

**Lucindole P/L v Dimitrios Mamolis & Irene Mamolis t/a Homer and Jim's Painting Service**

**DECISION : L. LeCompte.** Member. Consumer Trader & Tenancy Tribunal. Home Building Division. 29<sup>th</sup> September 2006

**APPLICATION**

1. The applicant sought the amount of \$7,500.00 from the respondent on the basis that the respondent failed to complete certain residential building work (being the painting of premises) and was responsible for certain defective work.

**BACKGROUND**

2. The applicant and the respondent hold licences issued under the *Home Building Act 1989*.
3. The arrangements between the parties arose from a quotation provided by the respondent to the applicant on 20 March 2005. The quotation related to the painting of a dwelling at Greenwich NSW for a total price of \$43,450.00 (GST included).
4. However the quotation also refers to a price of \$42,500.00 plus GST of \$4,250.00. It is thus apparent that the quotation was the subject of negotiation.
5. No formal contract was entered into between the parties. The quotation was regarded as the formal arrangements. However, there was disagreement between the parties as to the final price. The applicant submitted that the final price was \$41,000.00. However, this issue is not relevant to the matter before me.
6. According to the applicant, the respondent undertook works at the premises until May 2005 at which time the respondent ceased work to permit other trades to complete work that impacted on painting.
7. What happened after the respondent left the site was the subject of significant argument in the proceedings. However, it is apparent that the respondent did not complete all the "contracted" work at the site, and the applicant retained another contractor to finish work and undertake a significant amount of rectification work.
8. Ultimately, the respondent went back to the site and noticed that the painting works had been completed. At that stage, the respondent had submitted invoices but had not been fully paid.

**JURISDICTION**

9. The dispute between the parties arises out of a sub-contract arrangement pursuant to which the respondent performed contract painting works for the applicant as builder and principal contractor.
10. The respondent commenced proceedings under the *Building and Construction Industry Security of Payment Act 1999* for non-payment by the applicant of progress payments under the sub-contract. It received a determination in its favour in the amount of \$7,104.00 that was paid by the applicant.
11. The applicant later commenced action in the Home Building jurisdiction of the Tribunal on the basis of a building claim against the respondent for incomplete and defective work. The determination under the *Building and Construction Industry Security of Payment Act 1999* does not prevent the applicant from commencing legal proceedings before a Court or Tribunal arising out of a construction contract.
12. The claim for payment of moneys from the supply of building services (painting) is a building claim as defined in section 48A of the *Home Building Act 1989*. The claim arises from a building dispute that relates to the obligations of the respondent pursuant to the contract between the parties and the statutory warranty provisions contained in section 18B of the *Home Building Act 1989*.
13. Section 48 K of the *Home Building Act 1989* provides that the Tribunal has jurisdiction to hear and determine any building claim brought before it and directions issued by the Chairperson of the Tribunal regarding the acceptance of building claims permit applications to be heard for recovery of money by a trader against a sub-contractor when there has not been an investigation by a building inspector attached to the Office of Fair Trading.

**APPLICANT'S EVIDENCE**

15. The applicant gave evidence in the proceedings through its Director, Mr David Webster. Mr Webster gave sworn evidence in the proceedings and confirmed that the quotation received from the respondent represented the contract between the parties except that the price had been negotiated at \$41,000.00, not \$43,450.00 as contained in the quotation.
16. Mr Webster tendered a facsimile from the architects for the housing project at Greenwich dated 10 June 2005. That facsimile enclosed a defects list relating to the construction of the dwelling, the list being prepared after an inspection on 8 June 2005. Mr Webster pointed out that the defects list identified some issues relating to painting but that he was to prepare his own comprehensive list as to outstanding painting matters.
17. Mr Webster also tendered a defects list prepared by him that discloses a significant number of defects in the painting work undertaken by the respondent together with some incomplete work. Mr Webster gave evidence that the defects list was forwarded to the respondent but the respondent did not return to the site to address the defects. Mr Webster did not produce copies of any correspondence to the respondent in relation to the forwarding of the defects list.
18. Mr Webster also tendered a quote from a painting contractor dated 23 July 2005 to carry out remedial painting works "as per defects list M Halmo and P Janks, Architects dated 22 July 2005". The quote to undertake the works was \$8,650.00.

19. Mr Webster also gave evidence that the remedial works were undertaken in late November/early December 2005, just prior to practical completion of the project and that the value of the painting works attributable to the respondent was \$7,500.00.
20. A further document tendered by Mr Webster was an unsworn statement of the applicant's on-site supervisor, Mr Vartanian.  
Mr Vartanian states that:
  - The respondent had completed 80% of the required work before leaving the site while other works were completed.
  - Mr Vartanian was instructed to contact the respondent on completion of the other works and request the respondent return and complete the painting.
  - He tried "on a minimum of 10 occasions before advising the head Contractor Mr David Webster that I could not contract and have him return to complete work."
  - After a lengthy period separate contractors were commissioned and completed outstanding works and defects "as listed by Marianne Holmes and Peter Janks Architects".
21. Finally, Mr Webster tendered documents dated 14 January 2006 and 24 February 2006 being letters to the respondent regarding the alleged incomplete and defective work.
22. The letter of 14 January 2006 infers that there had been numerous unsuccessful attempts to contact the respondent to complete work and repair defects and in the absence of action on the respondent's part the applicant arranged for another contractor to complete the works.
23. The 24 February 2006 letter to the respondent refers to letters of November 2005 and January 2006 (I note that no copy of the November letter was tendered).
24. Mr Webster did not tender any statements from the architects or owners of the property nor rely on the oral evidence of any witnesses.

#### RESPONDENT'S EVIDENCE

25. Mr Dimitrios Mamolis gave sworn evidence on behalf of the respondent and tendered determinations made by the Adjudicator pursuant to the *Building and Construction Industry Security of Payment Act 1999*.
26. Mr Mamolis gave evidence that the owners of the premises entered into occupation at the end of May 2005. He left the site in late May 2005 but was to return to complete some painting and a "touch-up list" after works were completed by other trades.
27. Mr Mamolis stated that he returned to the site in July 2005 to paint some fences and was to return for some final works and the "touch ups" when other works had been completed.
28. Mr Mamolis also gave evidence that he was never contacted by the applicant to return to the site, did not receive a defects list and was not paid for outstanding invoices. He stated that he went to the premises in late November 2005 at which time he observed that painting works had been completed. Mr Mamolis tendered copies of his mobile telephone records indicating that he attempted to contact Mr Webster and/or Mr Vartanian on 22, 23 and 28 November 2005 and again on 8 and 9 February 2006.
29. Mr Mamolis did not provide any evidence of other attempted telephone or written correspondence contact to the applicant after leaving the site in May 2005 and July 2005 except for two invoices, one dated 20 August 2005 totalling \$4,994.00 and a further invoice dated 11 February 2006 for \$2,750.00.
30. Other documents tendered by the respondent included a letter from one of the owners of the premises who confirmed works required to be undertaken at practical completion. Mr Mamolis stated that the minor nature of the works confirmed that there were no real issues with his work.
31. Mr Mamolis also tendered an unsworn statement from Mr George Lentros, an employee of the respondent who states that the respondent had completed most of the works at the site (except for one item) but had not been called back to complete the works. In other respects, Mr Lentros's statement essentially repeats what he had been advised by Mr Mamolis.
32. Mr Mamolis did not call any other persons to give evidence in the proceedings.

#### CONSIDERATION AND FINDINGS

33. The dispute between the parties, as to the value of the contract, although not relevant to the matter before me is symptomatic of the difficulty both parties have in demonstrating with any accuracy what happened between them in relation to the contract.
34. Both of the principals gave sworn evidence as to the arrangements between them, but neither produced other parties to corroborate their positions, except in the context of some unsworn statements, nor did either party produce adequate documentary evidence as to the attempt by either to contact the other regarding outstanding or defective works or moneys owing.
35. It is evident that even though the homeowner apparently entered into occupation in May 2005, completion did not occur until late December/early January 2006, at which time there were only minor paint works required to be undertaken. In this context, it is not surprising that the homeowner advised the respondent that only minor

works were required on completion as this situation is confirmed by a fax from the homeowner's architects to the applicant dated 9 January 2006.

36. Completion of the project in December 2005/January 2006 also explains why the applicant did not bring in the second painting contractor until end November 2005.
37. I have noted that the second contractor provided a quote for the works dated 23 July 2005, and that Mr Mamolis stated that he attended the site in late July 2005 to complete certain works.
38. The respondent's evidence on the return to the works in July 2005 does not sit well with the applicant's evidence as to the defects apparently evident in late June 2005, and which were the subject of the second contractor's quote.
39. The respondent had the opportunity to have the homeowners architects, the applicant's site supervisor and the other painting contractor appear and give evidence in the proceedings but did not seek to have these persons give evidence.
40. In the absence of any other evidence in the matter I must rely on the sworn evidence and relevant documentation before me and, in this respect, I determined to accept the evidence of the applicant as I was satisfied that, on the balance of probabilities, the claim for rectification of defective work and for minor incomplete work is established.

**ORDER**

The respondent is to pay the applicant the amount of \$7,500.00 on or before 30 August 2006.

David Webster (Director of Applicant)  
Dimitrios Mamolis (Respondent)