

REASONS FOR DECISION Ms C Heyworth-Smith. Commercial and Consumer Tribunal Brisbane. 16 January 2008

Introduction

- 1 In March 2005 the applicant was the principal contractor on a domestic building site at 43 Paramount Terrace, Seven Hills. On 17 March 2005 he obtained a quote for roofing works from the respondent. The quoted price was \$12,397.00. The applicant has not paid that sum, or any other sum, to the respondent. He claims that the respondent's work was defective and incomplete and, by an application filed on 15 May 2006, sought an order for the rectification or completion of defective work.
- 2 On 29 May 2006 the respondent filed a Defence in which he asserted that the work was not defective or incomplete and a Counterclaim seeking payment of an amount of \$12,738.00 together with interest. The hearing was conducted on 20 November 2007 and both the applicant and the respondent were self-represented.

The Applicant's Evidence

- 3 The applicant gave evidence on his own behalf and called evidence from Mr Ernest Kretschmer, a technical officer with the Master Plumbers' Association of Queensland.
- 4 The applicant gave evidence that he had engaged the respondent for a number of sites prior to requesting that he provide a quote for this site. It is common ground between the parties that it had not been their practice in the past, nor on this occasion, to enter into a formal written contract.
- 5 The applicant provided to the respondent working drawing number 253/03A with respect to the site and the respondent attended the site for the purposes of providing the quote. The applicant gave evidence that the working drawing indicated that a tapered gutter was necessary at the relevant part of the works but during the course of discussions with the respondent prior to the provision of the quote it was decided that a square box gutter would be more appropriate. The quote provided as follows:
*"To Barry Marshall 17/03/05
Quotation for roofing at 43 Paramount Tce Seven Hills
Included in price;
Colourbond corrugated roofing.
Colourbond ridges, valleys and flashings.
Colourbond box gutters and sump.
Colourbond 175mm quade gutter on spikes.
Metal battens.
50mm blanket insulation.
Re-fit 2 roof ventilators.
All deliveries, labour and GST.
Total Price- \$12397.00
Not included in price:
Sky lights.
Edge Protection.
Downpipes."*
- 6 The respondent had an accident on a different site and could not perform the work the subject of the quote himself. He engaged sub-contractors for the purposes of carrying out the work. The respondent rendered an invoice to the applicant on 15 April 2005 for \$12,914.00. This was the total of the quoted price of \$12,397.00 plus "edge protection" in the sum of \$517.00.
- 7 The applicant did not pay the amount of this invoice and gave evidence that his refusal was because the works were not complete and/or were defective in the following respects:
 - (a) the box gutter had no overflow;
 - (b) rubbish had to be taken away;
 - (c) screws had not been installed at 90 degrees and were not straight;
 - (d) sarking and insulation materials were hanging out from under the roof into the gutters;
 - (e) the gutters were holding water;
 - (f) the roof sheeting was "wavy";
 - (g) the ridge capping and hip was not scribed or cut correctly;
 - (h) not all of the roof sheets were turned up into the ridge capping in places; and
 - (i) there were scratches to the Colourbond roof.
- 8 The applicant gave evidence that he brought these defects to the attention of the respondent first in a telephone conversation on 22 April 2005. In support of this he has filed a copy of that page of his diary. His writing is only legible in part but it appears to say *"S. Stimson was advised of roofing defects, wool, scribing to capping, screws, scratches, overflow etc"*.
- 9 He refers then to another telephone conversation on 28 April 2005 when he again advised the respondent to fix the roofing. In this regard he refers to a diary entry of that day. He gave evidence of subsequent conversations wherein he endeavoured to arrange for Mr Stimson to return to the site and, particularly, to do so prior to 6 May 2005 as that was the day when the scaffolding was to be pulled down. The applicant gave evidence that the respondent sent a number of faxes requesting full payment of his invoice and it appears that the position between them had reached an impasse. On 17 October 2005 the respondent sent a letter to the applicant

requesting a meeting on site to look at any rectifications and to resolve the matter of payment of \$12,914.00. The letter said, "When rectifications are complete please pay full amount within 3 days. Please contact Scott Stimson on the mobile number above to arrange a meeting".

- 10 The applicant said that he contacted the respondent after receiving that letter and told him that as soon as the respondent erected scaffolding they could meet on site. He said that the respondent told him that he would not arrange a scaffold and would just rectify the works using a harness. The applicant disagreed with this as he felt that it was a breach of the requirements of the Workplace Health and Safety legislation and that the conversation became heated and ended without a date and time being set to meet at the site. Further correspondence passed between the parties regarding the rectification works and the non-payment of the invoice.
- 11 Mr Kretschmer provided a statement filed 26 June 2006 to which he attached his report of 23 November 2005. He found that:
- (a) the box gutter situated in the centre of the roof was without overflow and that an adequate overflow should be installed to prevent flooding from excess rain;
 - (b) the right hand side rear gutter was holding a small amount of water;
 - (c) the right hand side (indent) gutter was holding a small amount of water;
 - (d) ridge capping at the right rear was not fastened at the end;
 - (e) the valley gutter extending to the box gutter had insulation sitting in the valley. Trimming of the insulation was required to prevent water soaking in to the roof space;
 - (f) the right hand side (indent) gutter had insulation hanging into the gutter and trimming of the insulation was required to prevent water soaking into the roof space;
 - (g) the ridge capping scribing of the main roof appeared to be of adequate standard;
 - (h) the general screwing of the roof seemed adequate however some screws had lost their Neo seals due to poor screwing;
 - (i) not all roof sheets were turned up at the top of the sheets;
 - (j) scratches were found on roof sheets.
- 12 Mr Kretschmer took 40 photographs of the roof and guttering. These were tendered and depict the faults referred to in his report. I note also that some of the photos show holes where screws should have been in place, screws not fastened fully down to the roof and an area where the roof capping had not been sealed where it had been split.
- 13 Mr Kretschmer gave evidence under cross-examination that, notwithstanding the fact that the quote referred only to a box gutter and sump, there should have been an overflow installed in the box gutter. Whilst he agreed that the manufacturer's specs for the roofing only required the turning up of the roofing sheets if the pitch of the roof was under 25 degrees, it was best practice to turn up the sheets anyway. He also noted that part of the roof was turned up whilst other parts were not.
- 14 The applicant cross-examined the respondent concerning the fact that the insulation had been left to run into the gutters. Mr Marshall disagreed that any agreement had been reached concerning that method of installing the roof. He did not agree that on a previous site he had insisted (over the respondent's objection) that the insulation run into the gutter. He said that he had insisted that the sarking run into the gutter but not the insulation. It should stop short otherwise water soaks into it and into the roof.
- 15 He agreed that he told sub-contractors doing the roofing work to provide a minimal fall of both gutters (upper and lower) but that it still had to shed the water. When he was helping dismantling the scaffolding he saw that the upper gutter had 30mm of water ponding towards one end.

The Respondent's Evidence

- 16 The respondent gave evidence on his own behalf. He said that he did not dispute that the box gutter required an overflow but that he had not included it in his quote and it would have cost extra. He said that there was no need for a full scaffold to be erected for him to perform any rectification work as it was common practice just to have edge protection.
- 17 The respondent gave evidence that the only defect that the applicant had communicated to him was the absence of the overflow. The applicant only informed him of all of the other defects after he had received the report from the Master Plumbers' Association of Queensland which was well after the applicant had refused to pay the respondent's invoice.
- 18 The respondent gave evidence that he had done a previous job for the applicant during which the applicant had insisted, over the respondent's protestations, that the insulation of the roof run into the guttering. He believed that this was incorrect but, having had that argument with the applicant on that other site, decided to perform this work in the same way on this site. He said that he knew it was the incorrect way to do the work. In relation to particular alleged defects, he said:
- (a) his workers had been instructed by the applicant to give a minimal fall to the gutter as a lot of fall would make the fascia look out of level;
 - (b) with the silicone on the factory made corners of the gutters, all gutters hold 2-5mm of water which quickly evaporates;

- (c) *the turning up of the roof sheeting is only required if the pitch of the roof is under 25 degrees. The pitch of this roof was 25 degrees and, accordingly, the BlueScope Steel Technical Bulletin CTB-19 and the Lysaght Installation Book did not require that the ends be turned up;*
- (d) *the applicant had never mentioned the roof being wavy or having scratches until after he had pressed him for payment.*
- 19 The respondent gave evidence that he and the applicant had reached an oral agreement subsequent to the dispute arising with respect to the non-payment of the invoice. He said that the applicant had agreed to pay him the full amount of his invoice in return for the respondent paying the applicant an amount of \$6,590.90 in respect of drawings the applicant had done over a lengthy period of time for a house design for the respondent. As soon as the respondent received the applicant's payment he would return to the site and do the rectification works. The respondent said that he duly paid the \$6,590.90 but that the applicant did not pay the \$12,914.00. Accordingly the respondent did not feel obliged to return to the site to perform the rectification works. When it was put to him that he was obliged to pay the \$6,590.90 in any event, the respondent said that he had first asked the applicant to do the drawings some years prior on the basis that the applicant would be given the job of building the house. As the years went on, the applicant continued to assert that he was too busy to do the respondent's job and, consequently, the respondent ultimately engaged another contractor to do that job. The applicant said that the respondent had not paid him for this job because he was "dirty" about the fact that the respondent had engaged a different builder.

Issues

- 20 The issues which arise in the case are as follows:
- (a) was it a term of the contract between the applicant and the respondent that the respondent should install an overflow to the box gutter;
- (b) was the work otherwise defective and/or incomplete in the following respects:
- (i) rubbish left on site;
 - (ii) screws not at a 90 degree angle and not straight (and missing);
 - (iii) insulation hanging into the gutters;
 - (iv) gutters holding water and ponding;
 - (v) roof sheeting being "wavy";
 - (vi) the ridge capping and hip not scribed or cut correctly;
 - (vii) the roof sheets not being turned up consistently;
 - (viii) scratching to the roof.
- (c) did such defects and/or incomplete works disentitle the respondent to payment of his invoice;
- (d) did the parties enter into an agreement with respect to payment for the works.

Consideration and Findings

- 21 Having had the opportunity of watching the applicant and the respondent give evidence and their demeanour whilst doing so, I am of the view that neither of them has given evidence dishonestly or in any manner which is not frank and with candour. To some extent this dispute has arisen because of differences of opinion as to the manner in which some parts of the work should be performed. To a large extent, however, it appears to have arisen through a series of misunderstandings and different interpretations of the same events. I do not hesitate to say that these misunderstandings probably would not have occurred if the parties had had the forethought to enter into a contract in writing which set out their rights and obligations in detail.
- 22 I accept Mr Kretschmer's evidence that an overflow should have been installed with the box gutter. It was an item which was required to be installed whether or not, at the time that he provided the quote, the respondent realised that this was the case. Accordingly, I find that it was a term of the contract between the applicant and the respondent that the respondent should install an overflow to the box gutter.
- 23 I also accept Mr Kretschmer's evidence in the photographs and his report concerning the defects and incomplete works. In particular, I find:
- (a) some screws were not installed at 90 degrees, were not straight and, in some cases, were missing;
 - (b) the right hand side rear gutter was holding a small amount of water;
 - (c) the right hand side (indent) gutter was holding a small amount of water;
 - (d) ridge capping at the right rear was not fastened at the end;
 - (e) the valley gutter extending to the box gutter had insulation sitting in the valley. Trimming of the insulation was required to prevent water soaking in to the roof space;
 - (f) the right hand side (indent) gutter had insulation hanging into the gutter and trimming of the insulation was required to prevent water soaking into the roof space;
 - (g) not all roof sheets were turned up at the top of the sheets;
 - (h) scratches were found on roof sheets.
- 24 As to the insulation hanging into the gutters, I find that this is a defect and should be rectified notwithstanding the respondent's evidence as to a direction given to him by the applicant on a different site. In this instance, he knew that it was incorrect to perform the work in that way and he had not been given those instructions by the applicant with respect to this site.
- 25 I do not find that an agreement was reached between the parties with respect to the payment of \$6,590.90 in exchange for payment of the full amount of the respondent's tax invoice. The respondent did not assert the

existence of such an agreement in any of his correspondence to the applicant nor that of his solicitors. I note also that no submission in that regard was made to the Queensland Law Society adjudicator, Mr Brian Egan, in relation to the adjudication conducted pursuant to the Building and Construction Industry Payments Act 2004. I also note that the respondent has not asserted that that amount was not, in any event, payable to the applicant in respect of the work that he had performed.

- 26 In light of these findings, I make the following orders:
1. The respondent will carry out the following rectification work:
 - (a) install an adequate overflow to the box gutter;
 - (b) raise or lower (as appropriate) guttering that is holding water;
 - (c) fasten ridge capping at the end;
 - (d) trim insulation that is extending into the guttering;
 - (e) remove ridge capping and turn up sheet end valleys to prevent ingress of water;
 - (f) touch up scratches;
 - (g) paint fascia boards where necessary after gutter alterations;
 - (h) dispose of rubbish as necessary.
 2. The works referred to in paragraph 1 be carried out by 4:00 pm on 16 February 2008.
 3. The applicant pay to the respondent the sum of \$12,738.00 by 4:00 pm on 1 March 2008.
 4. Each party shall have liberty to apply in relation to the matters arising from these orders by giving the Tribunal and the other party at least 3 business days notice in writing.
- 27 On 8 February 2006, the respondent made an application for adjudication in respect of the non-payment of \$12,754.00 pursuant to section 26 of the *Building and Construction Industry Payments Act 2004*. The application was adjudicated by Mr Brian Egan who decided on 3 March 2006 that \$12,738 was owing by the applicant (in this case) to the respondent and that interest at the rate of 15.61% was payable on the amount owing from the "payment due date" of 25 January 2006. The applicant was also ordered to pay \$242.00 to reimburse the respondent for his share of the adjudication fee.
- 28 The *Building and Construction Industry Payments Act 2004* is part of a national scheme to allow for the expeditious adjudication of payment disputes in the construction industry with as little formality and expense as possible.¹ One of its disadvantages was averted to by Mr Egan in this case. He said: "[76] The Adjudication process under the Act is entirely paper based and without a formal hearing. This results in there being no opportunity for either party to test the other party's case by cross examination in the witness box."
- 29 This disadvantage has been recognised in and addressed by the provisions of the Act itself such that the final determination of the rights of the parties in the present application by this Tribunal is not hindered by the outcome of the adjudication. Section 100(2) of the *Building and Construction Industry Payments Act 2004* provides, relevantly, that the adjudication process does not affect any civil proceedings arising under a construction contract, and section 100(3) provides:
- "100 Effect of pt 3 on civil proceedings**
- ...
- (3) *In any proceedings before a court or tribunal in relation to any matter arising under a construction contract, the court or tribunal--*
- (a) *must allow for any amount paid to a party to the contract under or for part 3 in any order or award it makes in those proceedings; and*
 - (b) *may make the orders it considers appropriate for the restitution of any amount so paid, and any other orders it considers appropriate, having regard to its decision in the proceedings."*
- 30 It is appropriate, in view of the findings I have made, that I make a further order pursuant to section 100(3)(b) of the *Building and Construction Industry Payments Act 2004* that the order of the adjudicator be set aside.
- 31 The respondent has sought in his counterclaim an order for interest on the amount ordered in his favour. I have some sympathy for this application given that he offered to return to the site on 17 October 2005 to perform rectification work but, as noted above, this did not eventuate due to a disagreement about whether or not scaffolding was required. I do not propose to make any findings as to the requirement or lack thereof for scaffolding. The parties have not placed any evidence before me (save for their own, divergent, opinions) on the point such as would enable me to make a finding. Ultimately, I will not make any order for interest on the amount of the counterclaim as the issue of scaffolding would not have arisen if the respondent had returned to the site to perform the rectification work prior to 6 May 2005 while the original scaffolding was still in place.

Costs

- 32 In view of the orders I have made on the basis of the findings referred to above, and in light of the objectives of Division 7 of Part 5 of the *Commercial and Consumer Tribunal Act 2003*, I make no order as to costs.

¹ Hansard, 18 March 2004, The Minister for Public Works, Housing and Racing, the Honourable R Schwarten; *Emag Construction Pty Ltd v. Highrise Concrete Contractors (Aust) Pty Ltd* [2003] NSWSC 903.