Auscoast Builders P/L v Mark Jason Smith t/as Mainline Tiling & Paving Contractors [2007] Adj.L.R. 07/23

REASONS FOR DECISION Mr D P Morzone Commercial and Consumer Tribunal Brisbane 23 July 2007

Introduction

1 The applicant claims for repayment of $3,736.13 from the money paid to the respondent pursuant to a contract for tiling work in compliance with an adjudication decision. The respondent filed a defence on 3 March 2006.

2 Both parties were self-represented at the hearing.

Background

3 On or about the middle of August 2005, the parties agreed that Mainline tiling carry out tiling works on the Azure Sea Project at Airlie Beach. At that time the parties generally agreed that the respondent's rates would match the rates of another tiler, Greg Molyneux. The respondent commenced work on site and completed a number of units, invoices were issued for the completed units and paid by the applicant.

4 In mid October 2005, the respondent came back to the site to carry out further tiling work in order to complete the units, a meeting took place between Mark Smith of Mainline Tiling and Bill Sharpe of Auscoast Builders, the works were discussed and the tilers commenced work. The parties did not discuss a rate for the work.

5 On or about 25 October 2005 the respondent issued an invoice number 61.[1] A payment claim was made under the *Building and Construction Industry Payments Act 2004* ("the BCIP Act"). The applicant contended that the rates claimed in the invoice were not consistent with the rates discussed and agreed in August and those rates previously paid to the respondent.[2] In addition the applicant contended that the areas of tiling and the works claimed that has been completed are not an accurate measurement of the works. On or around 22 December 2005 a payment Schedule was sent to the respondent identifying the agreed rates and payment that Auscoast Builders was prepared to pay.[3]

6 The parties dispute proceeded to adjudication under the BCIP Act. Under compulsion of the adjudication, the applicant paid invoice 61 (subject of the payment claim & adjudication) in full.

7 The applicant has applied to the Tribunal for an order requiring the respondent to refund $3,141.43 plus interest (as particularised in the list of amended orders in Exhibit 2) on the following grounds:

(a) $264.60 being the correct calculation for the Granite floor as follows, Rider Hunt total areas, 55.26m2[4] at the "agreed rate" of $40.00m2.[5] Not the area of 45m2 @ 55.00 m2 as charged by the respondent;

(b) $731.55 for wall cladding areas as calculated by Rider Hunt[6] as 41.73 m2 and multiplied by the *"agreed rates"* of $40.00m2. Not the 43.65m2 @ 55.00 m2 as charged by the respondent

(c) $877.50 charged for topping. The applicant relies upon its statement and exhibit 19 a *"confession"* by the respondent and the incorrect areas of topping charged versus the area of tiles laid on invoice 61.

(d) $1,050.78 (half of invoice T 3743) being part of the cost of the specialist consultants Rider Hunt invoice 3743.

(e) The cost of this Application of $217.00.

(f) Interest at the rate of 12% from 6 February 2007.

Issues

8 It seems to me that the following issues arise for determination by the Tribunal having regard to the scope of the application, and the defence:

(a) Whether the respondent is entitled to a refund of money in light of an adjudication?

(b) What were the contractual obligations in relation to the charge rates for the tiling work for the granite floor and cladding?

(c) Whether the scope of tiling work included the area claimed for the granite floor and cladding, and the topping work?

(d) Whether interest is payable on the refunded money?

(e) Whether the respondent should pay the costs claims in relation to the Rider Hunt report and application?

Entitlement to Claim Refund

9 The BCIP Act implements in Queensland a national regime to fast track adjudication for the quick interim determinations of payment disputes about construction contracts by adjudicators.[7] The procedure is to be carried out quickly with minimal formality and expense. In ***Austruc Constructions Ltd v ACA Developments Pty Ltd; ACA Developments Pty Ltd v Sarlos***,[8] McDougall J considered the object of the NSW equivalent: (my underlining)

"The object of BCIPA is to ensure that a person who undertakes to carry out construction work is entitled to, and recovers, progress payments. BCIPA provides a quick, and it must be said somewhat rough and ready, mechanism for giving effect to that purpose. The whole scheme of BCIPA is to provide a quick and certain means of determination ...

1 Exhibit 1 - Attch 1
2 Exhibit 1 - Attch 1 & 2
3 Exhibit 1 – Attch 4
4 Exhibit 15
5 Exhibits 1 – Attachments 1, 2, 3 and 7
6 Exhibit 1 Attachment 15
7 ***The Minister for Public Works, Housing and Racing***, *the Honourable R. Schwarten*, Hansard, 18 March 2004. ***Emag Construction Pty Ltd v Highrise Concrete Contractors (Aust) Pty Ltd*** *[2003] NSWSC 903*
8 [2004] NSWSC 131 at [102]

It was emphasised by the Minister in the Second Reading Speeches both on the Bill for the 1999 Act and on the Bill for the 2002 Act."

10 In accordance with the adjudication, on the 27 February 2006 the applicant paid $4,491.16 as part payment of invoice 61 and then again on the 27 April 2006 he paid $4,932.19 the balance of invoice 61, which included $573.05 in court costs. Accordingly, invoice 61 was now paid in full under compulsion.

11 The claims, responses and adjudication process under the BCIP Act do not affect any rights under the contract (eg progress payment)[9] and do not affect any civil proceedings arising under such a contract. However, the Tribunal must allow for any amount paid pursuant to a claim or an adjudication determination and may order restitution of any amount so paid or any other appropriate orders.[10]

12 Accordingly, the applicant's claim will not be hindered by the adjudication and subsequent payment.

Rates Agreed or Reasonable Price

"... A meeting was set up with myself, Mark Smith and Bill Sharpe at this time there was some discussion of price and also the fact that Mark nor myself had the appropriate saw to carry out the stone and granite work, Bill Sharpe agreed to supply the wet saw in his company's name.

We discussed with Bill Sharpe a rate of $55 per sq metre for the granite, and stone work. Borders at $30.00 per lineal metre. My normal charge for the supply and lay of topping is $30.00 per sq metre. I charged Auscoast builder $15.00 per square as Auscoast supplied the topping material as agreed. At this stage the meeting ended.

After the meeting Mark Smith received a call and a message was left by Bill Sharpe stating wet saw on site, I've got the cheque book start the granite and stone work. ...."

13 It is common ground that there was no discussion about the rate for the tiling work described in Invoice 61 which is now in dispute.

14 The applicant sought to rely upon a previous course of conduct and gave evidence that (with my emphasis):

"1. On or about the middle of August 2005 Mark Smith commenced work on my construction site known as Azure Sea apartments. Initially Mark Smith was working for Greg Molyneux Tilers and only after they had commenced work in unit 33 under Greg Molyneux directions did they approach me to inform me that they would no longer be working for Greg Molyneux but would be working directly for Auscoast Builders, a discussion then took place about the rates and a verbal agreement was entered into with the rates to be the same as the Greg Molyneux rates.

2. On or around the 23rd of September 2005 the Respondent provided me with invoice 59 (marked exhibit 1) for tiling works carried out in units 33 and 37, the invoice was faxed to me from Greg Molyneux fax machine (the name and number of the fax machine is located on the top of the page), the rate charged for work completed to that date was consistent with the Square metre rates which had been agreed to and was also consistent with the rates being charged by Greg Molyneux Tilers , I have provided Greg Molyneux Invoice 255 (marked exhibit 2) and invoice 256 (marked invoice 3) to demonstrate the rates.

3. The agreed rates for tiling works were $40.00 per meter squared for floor tiling, which included, patios, bathroom and ensuite and toilet floors, $40.00 per metre squared for wall tiling to bathrooms. Shower hobs at $60.00 lineal metre, mitres to corner tiles at $10.00 lineal metre. (exhibit 2 confirms these general rates).

4. ...

5. On or around mid October, Mark Smith came back to the site to carry out more tiling works and to rectify defective and incomplete works in units 33 and 37. A meeting took place between Bill Sharpe, Mark Smith and Adam Burge (who is a worker for Mainline tiling), over the commencement of the tiling to the front entry patios and the stone cladding located in the same area.

6. At the meeting the Respondent and the Applicant agreed that the tiles would be layer (sic) with a boarder tile around the perimeter of the patio and the tiles layer (sic) in between the boarders would be a 45 degree angle a, using a 5-8 mm grout joint. After a lengthy discussion about the difficulties in paying the tiles at the 45 degree angle, the Respondent then informed me that laying the tiles in a 45 degree angle would be more expensive as this would take longer and be more difficult due to the amount of cutting, I then agreed to the tiles being layer (sic) in a square and parallel fashion with the full tiles being layer (sic) against the walls and then a 90 mm gap between the tiles so as to eliminate the difficulties associated with cutting and laying the tiles on the 45 degree angle, this also eliminated the need for any cut tiles to the walls or the need for a boarder tile. At the same meeting I also agreed that I would be responsible for grouting the large 100 mm gaps left behind between the tiles and that I would place small black stones between the tiles and that I would also be responsible for Sealing the surface of the granite which is normally done by the tilers. ,,, this style of tiling required less glue, no grouting, no requirement for cutting except for the front riser and header tile ... overall making this tiling work significantly less difficult than laying tiles with a small grout joint, this style of tiling also did no require accurate levelling of the surface of the tiles as the discrepancy in the height of the tiles would be hidden by the large 80 mm gap filled with stones at the later date.

[9] Austin J observed in ***Jemzone v Trytan*** [2002] NSWSC 395 at [37], BCIPA "*generally leaves it to the construction contract to define the rights of the parties but makes 'default provision' to fill in the contractual gaps ...". ... [This section was incorporated] to provide, among other things, that BCIPA "does not limit ... any other entitlement that a claimant may have under a construction contract"*: McDougall J in ***Kembla Coal & Coke v Select Civil & Ors*** [2004] NSWSC 628 [at paragraph 85].

[10] ***Paynter Dixon Construction Group Pty Limited v JF and CG Tilston Pty Limited*** [2003] NSWSC 869 & ***Parist Holdings Pty Ltd v W T Partnership*** [2003] NSWSC 365

7 No agreement was entered into regarding the rate, other than, when the discussion that the difficulties in laying the tiles initially on a 45 degree angle would be more expensive due to the cutting. The respondent did not inform me that he would be charging a higher rate for the laying of the granite in the now simpler and lesser fashion now agreed to. It was understood that the same rate would apply for the front patio using the 400 x 400 granite tile as for the patio to the units previously tiled using the 600 x 300 tiles as invoiced from the respondent to the applicant on invoice 59 (exhibit 1), it was certainly less work now that I had deleted the need for cutting and the need for level surface of the tile face

15 In answer to each of these matters, the respondent Mr Smith stated that:

"1. In claim No. 1, a conversation took place between bill Sharpe, Mark Smith and Adam Burge. We agree that this conversation and we agree that the rate would be the same as Greg Molyneux. Refer Appendix (1) and Appendix (2)

2 In claim No. 2, we agree that Greg Molyneux Tilers and Mainline Tiling were on the same rate. Where Bill Sharpe shows an invoice from Greg Molyneux, his "Exhibit 3", it is obvious that he is only picking out one page from several invoices to suit himself. We refer to our Appendix (2).

3. In claim No. 3, Bill Sharpe claims the agreed rate was $40.00 per square metre. Since Mainline Tiling was also doing Stair Casings and Stonework, other square metre age was negotiated at different rates. We have a witness to these conversations and also refer to Claim No. 6, where Bill Sharpe admits that certain tiling jobs are more difficult and more expensive. Refer to Appendix (2), Appendix (3a)(3b) and Appendix (4a)(4b) and4(c). These appendices are from other tilers showing rates similar to Mark Smith's rates, not the one page hand picked invoice that Bill Sharpe is presenting.

4 ....

5 In claim No. 5, we agree that a meeting took place. Refer to Appendix (1).

6. In Claim No. 6, we agree that a meeting took place and pricing was discussed. We have a witness, who was at this meeting. Refer to Appendix (1). We have 4 different tiling invoices on the same job, with all four having different rates for different types of work. It is inconceivable that prices were not discussed, when we have four different invoices from four different tilers. No-one would believe that these tilers plucked a figure out of the sky, and the four different rates are all similar.

7. In Claim No. 7, we claim that different rates were discussed. Refer to Appendix (1). After the meeting had taken place, Mark Smith and Adam Burge had left the job with approval and had completed defect rectification work.

16 In contrast, Adam Burge also gave evidence about the mid October meeting in terms consistent with his statement of evidence.[11] In his statement of evidence he said:

17 Having regard to the evidence, on the balance of probabilities, I find that the parties did not expressly agree on a charge rate for the work. The course of prior dealings provided the parties some general guidance about rates whilst they were associated with Greg Molyneux rates. In my view the prior course of dealings was not sufficiently consistent nor relative to the respondent's contract to give rise to an implied term that the same rates should be incorporated into the contract between the applicant and the respondent here.

18 In these circumstances, it is appropriate to imply a term that the respondent would charge, and the applicant will pay, a reasonable rate for the work done.

19 The applicant relied upon the rate obtained from Rider Hunt as being reasonable.[12] This assists me to consider the general market rates. However, the circumstances of the project and work carried out by the respondent had some subjective elements and pressures, which render the objective market rates less helpful. The parties also relied upon invoices showing rates charged by other contractors, which were paid by the applicant.[13] These provide me with some guide in relation to the work on this particular project. However, those rates related to different work in different areas of the project.

20 Having regard to all the evidence, I am not persuaded that the rates charged by the respondent were outside a reasonable range. Therefore, I will not disturb the rates contained in Invoice 61.

Scope of Work

21 The next issue relates to the scope of tiling work for the granite floor and cladding, and the topping work.

Granite Floor

22 The applicant relies upon the measurements of Rider Hunt which show a total area of 55.26m2[14] and not an area of 45m2 charged by the respondent. This is an error in favour of the respondent.

23 The applicant says that *"on invoice 61, the respondent has measured the area of tiles layer as if he measured each individual tile but not the grouted area! He also included the measurement of the sqm area of the boarder tile which he has also charged at a lineal metre rate! Rider hunt have assessed that the correct method for measuring the surface area of tiles layer is by measuring the full area over all joints. The area of tiles layer by the Respondent is more than the area charged on invoice 61. Attached is the measured areas by Rider Hunt Qld marked "exhibit 15" confirming the total areas of Granite floor tiling layer is 55.26 m2 an increase by 10.26m2 in the respondents favour."*

[11] Exhibit 5
[12] Exhibit 1 – Attach 15
[13] for example, Exhibit 1 – Attach 2 & 3; Exhibit 6; Exhibit 4 – Attach 3 & 4
[14] Exhibit 1 – Attachment 15

24 Not surprisingly, the respondent does not dispute this part of the claim, but at the same time does not counter-claim for an adjustment to the claim. It seems to me that the respondent's claim fairly took into account the reduced intensity of the work due to the wider grouting, the applicant performing some of the work and the change from the angled tiling. This effectively reduces the charge rate to a lesser amount had the respondent chosen to calculate the area under the Australian Standards adopted by Rider Hunt.

25 For these reasons, I do not propose to make any adjustment of Invoice 61 in relation to this work.

Cladding

26 The applicant claimed that the wall cladding areas as calculated by Rider Hunt[15] were 41.73 m2 and being 1.92 m^2 less than the 43.65m2 charged by the respondent. The Rider Hunt report,[16] was prepared on the basis of their *"on-site measure of the floor and wall tiles at the Townhouse 31 – 39 entrances".*

27 The respondent maintains the claimed area, but otherwise said that: "*A matter of 1.92 square metres, over the size of a block of apartments is a waste of time for the Tribunal to even consider*."

28 I am left with competing claims of measurement depending upon the appropriate degree precision used by each witness. In my view, the difference in measurement is within a tolerable range. On balance, I accept the evidence of the respondent who produced the appropriate witnesses to deal with the issue. Therefore, I will not make any adjustment of Invoice 61 in relation to this work.

Topping

29 The applicant claims a refund of $877.50 charged for topping. The applicant relies upon its statement and exhibit 19, a *"confession"* by the respondent and the incorrect areas of topping charged versus the area of tiles laid on invoice 61.

30 Mr Sharpe argued in his statement of evidence that:

"Topping, no agreement existed for "topping" in any event topping would not be required in this instance as the patios have a 50mm fall to shed the water away from the front door. The tiles are layer with a 100mm gap so the need for an accurate substrate would not be required as "lipping" of the tile edges could not occur. The tiles that Mainline tillers have layer, have been layer with variances of up to 4mm in the surface level of each tile making the surface un even, if topping was used it would have been used to ensure the level of the tile surface is constant! The tiles have been layer by a method known as "buttering" the base of the tile with adhesive and individually sticking them to the surface thus eliminating the need to have a continuous and consistent level surface, this is why the surface is not evenly level. In addition to this Auscoast Builders did not supply any "topping" materials nor did we authorize the topping, Neither of the three Auscoast Supervisors Mark McConkey or Mathew Sams or Jim Benny authorized the use of any Topping materials to be supplied or installed nor was any topping materials purchased for this work. In any event the area of topping claimed by the respondent in invoice 61 is 6.5m2, this is inconsistent with the area of tiles claimed in the same invoice as being layer 5m2? I submit that no such topping ever took place and that any surface preparation carried out by the Respondent prior to tiling would be the normal cleaning and washing of surfaces ready for direct stick to the concrete surface, normally a cementitous water wash."

31 In contrast, Adam Burge also gave evidence about the mid October meeting in terms consistent with his statement of evidence.[17] In his statement of evidence he said:

"Originally we were led to believe that we were to lay the granite at either a normal straight lay bond or a 45 degrees with border ... Hence the reason why the cement topping was used to have a flat plain to work with which Jim Benny the site forman was well aware of, we used the topping compound which was stored in eth garage in unit 40. But consequently it was lade with a 70 – 80 ml joint which was later grouted by others."

32 Mr Molyneux, of G & E Molyneaux Tiling and Waterproofing, gave a consistent account of his experience that topping was needed because the floors were falling back to the door, that topping was required to prevent water falling towards the door.

33 Mr Benny also testified that a lot of the entry slabs had a fall towards the door. He corroborated the respondent's evidence that Mr Benny acted as supervisor and considered it necessary for topping to be carried out with material in a garage of the unit. He found that the respondent's work was of a tradesman's like manner.

34 Having regard to the weight of the evidence, I find that the topping was reasonably necessary in the fulfilment of the respondent's duty to exercise reasonable skill using appropriate material. I don't accept the argument and evidence of Mr Sharpe on this issue.

Interest

35 The applicant also claimed interest on money found to be refundable.

36 I have not found in favour of the applicant in relation to the amounts claimed to be refundable. Consequently, I do not need to consider the issue. I will say, however, that the contract terms and circumstances of the case do not enliven the Tribunal's jurisdiction to award any interest on any amounts claims.

[15] Exhibit 1 Attachment 15
[16] Exhibit 1 – Attach 15
[17] Exhibit 5

Costs

37 The applicant also claimed that the respondent should pay the costs claims in relation to the Rider Hunt report and application.

38 The Tribunal's jurisdiction in respect of costs is dealt with in Part 5 Division 7 of the *Commercial & Consumer Tribunal Act 2003*. Section 70 provides that the purpose of the division is to have "*parties pay their own costs unless the interests of justice requires otherwise*". Further, subsection 71(5) provides that a party is not entitled to costs merely because that party was the beneficiary of an order of the Tribunal, or the party was legally represented at the proceeding.

39 These provisions have been considered by the Court of Appeal in ***Tamawood Ltd & Anor v Paans***.[18] That case is authority for the proposition that the costs provisions impose a general rule that the parties should pay their own costs, unless good reason is shown in terms of the interests of justice for making an award of costs in the proceedings.[19]

40 Section 71 implements the purpose by empowering the Tribunal to award the costs it considers appropriate. In deciding whether to award costs, and the amount of the costs, the Tribunal may have regard to the following matters listed in Sub-section 71(4):

(a) the outcome of the proceeding;

(b) the conduct of the parties to the proceeding before and during the proceeding;

(c) the nature and complexity of the proceeding;

(d) the relative strengths of the claims made by each of the parties to the proceeding;

(e) any contravention of an Act by a party to the proceeding;

(f) for a proceeding to which a State agency is a party, whether the other party to the proceeding was afforded natural justice by the State agency;

(g) anything else the Tribunal considers relevant.

41 My findings and the outcome of the proceedings have fallen in favour of the respondent. Both were self represented at the hearing. Both parties have conducted themselves appropriately during the proceeding. Regretfully the differences between the parties reached a stalemate and were irreconcilable. The nature of the dispute and the complexity of the legal and factual issues was borne out of the fact that the parties failed to reduce their agreement to writing. A hearing was required in the Tribunal.

42 Having regard to all of the relevant circumstances, I propose to order that each party bear their own costs of the proceedings.

Order

43 For these reasons, I order that the application should be dismissed and each party should bear their own costs.

[18] [2005] QCA 111

[19] **Tamawood Ltd & Anor v Paans** [2005] QCA 111 per Keane JA at [24] (Williams JA and Philippedes J Agreed)