VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. BP249/2017

BUILDING AND PROPERTY LIST

CATCHWORDS

Building contract; payment for unauthorised variation, restitution.

APPLICANT	S & L Graham Developments Pty Ltd (ACN: 152 340 559) t/as Stephen Graham Landscaping (ABN: 74 228 780 640)
RESPONDENT	Campeyn Group Pty Ltd (ACN: 006 818 051)
WHERE HELD	Melbourne
BEFORE	Member
HEARING TYPE	Hearing
DATE OF HEARING	10 May 2017
DATE OF ORDER	1 June 2017
CITATION	S & L Graham Developments Pty Ltd v Campeyn Group Pty Ltd (Building and Property) [2017] VCAT 752

ORDER

The application is dismissed.

Hugh T. Davies
Member

APPEARANCES:

For the Applicant	Mr. & Mrs. Graham
For the Respondent	Messrs Atkins, Eather and Hyde

REASONS FOR DECISION

BACKGROUND

1 The Tribunal, on 10 May 2017, reserved its decision to consider the evidence and for the delivery of written reasons.

2 At the hearing Mr. & Mrs. Graham gave evidence on behalf of the applicant as did Messrs Atkins, Eather and Hyde on behalf of the respondent.

3 The applicant seeks payment of $9900.00 claimed as a variation to a contract made between the parties in May 2016 under which the applicant, as a sub-contractor to the respondent, agreed to carry out paving works ("the works") for the Monash City Council ("MCC") in Oakleigh ("the site").

4 In its application the applicant sought payment of $12193.00 but at the opening of the hearing accepted the Tribunal's suggestion that some of the claims for interest and legal costs would be unlikely to be allowed and so limited the claim to $9900.00.

5 The contract price for the works was $36297.80.

6 The specification for the works included a provision that pavers which were to be supplied by MCC would vary in measurement from 600 x300mm to 300 x 300mm and that their thickness would be 60mm nom (meaning nominal subject to an allowable tolerance).

7 The applicant's quotation for the works had been one of three the respondent considered and accepted this quotation as being in the middle of the range of the prices quoted.

8 Subsequently the applicant successfully quoted for additional works at the site; it has been paid for those works and they are not the subject matter of the current dispute.

9 On 8 August 2016 representatives of the parties had a site meeting at which Mr Graham had the opportunity to partially inspect the pavers for the job; he did not inspect them.

10 Initially the works were to commence some months after the contract was made but were further delayed and scheduled to commence on 22 August 2016.

11 The respondent later asked the applicant to quote for the completion of footpath works but rejected, as too expensive, the applicant's quotation and proceeded to do those works using its own employees.

12 The applicant commenced works on 1 September employing three tradespersons. Neither party made an issue of these delays or the commencement date. There was no evidence as to an agreed completion date albeit the parties had an understanding as to the time frames in general.

13 On 12 September Mr Eather approached Mr Graham expressing concern that the works were proceeding slowly stating that the applicant's employees did not appear efficient, were working too slowly, and that the works might not be completed as required by MCC which would give rise to problems with the overall project. At that time Mr Graham told Mr Eather that there was a problem with the pavers the applicant had agreed to lay and that a contract variation would be required.

14 On or about 14 September the applicant prepared a variation claim for $9900.00. ("the variation claim"). There was no available evidence as to the date upon which the variation claim was actually sent by the applicant or received by the respondent.

15 On 21 September Mr Graham asked Mr Eather about the variation claim and was advised Mr Eather had not seen it; Mr Graham sent the claim to the respondent again on that day.

16 On 21 September 2016, Ms. Vamphlew, an employee of the respondent, issued a purchase order for the claimed variation. Upon discovery of this Mr. Eather instructed Ms Vamphlew to withdraw the purchase telling her that the respondent had not authorised the variation claimed.

17 Ms. Vamphlew sent an email to the applicant on 21 September in which she stated, in part:-

> "After further discussion with the projects manager we have decided to formally retract purchase order 38074 for the variation works at Chester Street toilet block.
>
> We apologise for this error and will send a new purchase order over as soon as we have received approval for the woks to go ahead"

18 Thereafter there were discussions between Mr Graham and Mr Eather and an email from Mr Eather dated 27 September about the variation claim and the continuance of the works. It was clear to both parties that MCC had not accepted the variation.

19 Both parties clearly believed that it would be unwise for the applicant to stop the works until the variation claim was dealt with because to do could give rise to disastrous outcomes; this included Mr Graham's belief that the respondent and MCC might well regard his company as being in breach of contract if it stopped the works and would be likely to have the works completed by someone other than the applicant; this he believed would put at risk the applicant's prospects for receiving any payment for the works themselves let alone for the variation claim.

20 The works were completed to the satisfaction of the respondent on 27 September and the respondent then paid the applicant the amount of the initial price for the works excluding the variation claim.

21 At no time has the applicant claimed that the works were delayed unduly or unexpectedly because of weather conditions.

22 Later efforts by the respondent to have MCC accept the variation claim were unsuccessful.

23 By a letter dated 19 January 2017 the applicant's lawyers drew the respondent's attention to *Vasco Investment Managers Ltd. V Morgan Stanley Australia Ltd. [2014] VSC 455* ("Vasco") indicating an additional basis at law upon which the applicant claimed payment of the variation claim.

24 There was no dispute between the parties as to the matters referred to above and, as far as is required, they constitute findings as to fact.

THE APPLICANT'S CONTENTIONS

25 Mr Graham stated that the quotation for the works had been costed as follows:-

site preparation

130m2 of paving -estimate laying 20m2 per day i.e. estimated 7 days works

plus allowing for possible wet weather so that the project would take 2-3 weeks including weekends when there would be no work done.

26 There was no clear evidence as to the number of days the applicant had allowed for wet weather delays although Mr Graham did state in evidence that, in allowing a maximum of 21 days on the works, he did make some allowance.

27 The quotation did not attribute costings to different stages of the works.

28 The quotation detailed the works included to paving works as follows:-

establishing site levels

installing drain

laying compacted crushed rock

pave border pavers on mortar

plant garden bed and top with mulch

clean up of site.

29 The applicant claims that the amount of the variation was calculated, at a time when the works were not complete, on the basis that the works would take 6 days longer to complete than originally estimated. It so advised the respondent, and claims that the amount of $9900.00 is a fair and reasonable charge for the extra work involved.

30 It claims that, whereas there was a specification, the pavers supplied varied between 55mm and 65mm in thickness, giving a differential in some cases up to 10mm between adjoining pavers. Mr Graham stated in evidence that, by industry standards, a tolerance of no more than 2mm should be permitted. At the hearing there was disagreement between the parties on this issue and finally Mr Graham conceded, for the purpose of the hearing,

and as the respondent claimed, that a variation of 3mm would be accepted as an allowable tolerance.

31 In the claim as filed, and as the applicant's solicitors alleged in a letter of demand to the respondent dated 19 January 2017, the applicant alleged that the amount claimed was due as a variation to the contract for the works to which the respondent had agreed by providing a purchase order for the works on 21 September 2016.

32 Leaving aside the issue of what if any agreement was reached with regard to the variation claim, the applicant maintained that a large quantity of the pavers supplied by MCC did not meet specification, as it sought to demonstrate by photographs presented to the respondent after the dispute arose and as put in evidence.

33 It claimed that the condition of the pavers limited its employees to laying approximately 10m2 per day and that the time required for the paving works had been extended from 7 to 13 working days.

34 It denied that its employees were slow or incompetent.

THE RESPONDENT'S CONTENTIONS

35 The respondent claimed that the applicant may have misquoted underquoted for the works so leading to the problems it encountered in the course of the works.

36 It also maintains that the applicant had ample opportunity to inspect the pavers on more than one occasion well before commencing the works but did not do so.

37 Whilst the respondent denies liability for the claim, and does not accept the basis of the calculation of the claim, it did not deny that, if the variation claim was justified as made, the amount of $9900.00 would be a reasonable allowance for the 6 days claimed.

38 By email dated 29 September 2016, Mr Eather advised the applicant that it took issue with the applicant's complaints re the pavers and that, as stated by Better Exteriors, a paving company which provided a letter to respondent dated 29 September, the pavers as supplied were within allowable tolerances.

39 Mr Eather's main contention was that the applicant's employees were not competent and proceeded too slowly and that, if that had not been the case, the works could have been completed within the time frame the applicant originally estimated and planned.

40 According to Mr Eather, going by Mr Graham's calculations, the fact that the applicant's employees were taking up to 20 minutes on average to lay each paver is indicative of inefficiency, whatever problems arose.

41 Mr Eather gave evidence as to the extent of the works the respondent's employees undertook on the task for which the applicant quoted

unsuccessfully and performed without undue problems, without having to adopt the use of extensive amounts of mortar instead of a sand base.

42 Mr Eather stated that the respondent's workers who did the footpath were not expert tradespersons and they got the job done in a lesser time, relatively speaking, than did the applicant's employees with the works they undertook.

FINDINGS AS TO FACT

43 Notwithstanding Mr Eather's contentions as to the thickness of the pavers and the opinion expressed by Better Pavers, the photographs put in evidence by the applicant persuade the Tribunal that some of the pavers did not meet the specification, even allowing for a tolerance of 3mm plus or minus.

44 The state of the pavers was such that the supplicant was required to undertake works outside those required by the contract. Despite the respondent maintaining the applicant could have inspected the pavers, it was not bound to do so and the respondent could not for that reason alone be excused from meeting the paver specification.

45 There was no specific evidence as to the extent of the discrepancy other than from Mr Graham who said the problem was widespread.

46 Whether the applicant's employees worked efficiently is an important consideration as are the issues of whether Mr Graham accurately quoted for the works and whether, realistically, the works could be completed in the 2-3 weeks he estimated.

47 Mr Graham's evidence did not assist the Tribunal in determining the extent to which different parts of the works could or could not be done together.

48 Even if Mr Eather's estimates as to the time taken by the applicant's employees are exaggerated, going by the evidence overall, regardless of the cause, the works proceeded very slowly and far more slowly than either party anticipated.

49 Mr Eather's evidence as to the performance of the respondent's employees in carrying out the footpath works was very persuasive.

50 If the laying of the pavers was estimated initially to take 10 days, and the total time was to be 2-3 weeks i.e. 10-15 working days including an allowance for poor weather, Mr Graham was allowing less than 5 working days for all but the paving works unless all works could proceed together. The Tribunal finds from the evidence that it was most unlikely that that was achievable or that the initial allowance was adequate overall.

51 The uncontested evidence of the respondent was that during the works there were 5 days upon which there were rain delays.

52 The works involved more than the mere laying of pavers. Mr Graham's testimony was that the works were estimated to take 2-3 weeks overall did

not clarify what time the works were expected to take overall excluding 10 days for paving.

53 To the date of completion, taking out weekends and the days upon which the works may have been delayed in part or in full because of bad weather, the applicant worked on the project for at least 14 full days and perhaps some additional part days but certainly not for 19 days. The project extended overall from an estimated 2-3 weeks to 27 days (both including weekend and weather delays).

54 Whilst the evidence did not enable the Tribunal to reach a conclusive finding in this regard the real possibility remains that the days actually worked were not substantially in excess of those the applicant ought to have allowed, and that is without regard to efficiency issues.

55 Mr Graham claimed that the paving works in the end took 16 working days out of what the Tribunal finds to have been a maximum of 14 days totally unaffected by weather.

56 In all the Tribunal is not satisfied that the applicant's original estimate of time was accurate, or that the applicant's workers proceeded efficiently and that therefore the variation claim could not be allowed in full whatever other conclusions the Tribunal might reach.

57 The problems were known to the applicant early in the course of the works, as Mr Graham testified. The applicant certainly then had the opportunity to carry out a wider inspection and raise the issue rather than push on laying a substantial quantity and yet saying nothing at a time when to have raised the issue early may have presented the opportunity to resolve the issue; but by pushing on without complaint, for more than a week according to the evidence, the applicant made the situation worse overall as every day went by and it became almost unsolvable by 21 September.

58 In the view of the Tribunal the events of 21 September as outlined above are not to be regarded as constituting an agreement to which the respondent agreed to be bound to accept the variation claim.

59 Furthermore, whatever Mr Graham's beliefs were at the time, at no time after the purchase order was withdrawn on 21 September did Mr Eather, with whom Mr Graham was dealing exclusively, agree to pay the amount of the variation claim; Mr Eather did no more than state that he would deal with MCC to see if the latter would approve the claim.

60 The purchase order apart, there was no evidence before the Tribunal that the applicant acted to its detriment in reliance on the purchase order which was withdrawn less than 1 hour after it was issued on September 21. The works were already under way and the applicant did not proceed because of the issue of that purchase order. Between 14 and 21 September the applicant did not follow up on the variation claim.

61 The respondent is not to be estopped from treating the purchase order as non-binding.

62 It follows that there was no agreement to bind the respondent to pay the variation claim and, in the view of the Tribunal, the only basis upon which the applicant might succeed in this proceeding is if it is assisted by the principles laid down in Vasco.

63 Mr Graham was well justified in assuming what might be the outcome of a cessation of the works and the applicant was left with little practical choice than to press on with the works and hope it would get paid for the variation claim. However he took a risk in proceeding with an unapproved variation and, as he stated in evidence, he knew he was taking a risk.

64 Mr Graham's evidence was that problems were recognised within a few days of the works commencing; and yet he did not raise the issue until the third week of the project and then only when queried by Mr Eather as to why progress was seemingly so slow.

THE APPLICABLE LAW

65 The applicant's claim, in addition to being based upon an agreement by the respondent to pay the variation claim, is to be regarded as a claim in restitution on a quantum meruit (i.e. the value of the services in question) arising out of services performed; such a claim is for equitable relief.

66 As noted above, the respondent sought to rely upon the principles outlined in Vasco.

67 Section 184 (2) (b) of the *Australian Consumer Law and Fair Trading Act 2012* ("ACL") provides that this Tribunal may order *"the payment of money by way of restitution."*

68 In Vasco, Vickery J of the Supreme Court of Victoria, in his judgement, dealt with the principles applicable to a claim for restitution on a quantum meruit basis and stated:-

> "*337* The following principles apply to an action in quantum meruit, *as derived from Pavey & Matthews Pty Ltd v Paul, Brenner v First Artist Management Pty Ltd, Lumbers v W Cook Builders Pty Ltd (in liq) and the cases cited therein.*
>
> *339 The law may impose an obligation to make restitution on a quantum meruit basis, under what I will call the first class of case, where the plaintiff proves:*
>
> *a. 345 The cause of action seeking relief in quantum meruit in the first class of case … does not call for specific proof of the making of an express or implied request by the Actual or constructive acceptance of the benefit of the provider's goods or services by the recipient;*
> *b. The recipient of the goods or services should have realised that the provider expected to be paid; and*

c. It would be unjust for the recipient to take the benefit of the goods or services provided without paying a reasonable sum for them.

347 The court is not concerned with the actual state of mind of the parties when considering whether payment ought to have been contemplated in the first class of case. The appropriate enquiry is whether the recipient of the services, as a reasonable person, should have realised that a person in the position of the provider of the services would expect to be paid for them.

349 Fundamentally, an action on quantum meruit, such as that brought by Vasco, rests not on any implied contract, but on a claim to restitution based on unjust enrichment. Such a claim arises from the benefits accruing to a defendant as a result of the plaintiff's performance of services which were requested and accepted by the defendant, but not paid for.

350 The High Court considered the restitutionary principles informing an action based on quantum meruit in Pavey. The following passage from the judgment of Deane J in that case, was cited by Byrne J in Brenner and it is repeated here:

The quasi-contractual obligation to pay fair and just compensation for a benefit which has been accepted will only arise in a case where there is no applicable genuine agreement or where such an agreement is frustrated, avoided or unenforceable. In such a case, it is the very fact that there is no genuine agreement or that the genuine agreement is frustrated, avoided or unenforceable that provides the occasion for (and part of the circumstances giving rise to) the imposition by the law of the obligation to make restitution."

CONCLUSIONS

69 It is the view of this Tribunal that the circumstances of this application, in which the applicant claimed that its continuance of the works it had contracted to perform entitled it to payment for an unapproved variation, cannot give rise to a claim for restitution

70 The basis of a claim for restitution would be that the additional works for which the variation was claimed were not works the applicant was required to perform because the pavers supplied did not meet contract specifications thus relieving it of the obligation to perform the contract.

71 Whilst not seeking to examine all of the background to Vasco in these reasons, the Tribunal is of the opinion that the cases may be distinguishable on their facts.

72 Mr Vasco was providing advisory services to the defendant in circumstances where, according to the judgement, there was some blurring of his responsibilities and the defendant ought to have known, accepting the services, that Mr Vasco expected to be paid for what he was doing; and this

albeit that the totality of what he was doing might not have been known to the defendant.

73 Were the cases not distinguishable on their facts, the Tribunal would nonetheless conclude that the applicant has not satisfied, as it must, each of the three test laid down in Vasco.

74 The evidence clearly indicated that the respondent did not actually accept the benefit of the claimed extra works provided. The respondent advised the applicant against suspending the works; however in doing so was looking at the situation from a practical point of view. The applicant was not threatened with the consequence of suspension and all this in circumstances where, according the evidence, the respondent did not believe that the applicant should expect to be paid more than the initial agreed price.

75 "Hope or aspiration" and "expectation" are not synonymous words. Clearly Mr Graham hoped to be paid for the works but whether he expected or was entitled to expect he would be paid is another matter. Whilst the respondent knew that the applicant hoped to be paid for the variation claim, looking at the circumstances objectively, the Tribunal could not conclude that the respondent should have realised that the applicant expected to be paid.

76 In the current application there was no room for dispute as to what the applicant was doing and in circumstances where Mr Graham knew he was taking a risk in continuing the works without approval for the additional claim. His view that to stop work was not the course to adopt does not mean necessarily that at law the applicant would be held to be in breach of contract; but that was the course upon which he decided.

77 This Tribunal has some difficulty in determining the extent, if any to which the respondent was unjustly enriched by the performance of the works at the original price. There was no alteration to the nature of the works but to the amount of labour the applicant had to commit to the task. The respondent got no more than it bargained for albeit it was at a price which was lower than that at which the applicant might have quoted if all the facts it later alleged were known to it at the time when it quoted for the works. It may be that the applicant might not have got the job if initially it had allowed sufficient to cover what it now claims. The applicant was not the lowest price tenderer.

78 The applicant has not satisfied the Tribunal that:

the restitution claim is made out; or

the claim for 6 days extra work is justified in view of the above findings, or

that the respondent agreed to accept the variation claim.

79 For those reasons the application is dismissed.

Hugh T. Davies
Member