

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO.BP1134/2016

CATCHWORDS

Building agreement, claim of right of set off. Whether variation to building agreement excluded right of set off, if any - no set off. Right to payment under accord and satisfaction.

APPLICANT: Mr Norman D'Ambra t/as D'Ambra
Construction

FIRST RESPONDENT: Mr John Angel (Removed from proceeding 20
October 2016)

SECOND RESPONDENT: Mr Fred Zeenni (Removed from proceeding 20
October 2016)

THIRD RESPONDENT: Mr Tony Naggar

WHERE HELD: Melbourne

BEFORE: Member M Sweeney

HEARING TYPE: Small Claim Hearing

DATE OF HEARING: 20 October 2016

DATE OF ORDER: 20 October 2016

DATE OF REASONS: 2 December 2016

CITATION: D'Ambra v Naggar (Building and Property)
[2016] VCAT 1962

PRELIMINARY

Introduction

1. On 20 October 2016, I heard and determined the proceeding.
2. Orders and oral reasons were pronounced at the conclusion of that hearing. In proceeding BP1134/2016 the third respondent was ordered to pay the applicant \$2,000 on the applicant's claim, plus \$61.50, being reimbursement of the application filing fee, and costs fixed at \$100.

3. On 31 October 2016, the third respondent wrote to the Tribunal and requested written reasons, which I now provide.
4. In accordance with the principles succinctly set out by Bromberg J in *Negri v Secretary, Department of Social Services* [2016] AATA 179, it is permissible for me to provide a more elaborate exposition of the same reasoning underpinning my oral reasons given on 20 October 2016.

MEMBER M SWEENEY

REASONS

BACKGROUND

- 1 The builder, Norman D'Ambra trading as D'Ambra Construction, entered into an agreement with three owners, John Angel, Fred Zeenni and Tony Naggar for building works for units 1, 2 and 3 at McCullough Street in Dromana. The agreement was in writing and made on or about 9 September 2012.
- 2 The agreement was varied. The variation arose out of the anticipated absence of the builder who was travelling overseas during the early part of September 2015. The owners desired that plastering works continue and not be interrupted by the absence of the builder.
- 3 The variation was evidenced by an email dated 26 August 2015 from Mr Naggar of unit 3 to the builder, copied to the other owners, Messrs Angel and Zeenni. The email confirmed a verbal agreement of the owners with the builder that the owners would engage a separate trade to complete plastering works, given the absence of the builder.
- 4 The email stated that the plastering would cease to be part of the scope of works under the original agreement and that those works be removed from coverage under the builder's warranty. In all other respects, the responsibility of the builder under the warranty was to remain in force. The email also stated that the variation as to plastering works was in respect of units 1 and 3 only.
- 5 The above variation was subsequently more formally recorded in a signed agreement between the builder and the three owners dated 24 September 2015 (Varied Agreement).
- 6 The Varied Agreement was made in respect of all three units at McCullough Street. The adjusted amount agreed as owing to the builder was \$30,900, being the sum of \$36,900 minus \$6,000.
- 7 The reduction of \$6,000 was deducted 'for all outstanding plastering work carried out by the owners of all dwelling units'. Seven aspects of the works that remained to be completed were listed, none of which related in any way to plastering works. The Varied Agreement gave effect to the exclusion of plastering works previously notified in the email of 26 August 2015.
- 8 On or about 6 January 2016, the builder sought final payment of \$30,900 from the owners for the works. In response, Mr Zeenni, on behalf of all owners, sent an email to the builder, dated 16 January 2016. Whilst the

email confirmed the amount stated as owing under the Varied Agreement¹ as \$30,900, the owners refused to pay.

- 9 The email on behalf of the owners stated that four items of work, mainly storm water works, costed at \$3,140, should be deducted from \$30,900. These cost reductions were not related to plastering works. The owners proposed that they pay \$27,759.
- 10 It was a term of the proposal that, if the builder accepted the further reduced amount of \$27,759, they would each immediately pay the builder in equal portions. Mr Zeenni's email stated this as follows:

Upon confirmation of the amount payable, you will receive 3 cheques for the amount of \$9,253 each. Thanks, J Angel, A Naggar, F Zeenni.
- 11 The builder reluctantly agreed to accept this reduced payment proposal (Settlement Agreement). In response to Mr Zeenni, he sent an email dated 18 January 2016, which stated as follows:

I found [sic] this unfair because I am supposed to pay part of storm-water not all of it but so long as we finish this stress situation I agreed [sic] on the total amount of \$27,759 if you pay in 7 days. Thank you.
- 12 It is common ground that Mr Zeenni and Mr Angel both paid \$9,253 within the 7 days but that Mr Naggar only paid \$7,253, leaving a deficit under the Settlement Agreement of \$2,000. Mr Naggar claims a \$2,000 right of set off in respect of certain plastering works.
- 13 On 28 January 2016, the builder demanded the outstanding \$2,000 be paid in accordance with the Settlement Agreement. In demanding the \$2,000, the builder reminded the owners of their agreement that each owner agreed to pay a cheque of \$9,253.
- 14 At the hearing, the builder withdrew his claim against Mr Zeenni and Mr Angel (who did not appear), given they had made full payment under the Settlement Agreement.
- 15 Mr Naggar denies that he owes the builder \$2,000 due to claiming a right of set off of \$2,000 for non-completion by the builder of plastering works to his kitchen ceiling at unit 3. Mr Naggar claims the set off arises under an alleged agreement with the builder made around 9 or 10 July 2015 whereby Mr Naggar could deduct \$2,000 from the final contract price for cost of completion of the ceiling plaster works by another contractor to be obtained by Mr Naggar.
- 16 In his points of defence, paragraph 4, Mr Naggar asserts:

Mr Naggar also agreed to release the applicant from any liability for the ceiling works to be completed by the other contractor.
- 17 The issues in the proceeding are twofold.

¹ It was agreed that the date of the Varied Agreement was 24 September 2015, but was erroneously referred to in the email of 16 January 2015 as 24 November 2015.

- Effect of the Varied Agreement: Whether Mr Naggar is entitled to set off costs of plastering in the circumstances of the Varied Agreement, dated 24 September 2015
- Effect of the Settlement Agreement: If there is a right of set off, whether the Settlement Agreement, dated 16 January 2016, constitutes a waiver precluding any right of set off

Effect of the varied agreement

- 18 Mr Naggar gave evidence that the kitchen ceiling plastering at unit 3 owned by him was not completed. Other plaster works in unit 1 were also incomplete. He produced photos taken by him on 25 August 2015 showing incomplete plastering to unit 3's kitchen cornices.
- 19 As referred to in paragraph 15 above, Mr Naggar said he had discussions with the builder around 6 to 9 or 10 July 2015. In those discussions he asked the builder how much it would cost to complete the plaster works. The builder replied that it might cost \$6,000. Mr Naggar said that he paid \$6,000 to the builder on or about 9 July 2015 but that the builder, whilst he completed the ceiling, did not complete all works, including the cornices. Mr Naggar said that the builder did not complete the cornices as he was going overseas.
- 20 Mr Naggar referred to his email dated 26 August 2015 (paragraphs 2 to 5 above and copied to Messrs Angel and Zeenni), concerning confirmation of a verbal agreement that 'we will engage someone else to finish the plastering works'. He said that the reference in that email was to all plastering works in the sense that it did not differentiate between separate works for the kitchen and all the plaster works.
- 21 However, Mr Naggar also said that the verbal agreement only applied to units 1 and 3 and that this 'relief of responsibility' only applies to units 1 and 3 plastering. This is supported by the words of the email of 26 August 2015.
- 22 Mr Naggar's email goes on to state that 'we expect that upon your return from overseas, you will immediately arrange for all outstanding works to be completed well before the end of October as discussed last week'.
- 23 Mr Naggar said that the email was a wrapping up approach to all the works, not specifically the kitchen at unit 3.
- 24 Mr Naggar said that the works were completed by the other trade to his unit 3 kitchen cornices prior to the time that Mr Naggar and the other owners entered into the Varied Agreement on 24 September 2015. Mr Naggar said he paid more than \$2,000 for completion of the works to the other trade but that he did not have a receipt.
- 25 Mr Naggar's evidence, whilst not entirely clear, appeared to be that, given that he had paid the \$2,000 to the other trade, his only avenue left was to take it off. By this I understood he meant that his only redress was to

deduct \$2,000 in the nature of the set off that he is presently claiming. However, Mr Naggar made no reference in his email of 26 August 2015 confirming a verbal agreement about any right to withhold \$2,000 from the final payment. Further, no reference to any such verbal agreement was made in the Varied Agreement of 24 September 2015.

- 26 The builder did not dispute that the kitchen ceiling to unit 3 and other plastering works were not complete around the time the photos were taken. He also acknowledged that the works had been completed by another trade before the time the Varied Agreement was made on 24 September 2015. He did dispute that there was any verbal agreement with Mr Naggar to let him deduct \$2,000 from the final payment for plastering works.
- 27 Subsequently, following the return from overseas of the builder, the parties entered into the Varied Agreement dated 24 September 2015, referred to in paragraphs 5 to 7 above. I do not need to repeat here the details of that agreement. An important part concerned that the adjusted amount agreed as owing to the builder was \$30,900, instead of \$36,900. The reduction of \$6,000 was made 'for all outstanding plastering work carried out by the owners of all dwelling units'.
- 28 The typed Varied Agreement appears clear as to its terms. Mr Naggar said that it was prepared by the architect on behalf of all three owners. On the face of the document it has the character of a total settlement of \$36,900 less \$6,000 for outstanding plastering work now undertaken by the owners of all dwelling units. A value has been taken off for plastering done by the owners. The price payable is reduced to \$30,900. It is agreed that the builder will satisfactorily complete a list of items and the completion of these is not in contention.
- 29 In my opinion, the Varied Agreement is clearly expressed. It has the character of wrapping up all matters as a final agreement and of subsuming any previous agreement, including the email of 26 August 2015. The three owners signed their agreement which states the removal from the original agreement of 'all outstanding plastering work carried out by the owners of all dwelling units at the above property'. It then states a new reduced price. The removal of all plastering works was the clear reason for the Varied Agreement.
- 30 For Mr Naggar to claim that the Varied Agreement, drawn by the architect, did not exclude a claim for plastering costs already incurred because the builder had allegedly agreed to reimburse such cost, is inconsistent with the weight of evidence and the clear expression of the Varied Agreement.
- 31 In the event that Mr Naggar had a prior agreement with the builder for reimbursement of costs, Mr Naggar could easily have requested a carve out or caveat for such a cost which would have made his position clear. He did not do so. Mr Naggar was unable to provide supporting evidence of the alleged agreement for an offsetting payment of \$2,000.

- 32 In my opinion, there is no ambiguity in the Varied Agreement. A reasonable person in the place of the parties on 24 September 2015 would be under no illusion that the terms of the Varied Agreement represented a full description of the amendment agreed, specifically identifying the issue of removing plastering works in respect of all dwelling units, and the consequent value adjustment in favour of the owners. If there had been some prior agreement for reimbursement of costs related to plastering of unit 3's kitchen, viewed objectively, the intent of the parties under the Varied Agreement was to supersede any such agreement so as to be applicable in respect of all dwelling units. The parties in signing the agreement must be taken to be bound by it.
- 33 I am not satisfied that Mr Naggar has demonstrated that, if he had any agreement to set off plastering costs, such agreement survived the Varied Agreement of 24 September 2015.
- 34 The builder has relied on the Varied Agreement, and the Settlement Agreement dated 16 January 2016, for his entitlement to be paid the full amount of his claim. For the reasons above, I have found that the Varied Agreement was clear and unambiguous as to its terms requiring payment for the works in the agreed sum which had been calculated by reference to removal of all plastering works.
- 35 The builder also relies on the Settlement Agreement in support of his right to receive actual payment. I find that he is entitled to payment under the Settlement Agreement the reasons briefly discussed below.

Effect of the Settlement Agreement

- 36 Given my finding above, it is unnecessary to address the second issue of the effect of the Settlement Agreement as constituting a waiver of any right of Mr Naggar to set off. I have found that there was no right of set off, given the terms of the Varied Agreement.
- 37 However, the builder also relies for payment on the validity and performance of the Settlement Agreement. In my opinion the Settlement Agreement, whether viewed alone or in conjunction with the Varied Agreement, constitutes an accord of the parties whereby the three owners, unequivocally,² agreed to pay \$9,253 each in return for a reduced amount previously payable under the Varied Agreement.
- 38 The accord agreement, the Settlement Agreement, addresses the exclusion of certain, mainly storm water, costs. It represents the total position offered by the three owners on which they undertook to make final payment without scope for further debate or deduction.
- 39 The accord agreement is also further confirmation by all the owners, of the amount agreed to be paid under the Varied Agreement as having resolved

² Refer language of the Settlement Agreement quoted in paragraph 10.

all costs related to plastering works.³ There was no question in the Settlement Agreement of some residual issue concerning a set off for unit 3 plastering works. Two of the owners have paid in accordance with the Settlement Agreement. Mr Naggar has not.

- 40 The Settlement Agreement was agreed to by the builder, reluctantly, as evidence by the tone of his acceptance email.⁴
- 41 If there had been any right of set off by Mr Naggar in respect of plastering costs, which I have found there was not, the unequivocal nature of the Settlement Agreement is such that it constitutes an accord and satisfaction of the parties.

CONCLUSION

- 42 I am satisfied that Mr Naggar has breached the terms of the accord as constituted by the Settlement Agreement (including the Varied Agreement), thus entitling the builder to payment of the remaining balance of \$2,000 in accordance with its terms.
- 43 Mr Naggar has failed to establish a right of set off.
- 44 Having regard to s 109(3)(c) and (e) of the *Victorian Civil and Administrative Tribunal Act*, I am satisfied that the applicant builder has incurred legal costs of \$100 in the preparation of his case and that it is fair in the circumstances of the case having regard to the relative strengths of the claims made by each of the parties that an order for payment of the costs be made against Mr Naggar.
- 45 The claim in respect of the first and second respondents was withdrawn.

MEMBER M SWEENEY

³ Settlement Agreement, dated 16 January 2016, fifth line: Our agreement dated 24/11/15 [sic] \$30,900.

⁴ Refer paragraph 11.