowed for 8 drums of sealer had he completed the works, and while this is more than strictly specified, I will accept this evidence.

89. I will allow the amount of $2000 for this claim for the following reasons:

[18] Respondent's Summary of Counterclaim Amounts and Exhibit R1
[19] Exhibit R1

a. the lack of documentation proving that $500 was a reasonable figure for the pressure washing;

b. the specification for the amount of sealer combined with the respondent's evidence that 8 drums is a reasonable allowance; and

c. the fact that the respondent and his father are not skilled labourers and so I cannot accept that their estimate of 4 man days is reasonable.

Credit for cement costs less than the agreed allowance $7527

90. This claim is for a credit allegedly due to the respondent as a result of the agreed variation changing the concrete finish from "Paradise Beach" to "Golden Speckle".

91. The respondent calculates that the difference in price between the "Paradise Beach" and the "Golden Speckle" finishes was $7527. His calculations are based on the prices he had obtained in February 2017 from another concreter (Elite Signature Concrete), and which were shown to the applicant in the text messages[20]. He says as follows:

a. The originally quoted price (by Elite Signature) for "Paradise Beach" was $463 m³ including GST and truck wash out fee;

b. The originally quoted price (by Elite Signature) for "Golden Speckle" was 338 m³ including GST and 'enviro' and truck wash out fee;

c. The amount of concrete required was 61 m³;

d. The difference between the two amounts x 61 m³ is $7527[21].

92. The applicant says that at the time the variation was discussed and agreed to, there was no discussion about any change in the contract price. It says that in any event, it carried out other items of work at the request of and for the benefit of the respondent for which it has not charged, and that the parties had agreed there would be some "give and take" on the amounts to be charged.

93. No evidence was provided to show what amounts the applicant had actually allowed for the "Paradise Beach" or what it had actually paid for the "Golden Speckle". I do not accept that estimates of rates given by another contractor (Elite Signature) in February 2017 are sufficient evidence of what rates the applicant was or was not required to pay in July 2017. It is possible that just as the "Paradise Beach" went up in price

[20] Exhibit R1

[21] I note that the result of this equation is slightly higher than the amount claimed, but the respondent said this is due to the wash out fee variables. He confirmed at the hearing that he seeks the lesser amount.

(leading to the variation), so too did the "Golden Speckle". But I have no evidence before me one way or the other.

94. Further, throughout this job it was the respondent who told the applicant what amounts the applicant should charge for its works, and the applicant which went along with what it was told. This is apparent from the making of the May 3 invoice. In light of this relationship, I find it more likely than not that the respondent would have said something to the applicant at the time of the change to "Golden Speckle" if the respondent had expected a credit as a result of the variation. No evidence was put to me by the respondent of such a conversation. Mr Smith denied any such conversation.

95. Accordingly I do not allow this claim.

Credit for avoidable costs incurred by the applicant, including cement wastage and time $1241

96. As it is a fixed price contract, no credit is due to the respondent. The respondent's obligation was to pay the applicants the agreed sum of $55,000 (or such other sum as may have been agreed by variation). Whether or not the applicant has wasted materials or time is of no consequence to the respondent.

A nominal amount to cover miscellaneous items $1000

97. I do not allow this item. The claim relates to works that would have been completed had the applicant completed the job (the brick cleaning, site clean), some repairs (broken fence, cross over), allegedly stolen materials and the respondent's time. The respondent provided some photographs in his application but no evidence was led during the hearing and the applicant was not given the opportunity to address these items. No break down of the amount was provided, other than Mr Chy's statement that it was a nominal sum. I do not have enough evidence before me to be able to conclude that the items were the applicant's responsibility or what amount they would cost the respondent to rectify. Insofar as the claim is for his time, that is not an item compensable at law[22].

FINAL RECONCILIATION

98. As a result of my findings above, the amounts due are as follows:

Due to applicant		
4	Extra drains in concreting works	$700

[22] *Cachia v Hanes* [1994] HCA 14 at [6]

5	Top soil taken around backyard and pushed around front yard but not 100% spread	$198
6	Balance due for concreting works	$5,965.70
Due to respondent		
2	Supply and adjustment of placement of garden rocks	$220
3	Supply of 50 mm crushed rock, compact, spread and laser grading of the tennis court area	$800
4	Driveway and rear path to be pressure washed and sealed	$2000

99. The total due to the applicant is therefore $6863.70. The total due to the respondent is $3020. I will set off these amount against each other, with the result that the respondent must pay the applicant $3834.70.

COSTS AND FEES

100. Both parties applied for their costs of the proceedings. I note that neither party was legally represented throughout the proceedings and the cost they seek relate to the time they spent in preparing and conducting their cases. These 'costs' are not costs within the meaning of section 109 of the *Victorian Civil & Administrative Tribunal Act* 1998. Further, as the High Court has held, the 'costs' provided for in the [Court] Rules do not include time spent by a litigant who is not a lawyer in preparing and conducting his case. They are confined to money paid or liabilities incurred for professional legal services. It is only in that sense that the Rules speak of 'costs'[23]. Accordingly I do not allow any amounts for costs.

101. I will make an order in respect of the filing fees paid by each of them that each party must bear their own. I note that section 115B of the *Victorian Civil and Administrative Tribunal Act* allows the Tribunal to order the reimbursement of fees to a party who has substantially succeeded against another party. In light of my findings above, neither party has been substantially successful.

[23] *Cachia v Hanes* [1994] HCA 14 at [6]

CONCLUSION

102. The orders to give effect to the above findings are as follows:

1. In proceeding BP161/2018:

   a) the respondent (Chy) must pay the applicant (Smith) the sum of $3834.70.

   b) No order as to costs.

2. In proceeding BP140/2018:

   a) In light of the orders made in proceeding BP161/2018, this proceeding is dismissed with no order as to costs.

SENIOR MEMBER S. KIRTON