VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP807/2018

CATCHWORDS

DOMESTIC BUILDING–Oral agreement as to payment–Ascertaining terms of oral contract concerning method of payment of the sub-contractor engaged to lay bricks and blocks–whether hourly rate or per brick/block rate–conduct of the respondent contractor consistent with the existence of an express oral term of the type contended for by the applicant sub-contractor–evidence of the sub-contractor preferred on this basis.

SCOPE OF WORKS–Ascertaining terms of oral contract concerning scope of work undertaken by sub-contractor–whether the sub-contractor had demonstrated that the works undertaken by it extended to certain other works undertaken by it beyond the laying of bricks and blocks–found on the evidence that it had done so.

EVIDENCE–*Jones v Dunkel*–Finding that the evidence of an uncalled witness would not have assisted the case of the respondent.

APPLICANT	WW Archer Pty Ltd (ACN: 120 669 641)
RESPONDENT	MIRA Group Pty Ltd (ACN: 130 222 338)
WHERE HELD	Melbourne
BEFORE	A T Kincaid, Member
HEARING TYPE	Hearing
DATE OF HEARING	22-23 July 2019, 19 August 2019, 20 September 2019 (closing submissions)
DATE OF ORDER	19 December 2019
CITATION	WW Archer Pty Ltd v MIRA Group Pty Ltd (Building and Property) [2019] VCAT 1998

ORDER

1. The respondent must pay the applicant $47,019.50
2. Reserve the questions of interest and costs.
3. Should the parties not be able to agree interest and costs, there is liberty to apply. **Upon any application, the principal registrar is directed to fix the matter before Member Kincaid, allow 1 hour**.

A T Kincaid
Member

APPEARANCES:

For Applicant	Mr R A Fink of Counsel.
For Respondent	Mr C King of Counsel.

REASONS

1. The applicant ("**Archer**") carries on business as a bricklayer and scaffolder. Mr Archer is a director of Archer. He is also a registered scaffolder.

2. The respondent ("**MIRA**") was engaged to perform residential construction works at addresses in Glen Iris and Heidelberg. MIRA engaged Archer to perform some of the works as a sub-contractor.

3. The parties did not record in writing the terms of Archer's engagement and, as a result, they fell into dispute. The outcome of the proceeding has been largely determined by my findings as to what was orally agreed in discussions between Mr Archer and the director of MIRA, Mr Antonacci.

General description of the works

4. Archer laid the brick eastern elevations of the Glen Iris development, which comprises eight dwellings running north-east off Malvern Road. Archer also laid concrete blocks there, mainly at the development's front entrance, in an area between dwellings 4 and 5 and at the rear of the development.

5. In respect of the Heidelberg development, Archer laid a concrete block boundary wall along the south and east elevations, containing formed gaps for the insertion by others of laser cut steel panels to be bolted to the blockwork, and with "capping" blocks along the top.

6. Concrete blocks of the type laid by Archer at both developments are larger than the standard clay or concrete bricks. They have manufactured penetrations in them for the placement of vertical and horizontal reinforcement, and for accommodating vertical "starter bars" usually recessed into the footing to facilitate the laying of the first courses of blocks. The blocks are filled with cement-based mortar or concrete, for stability, as the laying progresses.

Issues

7. The issues in the proceeding are:

   (a) whether, as contended by Archer, a term of the oral arrangement was that Archer was entitled to be paid on an hourly basis for the laying of bricks and blocks (and for the wall capping at the Heidelberg development) or whether, as contended by MIRA, the agreement was that Archer was entitled only to be paid on a "per brick" and "per block" basis; and

   (b) whether Archer also carried out certain further works, allegedly undertaken at the request of MIRA, being:

      (i) scaffolding services at the Glen Iris development;

(ii) the placement of vertical and horizontal reinforcement (including vertical Y12 "starter bars"[1]) inside the concrete blocks at both developments; and

(iii) the core filling of blocks with concrete (the "**further works**").

8. If the answer to issue (a) was to the effect that Archer is entitled only to charge on a "per brick" and "per block" basis, and not on an hourly basis, and the answer to any part of (b) is "yes", it would have been necessary to determine a fair rate for the further works. Because I have found in favour of Archer in respect of the claimed "hourly charge" terms of payment as extending also to the further works, it is unnecessary for me to determine a fair rate.

State of account between the parties

Glen Iris

9. In respect of the Glen Iris development, Archer rendered invoices amounting to $47,134.35. Archer claims the balance alleged to be owing of $35,949 as follows:

Invoice 304	15 August 2017	$11,185.35
Invoice 311	17 September 2017	$13,585.00
Invoice 317	2 December 2017	$17,711.00
Invoice 318	18 December 2017	$4,653.00
	TOTAL	$47,134.35
	Less paid in respect of invoice no. 304 on 18 September 2017.	$11,185.35
	TOTAL CLAIMED	**$35,949.00**

10. MIRA says that Archer is entitled only to render invoices to a total of $25,478.20. This is comprised of:

(a) $24,147.20 pursuant to an alleged oral agreement of "$1.60 for each brick laid" (being $1.40 per brick, and a further 20 cents per brick for coloured mortar);

(b) $1,100.00 for 200 blocks at $5.50 per block; and

(c) $231.00 for 7 lineal metres of capping at $33 per lineal metre.

11. Following a deduction of $11,185.35 being the amount agreed as having been paid by MIRA, MIRA therefore contends that a balance of only $14,292.85 is owing.

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[1] A "starter bar" is a steel reinforcing bar embedded in concrete through a construction joint to bind adjoining masses of concrete together.

Heidelberg

12. In respect of the Heidelberg development, Archer rendered invoices amounting to $19,785.25. It claims the balance alleged to be owing of $11,070.50, as follows:

Invoice 307 (paid)	29 August 2017	$8,714.75
Invoice 312	26 September 2017	$11,070.50
	TOTAL	$19,785.25
	Less paid in respect of invoice no. 307 on 6 November 2017	$8,714.75
	TOTAL CLAIMED	**$11,070.50**

13. MIRA says that Archer was only ever entitled to render invoices in the amount of $11,350 for the Heidelberg works. This amount is comprised of:

    (a) $9,350 pursuant to an alleged "$5.50 for each block laid" agreement; and

    (b) $2,000 for capping.

14. Following a deduction of $8,714.75 for the amount agreed as having been paid by MIRA, MIRA contends that a balance is therefore owing of $2,635.25.

Respondent has not paid the conceded liability

15. Notwithstanding MIRA's total conceded liability to Archer of $16,928.10, as appears from the above summary, I was informed during closing submissions, surprisingly, that no part of this sum has yet been paid by MIRA to Archer.

The hearing

16. The hearing lasted for 3 days, plus a fourth morning for closing submissions.

17. Evidence was given by Mr Archer and Antonacci.

18. In respect of the further work claimed to have been performed by the applicant, beyond the laying of bricks and blocks:

    (a) Archer also called Mr Burns, a bricklayer employed by Archer on the Glen Iris development, and a Mr Braun, a graduate science student who worked for Archer on the Glen Iris development on a casual basis; and

    (b) MIRA called Mr Benjamin Shaw, Mr Rhys Hawthorne and Mr Fraser Pope, all engaged by MIRA in various capacities on the Glen Iris development, and a Mr Cervie, a carpenter engaged on the Heidelberg development.

19. Archer also called Mr Nathan Grimes, Quantity Surveyor. MIRA called Mr Edmund d'Cruz, Quantity Surveyor. The respective reports of these gentlemen are also in evidence.

20. Mr Grimes was engaged to "ascertain the reasonable pricing for the masonry [and associated] works" at the two addresses. Quite why Mr Grimes was requested to do a remeasure was unclear to me. Mr Fink, counsel for Archer, informed me that it was because the reasonableness of the invoices submitted by Archer had been put into issue. Mr King, counsel for MIRA, denied that this was so. I understood this to mean that MIRA "stood or fell" by its denial that the arrangement was an hourly rate basis, contending that payment agreed was on respective "per brick" and "per block" rates.

21. Mr Fink also explained that a collateral purpose of the Grimes report, if the reasonableness of the hourly bricklaying charges was not in contention, was to provide some costings for the extra works alleged to have been carried out by Archer. These matters may become relevant to any costs application.

Issue 1: Payment of Archer on an hourly basis or per brick/block basis

22. Both parties rely on terms that each says were agreed orally. It therefore requires the Tribunal to make findings as to what was orally agreed.

The Glen Iris development

Archer's case

23. The Points of Claim allege that the Glen Iris agreement was constituted by a verbal agreement between MIRA's site foreman Mr Skipper and Mr Archer on about 23 July 2017. Mr Archer gave evidence that the agreement was on 22 July. He said that he was asked by Mr Antonacci to meet with Mr Skipper about the job.

24. Mr Archer had previously met Mr Skipper, because he was MIRA's site foreman on another job in which Archer had been engaged at Manningham Road, Lower Templestowe.

25. The terms of the Manningham Road development are evidenced by an invoice of Archer dated 14 March 2015 covering the period from 11 March 2015-30 April 2015. Those works included:

- the laying of bricks;
- the laying of concrete blockwork;
- associated scaffolding work;
- the core filling of blockwork; and
- block saw cutting.

26. The works at the Manningham Road development were charged at an hourly rate. Mr Archer tendered Archer's price schedule dated 2014 that he said he gave to Mr Skipper prior to the Manningham Road works, showing a "payment per brick" option, and the hourly rate option, and that he agreed an hourly rate option with Mr Skipper.

27. Mr Archer gave evidence that the terms of the Glen Iris agreement were agreed as being the same as the Manningham Road development.

28. Mr Archer gave further evidence that the oral agreement that he reached with Mr Skipper on behalf of MIRA was that:

    (a) payment of Archer would be calculated on the basis of hours worked on site by Archer's bricklayers and assistants, plus the cost of materials supplied (excluding bricks and blocks, which were all supplied by MIRA) and the cost of materials supplied and equipment hired;

    (b) Mr Skipper would record the hours worked by Archer's employees in his diary, which would be cross referenced, if required, with the diary entries of hours in Mr Archer's diary;

    (c) that the hourly rates used for the Manningham Road job would apply to the Glen Iris job, increased by 10% to allow for rising costs and inflation; and

    (d) the works would start on 25 July 2017, which they did.

29. Mr Archer gave evidence that pursuant to the terms of the retainer, Archer rendered invoice no. 304 dated 15 August 2017 in the sum of $11,185.35 for services performed between 25 July 2017 and 11 August 2017 which, he contended, reflected the agreed hourly rates, and that it was paid by MIRA on 18 September 2017 without protest. Archer submits that the conduct of MIRA here was entirely consistent with the existence of a term as to payment for which Archer contends.

MIRA's case

30. The amended points of defence state, without any particulars, that there was "an agreement" between the parties that Archer would perform the laying of bricks on a per brick basis of $1.40 per brick, and a further 20 cents per brick for coloured mortar.

31. Mr Antonacci gave evidence that the agreement was oral, and was made at a site meetings attended by himself and Mr Archer at the Glen Iris development, prior to Archer commencing works.

32. To the extent that Archer has charged for further works at Glen Iris, allegedly performed by the applicant, that is to say, associated scaffolding work, block laying, the core filling of blockwork and block saw cutting, that amount is unrecoverable says MIRA, as it went beyond the "lay bricks" only retainer.

Heidelberg development

Archer's case

33. In regard to the Heidelberg retainer, Mr Archer gave evidence that Mr Antonacci called him twice and asked him to help on the Heidelberg development.

34. The Heidelberg development involved principally the erection of a substantial blockwork fence. That was in about August 2017. Mr Archer alleges that on about 15 August 2017 (about the time of his first invoice for Glen Iris, the one that was paid) Mr Antonacci asked him to leave the Glen Iris development, and start work at the Heidelberg development immediately. Archer started work at the Heidelberg development on 18 August 2017.

35. Mr Archer gave evidence that pursuant to the terms of the retainer, Archer rendered invoice no 307 dated 29 August 2017 in the sum of $8,714.75 for services performed between 18 August 2017 and 22 August 2017 at the agreed rates, and that it was also paid by MIRA on 6 November 2017 without protest.

36. Archer submits that the conduct of MIRA here was again entirely consistent with the existence of the term as to payment for which Archer contends.

MIRA's case

37. The amended points of defence state, again without any particulars, that there was "an agreement" between the parties that Archer would perform the laying of bricks on a per brick basis of $1.40 per brick, and a further 20 cents per brick for coloured mortar.

38. Mr Antonacci contends that there was a further meeting between himself and Mr Archer on 24 July 2017 at Heidelberg, when it was orally agreed that Archer would lay blocks at a rate of $5.50 per block, and also be paid a lump sum of $2,000 for capping.

39. Mr Antonacci says that he provided 1,700 blocks for Archer to lay, making a total chargeable by Archer $11,350**.**

40. Mr Antonacci contends that to the extent that Archer has billed for further works allegedly performed by Archer at Heidelberg, that is to say, core filling, measuring and cutting reinforcement, that amount is unrecoverable, as it went beyond the "lay blocks" retainer.

Discussion-evidence of express term contended for by the applicant

41. If there is conflicting evidence of alleged oral express terms, as is the case here, support for the existence of such a term may be found from the conduct of the parties. That is to say, insofar as parties to a contract have conducted themselves in a way that is consistent with the existence of an

alleged express term, the law will find, by inference of actual intention, that there was such a term.[2]

42. The Tribunal is also entitled to consider the subsequent conduct of the parties as part of the process of assessing the credibility of the evidence given by each of them, concerning the content of their oral agreement.

43. The first issue in dispute may be readily dealt with by a consideration of the conduct of the parties.

44. The first instance of the parties' conduct consistent with the existence of a term contended for by Archer is:

    (a) that on 18 September 2017, MIRA paid invoice no. 304 dated 15 August 2017 in respect of the Glen Iris project without any sort of protest; and

    (b) on 6 November 2017, MIRA paid invoice no. 307 dated 29 August 2017 in respect of the Heidelberg project without protest.

45. Notwithstanding the degree of detail contained in Archer's accounts concerning the work that was carried out by the applicant, and the claimed hourly rate, there is no evidence of any written communications from MIRA disputing its liability to pay these accounts on the basis of the express "per brick" and "per block" terms now alleged by MIRA.

46. Mr Antonacci denies that MIRA paid the account without protest. He gave evidence that when he received invoice no. 304 on about 15 August 2017, he telephoned Mr Archer to complain about the hourly rate basis of charging, but this is denied by Mr Archer. There is no supporting evidence as to the content of these alleged telephone calls, and I find them to be unproven.

47. There is also no support for Mr Antonacci's contentions in the SMS communications between himself and Mr Archer between 19 February 2018 and April 2018. In fact, they are to the opposite effect. They arose in connection with the Archer's attempts to receive payment of its outstanding accounts. They read, in part, as follows:

Date	**From Archer**	**From MIRA**
19 February 2018 -4 April 2018	[A number of SMSs to MIRA asking for the outstanding "$47,019", to which MIRA was, in substance, non-responsive.]	
6 April 2018		I get some of your claims paid when I get back Thursday 12th. There was a delay because we have to get Rod [Skipper] to approve the days worked.

[2] A different but related enquiry is what can be implied in the contract by reason of presumed intention. See *Hawkins v Clayton* (1988) 164 CLR 539 at 570 per Deane J. at [16]-[19].

10 April 2018	Hi Mark, I have spoken with Rod Skipper about approval of days worked. He assures me you now have his diary. As you are back on Thursday 12, I expect you will ensure that all my accounts in total will be settled by Friday 13 April. I will call you.	
12 April 2018		I just got back and I look at your bills in the next couple of days.
12 April 2018	I want to be paid tomorrow. Our business needs to be liquid. We seriously need to be paid for our work. It's been way too long. It's way overdue. Just get it done please. I'll call you tomorrow afternoon or you can call me. You know I always answer my calls.	
16 April 2018		I start to put some money in your account tonight.
26 April 2018 - late April 2018 [Further disputatious texts between the parties]		

48. I find that in none of the SMSs from MIRA to Archer does MIRA contest the hourly basis of charging, or maintain that the charging agreement was otherwise than as now alleged by Archer. In fact, MIRA's text to Archer dated 6 April 2018 is consistent with Archer's evidence that a term of the agreement was that Mr Skipper would record the hours worked by Archer's employees in his own diary, which would be cross referenced if required with the diary entries of hours in Mr Archer's diary.

49. Further, a letter from MIRA to Archer dated 23 May 2018 was tendered. It states:

> Based on the following points [MIRA] blatantly refutes your second claim (invoice 312) for works carried out at [Heidelberg]. Your previous Invoice 307 for $8,714.00 for works carried out at Heidelberg was paid in full.
>
> Based on the project estimates, [MIRA] purchased 1,892 Besser [concrete] Blocks to construct the front fence at [Heidelberg].
>
> Taking into consideration that all materials were supplied by [MIRA] and calculating at the common rate for labour, there will be no more money for the [Heidelberg project].
>
> **We believe this to be a fair and reasonable decision.**

> In relation to the claims issued [for the Glen Iris project] MIRA also refute[s] all claims.
>
> - There have been no purchase orders issued or quotations received from [the applicant] to [MIRA]
> - **There are no documented agreements in place from [the applicant] to charge out your labour on an agreed hourly or daily rate**
> - At no time did you or any of your employees sign in onsite, there are no records of your attendance onsite on this job.
>
> Your previous invoice 304 for $11,185 for works carried out at Glen Iris has been paid in full.
>
> Based on the project estimates, [MIRA] purchased 15,082 bricks to complete [the Glen Iris project].
>
> Taking into consideration that all materials were supplied by [MIRA] and calculating at the common rate for labour-$1,500 per 1,000 bricks, the total labour for Glen Iris should have totalled $22,638.
>
> [Archer's] claims for works at Glen Iris have totalled $47,134.00
>
> Taking into account what [MIRA has] already paid for works at Glen Iris, the balance you are owed and will be paid is $11,453.
>
> **We believe this to be a fair and reasonable decision.**
>
> **[emphasis added]**

50. Although the letter disputes Archer's entitlement to charge on an hourly rate basis, and only insofar as there are no "documented agreements that evidence it", it makes no reference to the oral agreement now alleged by MIRA, and instead advocates for the proposition that Archer should be paid an amount that is considered by MIRA to be "fair and reasonable".

51. In respect of the amount which MIRA then considered to be "fair and reasonable" for the Glen Iris project the letter also, in effect, values Archer's brick laying at $1.50 per brick,[3] which differs from the $1.60 per brick that MIRA now alleges was orally agreed between the parties.

52. In respect of the amount which MIRA then considered to be "fair and reasonable" for the Heidelberg project the letter, in effect, values Archer's block laying at $4.60 per block,[4] which differs from the $5.50 per block that MIRA now alleges was orally agreed between the parties.

Points of Defence dated 21 September 2018 and filed 12 October 2018

53. The Points of Defence (subsequently superseded by the Amended Points of Defence) dated 21 September 2018 and filed 12 October 2018 also makes no reference to the agreement as now alleged by MIRA.

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[3] "$1,500 per 1,000 bricks"
[4] $8,714 divided by 1,892.

54. Rather, it alleges that MIRA will not pay any more than the standard industry rate for any trade"[5] or "the standard industry rate for labour".[6] This may be the position at law, if Archer was engaged without anything being said as to the nature of Archer's remuneration. This is not however what MIRA now contends.

55. MIRA contends in its Amended Points of Defence that the terms as to payment were the subject of express oral "payment per brick" and "payment per block" agreements. This is at odds with the allegations in the earlier Points of Defence that MIRA "holds no verbal agreements with its subcontractors".[7]

56. Again, the Points of Defence alleges that Archer is entitled to be paid on a basis that is "fair and reasonable", rather than on the basis subsequently alleged in the Amended Points of Defence and contended for at the hearing.

57. I find on the basis of the evidence that there is no conduct on the part of MIRA that is consistent with the proposition that it was a term of the respective agreements that Archer would be paid on the basis now claimed by MIRA. I therefore prefer the evidence of Mr Archer to that of Mr Antonacci, and find that Archer is entitled to be paid on an hourly rate basis for the works that MIRA requested it to perform.

Issue 2: Is MIRA entitled to be paid for the additional works?

58. I turn now to the claims by Archer for the additional works which, it says, MIRA requested it to perform.

59. In respect of the Glen Iris works, Mr Archer gave evidence that he was instructed to do additional scaffolding works by Mr Skipper.

60. At Mr Skipper's request, he stated, and being a licensed scaffolder, he raised the scaffolding at the north east corner by 2 levels,[8]and adjusted the scaffolding at other areas.[9] The need for the scaffolding to be adjusted at Area "C", he stated, was to allow access for MIRA's forklifts to the garage in the basement.

61. In respect of core filling of concrete blocks at both projects, Mr Archer gave evidence that filling is an integral part of the laying of blockwork, and that only his employees undertake this work. He stated that he would not allow this task to be undertaken by third parties, given the importance of the structural integrity of the blockwork required to be achieved by Archer.

62. In respect of reinforcement, he gave evidence that Archer placed the vertical and horizontal reinforcement in the blockwork, and that he placed starter bars himself at the Heidelberg development.

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5 Paragraph 2 of the Points of Defence.
6 Paragraph 2 on the third page of the Points of Defence.
7 See 3(a) and 4(a) of the Points of Defence.
8 In an area marked "B" in plan at exhibit A12.
9 At areas "A" between units 4 and 5 for the purpose of building the stair enclosure, instructed by Mr Skipper and "B" in the plan at Exhibit A12.

63. In summary, Mr Archer denied that all the concrete block reinforcing work was done by MIRA, that MIRA did the concrete block filling work and that MIRA undertook all the scaffolding erection and adjustment at the Glen Iris development.

64. Archer called Mr Kayne Burns, bricklayer. Mr Burns gave evidence that he placed the steel vertical and horizontal reinforcement in the blockwork, that he placed some of the starter bars, but that MIRA contractors or employees placed some starter bars. He also gave evidence that he placed the concrete fill in the blocks. He denied that MIRA filled the blocks, or provided any input in relation to blockwork save some of the work relating to the starter bars.

65. Archer also called Mr Shannon Braun, a university graduate in science, who worked for Archer at the Glen Iris development on a part time basis, as a bricklayer's labourer. He passed up scaffolding components when it was being adjusted by Archer employees, but had no recollection of the filling of blocks by Archer employees.

66. Mr Antonacci, on the other hand, gave evidence that "no-one touches my scaffolding" once it is erected. He denied that Mr Braun was involved in assisting with scaffolding erection or adjustment.

67. Mr Antonacci gave evidence that he is the site supervisor, and that Mr Skipper was the foreman. He conceded that Mr Skipper was in charge when he was not at the site. He "doubted" that Mr Skipper would have asked him to adjust the scaffolding in any way.

68. It was suggested to Mr Antonnaci by counsel for Archer that it would have been a simple matter for MIRA to have called Mr Skipper to deny that he ever gave instructions to Archer to adjust the scaffolding in the way that Archer alleged. I deal below with MIRA's failure to call Mr Skipper.

69. MIRA called Mr Ben Shaw, a crane operator engaged by MIRA at the Glen Iris development. He also mixed the mortar from time to time, when there was a shortage of labour. He gave evidence that he never saw Archer employees making adjustments to the scaffolding, nor did he witness Archer carrying out any core filling of the blockwork. He also conceded that he may not have witnessed Archer make adjustments to the scaffolding, if that's what Archer now says it did.

70. MIRA also called Mr Fraser Pope, a carpenter engaged by MIRA at the Glen Iris development. He witnessed Archer laying bricks and blockwork. Mr Pope stated that he assisted with concrete filling at the front of the development and the placing of vertical reinforcement bars. He said that he had assumed that Archer would place the horizontal reinforcement bars. He did not concede that any of the concrete block filling work at the front of the development was carried out by persons other than MIRA employees.

He conceded that other parties may have undertaken the core filling of blockwork at the middle and rear sections of the Glen Iris development. [10]

71. In respect of the Heidelberg development, MIRA called Mr Claudio Serby, a carpenter engaged by MIRA. He gave evidence that he did not see Archer employees do anything but lay blocks. He said that he did not see Archer employees place vertical reinforcement in the blocks.

72. Having weighed the evidence given by the witnesses to whom I have referred, I favour the conclusion that Archer was requested by MIRA to carry out the additional works for which it makes payment claims. The evidence of Mr Archer was given persuasively. The evidence of Messrs Shaw, Pope and Serby was limited to what those gentlemen were able to observe. It is plain that no witness called by MIRA had general oversight of the works at either the Glen Iris development or the Heidelberg development. It is also clear from the evidence that Mr Antonacci was not present at all times, either at Heidelberg or Glen Iris.

73. The evidence of MIRA also suffers from the fact that MIRA paid Archer's invoices no 304 in respect of Glen Iris and no. 307 in respect of Heidelberg without demur. Invoice no. 304 makes expressly states that the nature of the works for which the claim was being made was "scaffolding", "raising scaffold" and deliver and erect Kwikstage scaffold components". This is of course one component of the extra works for which Archer makes claims. It supports the proposition that MIRA requested these works to be carried out and also acknowledged that Archer had done so.

Failure to call Mr Skipper

74. MIRA has the additional challenge of overcoming Mr Archer's evidence of what he agreed with a Mr Skipper, described by Mr Antonacci as MIRA's foreman at the Glen Iris development, and in charge of the works when Mr Antonacci was not there. He was not called by MIRA to give evidence.

75. It is also clear from the content of the SMSs, to which I have referred, that Mr Skipper was regarded by Mr Antonacci not only as MIRA's foreman but also MIRA's administrator at the Glen Iris development, with a level of authority that would in the circumstances have been reasonably assumed by Archer.

76. It was contended on behalf of Archer that the Tribunal should take into account the failure by MIRA to call Mr Skipper to give evidence both in respect of the basis of payment allegedly agreed with Mr Archer, and on the crucial issues of what Mr Skipper directed Archer to do at the Glen Iris development. It was submitted on behalf of Archer that the Tribunal should therefore draw an inference that the evidence of Mr Skipper would not have assisted MIRA, relying in this respect on the rule in *Jones v Dunkel.*[11]

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[10] viz. Areas "A" and "B" shown on Exhibit A12.

[11] (1959) 101 CLR 298. In *Primrose Meadows Pty Ltd v River View Pty Ltd* [2019] VSC 263 at [21] in which Croft J held that although the Tribunal is not bound by the rules of evidence (and

77. In respect of the terms of the arrangement regarding the basis of payment, I am satisfied that the evidential threshold for the operation of the rule has been reached. Archer, by its evidence of the oral alleged arrangements, the previous "hourly rate" dealings the post-agreement conduct of MIRA to which I have referred, has established a case for MIRA to answer.[12]

78. I also find that Archer has established a case for MIRA to answer in respect of the further instructions alleged to have been given by Mr Skipper to Mr Archer concerning the further items of work for which Archer makes a claim on an hourly rate.

79. I accordingly find that there is no deficiency in the evidence given by Archer as to prevent Archer's case being made good by the operation of the rule in *Jones v Dunkel*.

80. The rule in *Jones v Dunkel* only permits an adverse inference to be drawn where the failure to call a person is not satisfactorily explained.[13]

81. Counsel for MIRA informed the Tribunal that MIRA discovered that Mr Skipper had other commitments during working hours that affected his ability to be on site at all times, that he had been terminated by MIRA since the events in question, and that this made it impracticable to call Mr Skipper. However, Mr Antonacci gave evidence that the termination of Mr Skipper was amicable.

82. I am not satisfied that the matters that occurred between MIRA and Mr Skipper, described by Mr Antonacci at a high level of generality, give rise to a conclusion that Mr Skipper would be hostile to MIRA, such as to constitute an adequate explanation for the failure by MIRA to call Mr Skipper.[14] I consider that the greater the part allegedly played by an uncalled witness in the course of events particularly where, as in this case, it is alleged that the witness agreed the terms of the relevant engagement, and as supervisor had ostensible authority to do so, the more detailed the explanation needs to be as to why the witness was not called. I am unable to be satisfied that there is a reasonable explanation for the non-attendance of Mr Skipper.

83. I am satisfied that in the circumstances I am able to draw the inference that the evidence of Mr Skipper in respect of both of the issues for determination in respect of the Glen Iris development would not have assisted MIRA.

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therefore the rule in *Jones v Dunkel* may not be directly applicable), it does not follow that the rule may not arise as a result of the Tribunal's consideration of the probative value of evidence, applying analogous reasoning to the rule.

12 See Tenth *Vandy v Natwest Markets Australia* [2012] VSCA 103 at [154]-[156] per Nettle and Neave JJA (with whom Bell AJA agreed).

13. *Cadwalader v Bajco Pty Ltd* [2002] NSWCA 328

14 See *The Bell Group Ltd v Westpac Banking Corporation [No 9]* [2008] WASC 239 at [1007]; *Smith v Samuels* (1976) 12 SASR 573, 581: *Cross on Evidence* [1215]

84. There will be orders that follow from my findings.

A T Kincaid
Member