

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1511/2015

CATCHWORDS

Contract for the provision of structural engineering design and calculations for a fixed fee; Applicant requested changes to the Respondent's preliminary engineering design; Respondent requested a revised fee as a condition of completing the design and calculations by a specified date; Applicant refused to accept a revised fee and terminated the contract by appointing another engineer to provide the engineering services; Applicant's claim dismissed.

APPLICANT	Milani Pty Ltd (ACN: 141 602 477)
RESPONDENT	Mehren Orangi t/as Pars Design and Construction
WHERE HELD	Melbourne
BEFORE	B. Thomas, Member
HEARING TYPE	Hearing
DATE OF HEARING	21 January and 11 August 2016
DATE OF ORDER	27 October 2016
DATE OF REASONS	27 October 2016
CITATION	Milani Pty Ltd v Orangi (Building and Property) [2016] VCAT 1784

ORDER

The claim of the Applicant is dismissed.

B W Thomas
Member

APPEARANCES:

For the Applicant	Mr Nick Milani, Director
For the Respondent	Mr Mehren Orangi, in person

REASONS

BACKGROUND

1. The Applicant (Milani) is a builder-developer and the Respondent is a structural engineer. On 8 June 2015 Mr Nick Milani on behalf of Milani, accepted Mr Orangi's quotation for the preparation of structural working drawings (the services) for the construction of a residence in Templestowe (the contract). Milani says that Mr Orangi failed to provide the services and thereby breached the contract, forcing it to engage another structural engineer to complete the services. Milani claims damages of \$4,998.00.
2. Mr Orangi says that at a meeting on 24 June 2015, Mr Milani requested alterations to the preliminary engineering drawings, which necessitated a revised fee which Mr Milani refuse to accept. On 2 July 2015 Mr Milani engaged another engineer.
3. On 6 May 2016 Milani was ordered file and serve Amended Points of Claim by 20 May 2016 and Mr Orangi was ordered to file and serve Points of defence by 3 June 2016. Milani complied with these orders but Mr Orangi failed to do so. The hearing took place on 11 August 2016.

THE EVIDENCE

4. Mr Milani said he provided architectural drawings to Mr Orangi and received a Fee Proposal dated 8 June 2015. The services described in the Fee Proposal were structural engineering working drawings and calculations and the fee was \$2,200.00 including GST. The Payment Schedule was stated to be *100% after preparing all the documentation listed and before issuing certificate of design*. Mr Milan said he accepted the fee proposal on that day.
5. Mr Milani said he met with Mr Orangi on 24 June 2015 to review Mr Orangi's preliminary drawings and calculations and to ascertain what was needed to complete the job. Mr Orangi agreed to provide a complete set of structural drawings and calculations by Monday or Tuesday of the following week.
6. On 26 June 2015, Mr Milani received by email an amended Fee Proposal from Mr Orangi for \$2,500.00 of which 50% was required as a deposit. In the covering email. Mr Orangi said -

I made a change in the fee as per our agreement and also change the term of payment as it extended more than the time we expected.
7. On 27 June 2015, Mr Milani replied -

As you are aware I'm away and have limited access to internet. The last we spoke you were going to send the package and alert me with an SMS, Monday or latest Tuesday. Best is to concentrate to deliver on your committed date (sic).

8. On the same day Mr Orangi replied -

I am aware of your trip, but expect you to read the updated contract and follow what is there if you wish to continue. I will update you with the delivery time as soon as the terms of contract are fulfilled.

Mr Milani replied

No new terms were discussed nor agreed. You cannot change the terms unilaterally at the eleventh hour. If you cannot confirm that the work is going to be completed as you promised latest by this Tuesday, I will assign somebody else to do it as we have already lost a lot of time.

9. On 29 June 2015, Mr Milani emailed Mr Orangi:

I have not heard back from you after this email nor you have answered my SMS regarding the completion of the work today (sic) are you going to complete this work as promised or not?

10. Mr Orangi replied:

As per Devison 4, (sic) Part – 3 of Domestic Building Contracts ACT 95 and Consumer affairs rules, any variations more than % 2 (sic) in the contract must be addressed in written notice agreed and signed by both parties.

Our initial contract for design of single dwelling double story in Templestowe has been done up to %85 completed and the change in setbacks of the 2nd floor in the building would be optimistically %40 (sic) change in the initial design work.

As per my written notice date 27th of June, the following options are viable to proceed with the initial contract:

- 1) agree on the new notice of variation and sign it, then we will proceed to finish. The earliest time we can deliver the design due to traffic (sic) of work we have at the moment, is Thursday 9th of July. As the scope of the contract has changed, we do not afford continuing without any deposit payment.
- 2) terminate the contract as per your intention by sending me written notice stating that.(sic) I will send you an invoice for % 85 (sic) of the initial contract. I have enough evidence and witness to prove it if necessary.

12. Mr Milani replied:

Your revised completion date is not acceptable and is against your repeated assurances including your confirmation that the works will be completed by today Monday or latest Tuesday.

If you wanted a payment in advance, even though it wasn't part of our original agreement, all you have to do was to ask.

I do not agree with your assessment of variation or request for payment.

If you would like to finish this work amicably, you need to reprioritise your work and complete the work no later than this Thursday 2 July.

If you cannot confirm this new deadline, I have no option but to assign somebody else to the job.

13. Mr Orangi replied:

As you know, the circumstances have changed since you had conversation with Architect in our design team. I am so stressed and got anxiety from your behaviour that couldn't touch the job. I had the same feedback from our architect.

The earliest time I can promise at the moment is Tuesday 7th of July not earlier whatsoever.

Although the changes is nearly % 40 (sic) but I asked for % 10 (sic) increase in fee and the deposit requested because of extension of time.

As per your request, we prepared the job to deliver on Thursday evening the same day, which you changed the plans. So, I would say % 85 (sic) is a very fair figure.

Please advise if you wish to continue, otherwise we can act as per option 2 of my previous email.

14. On 2 July 2015, Mr Milani engaged D & A Consulting Group Pty Ltd to complete the structural design and calculations at a cost of \$2,310.00 including GST. Mr Milani pointed out that D & A Consulting did not charge for amendment to the structural design and calculations as the result of repositioning a beam.

15. Mr Milani said his claim for \$4,998.00 is made up as follows:

D & A Consulting Group's fees	\$2,310.00
Holding costs	\$2,688.00

16. He said the holding costs were based on a delay in construction of 21 days by reason of having to engage D & A Consulting Group. He considered that Milani was entitled to recover consequential losses it had sustained as a result of Mr Orangi's breach of contract, regardless of the fact that an entitlement to do so was not a term of the contract with Orangi.
17. Mr Orangi said that at the meeting between him and Mr Milani on 24 June 2015, they reviewed changes in the design for the residence, and in particular changes in the setback of walls. Mr Orangi said he would review the changes and complete the design as soon as possible. He said he told Mr Milani that he would complete the design the following week if he could, but if not, he would tell Mr Milani when the design would be completed.
18. He said that the changes to his preliminary drawings required by Mr Milani were more than 40% of the original design, which was denied by Mr Milani. Mr Orangi said he therefore requested an additional fee, which was only 10% more than his original fee.

19. Mr Orangi denied that he agreed to complete the design by the following Monday or Tuesday. Mr Milani said that the only date mentioned in subsequent communications with Mr Milani was 7 July 2015, but this was conditional upon him accepting a new contract.
20. Mr Milani said that the changes to the engineering design he requested and agreed to by Mr Orangi, simplified the work Mr Orangi was required to do; by changing the offset a number of beams were eliminated meaning there were less beams to design and detail the connections. He also said that it is customary for minor changes to an engineering design to be required, which would not attract an additional cost.
21. Mr Orangi maintained that the changes were major with significant cost consequences. He produced two sheets being the original design (Exhibit G) and the revised design (Exhibit H). He said he was happy to change the design, but in his own time. Mr Milani said that both these exhibits were architectural and are not engineering designs and the revised design eliminated structural beams, and used a brick wall to support the second floor instead of cladding, which he confirmed in his email to Mr Orangi of 23 June 2015 and in the meeting the following day. Mr Orangi maintained that he did not receive the revised design until after the meeting on 24 June 2015, and the changes to the design were major, because they involved not merely changing beams, but eliminating them altogether.
22. Mr Milani maintained that the breakdown in the relationship occurred when Mr Orangi, having committed to a completion date on 24 June 2016, subsequently refused to commit to a completion date. The reference to his conversation with the architect, necessitating a revival of the fee agreement was irrelevant. He therefore had no option but to terminate the agreement with Mr Orangi and engage another engineer.

FINDINGS

23. I find that –
 - On 8 June 2015, it was agreed that Mr Orangi would provide engineering services to Milani for a fee of \$2,200.00 including GST;
 - Mr Milani provided a set of architectural drawings to Mr Orangi;
 - On 24 June 2015, Mr Milani requested amendments to the preliminary drawings prepared by Mr Orangi;
 - Due to the scope of work now required, on 26 June 2015 Mr Orangi sent to Mr Milani an amended fee proposal;
 - Mr Milani did not agree with the revised fee or payment terms;
 - On 29 June 2015, Mr Orangi gave Mr Milani the opportunity to terminate the contract; and

- On 2 July 2015, Mr Milani terminated the contract by engaging D & A Consulting Group to provide the engineering services.

24. Therefore, I dismiss the claim of the Applicant.

B W Thomas
Member

27 October 2016