

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST

VCAT REFERENCE NO. D831/2006

CATCHWORDS

Domestic building – contract – parties to same.

APPLICANT	Shelcon Pty Ltd (ACN 108 192 392)
RESPONDENTS	Daniel Duhovic, Hasan Erlinoglu
WHERE HELD	Melbourne
BEFORE	Senior Member D. Cremean
HEARING TYPE	Hearing
DATE OF HEARING	7 June 2007
DATE OF ORDER	28 June 2007
CITATION	Shelcon Pty Ltd v Duhovic (Domestic Building) [2007] VCAT 1072

ORDER

- 1 I determine that the contract with the Applicant was made with SMK Developers Pty Ltd and not with the Respondents or with either of them.
- 2 Reserve costs.

SENIOR MEMBER D. CREMEAN

APPEARANCES:

For the Applicant	Mr M. Mackinnon of Counsel
For the Respondents	Mr J. Isles of Counsel

REASONS

A. INTRODUCTION

1 The Applicant in this case began proceedings on 24 November 2006 by Application filed on that date and subsequently served.

B. CLAIMS AND DEFENCES

2 The Applicant alleges it is the owner of the property at 310 Camp Road Broadmeadows. It alleges it entered into an agreement with the First Respondent to perform certain concrete and other works associated with the construction of 3 residential units on that property. The agreement is alleged to have been made in or about September 2006. The Applicant alleges that the First Respondent employed the Second Respondent to execute the works. Payment for carrying out the works is alleged to be the sum of \$20,000.00.

3 The Applicant alleges the works began in the week commencing 11 September 2006 and are still incomplete. It is alleged the works were not executed properly and are defective. Further it is alleged the Applicant's property has been damaged.

4 As a result of the Respondents' alleged wrongdoing, the Applicant alleges the units are not ready for sale and that it has incurred interest costs.

5 In all a sum of \$58,996.00 is claimed. That sum includes the following: \$48,000.00 in connection with rectification and completion of the works; \$275.00 for replacement of damaged guttering; \$180.00 for replacement of damaged door; and \$10,541.00 interest from 3 October 2006 to the date of filing (24 November). Further interest is claimed from 24 November to 2 December 2006 and from then to judgment. Costs also are sought.

6 By their defence (in Points of Defence filed on 7 February 2007) the Respondents make certain (qualified) admissions, and denials, or do not plead as the case may be. In particular the First Respondent denies that he is now or ever has been a builder or concrete worker or that he has ever undertaken any works of the kind alleged either on his own behalf or through any servant or agent. The First Respondent denies he employed the Second Respondent to execute the works. Both Respondents deny the Applicant has any entitlement to damages from them or from either of them either in the sum claimed or at all.

7 The following further matters are alleged in the defence:

- a That the First Respondent is unemployed and has permanent physical and intellectual disabilities by reason of a motor cycle accident occurring on 21 August 2001.
- b That the Second Respondent is an employee of SMK Developers Pty Ltd and was at all times material acting in his capacity as such and that at all such times Mr Salvatore Virduzzo well knew he was dealing with that company;

- c That the Second Respondent says the First Respondent is not and does not represent that company in any capacity.

8 No counterclaim is filed by the Respondents.

C. PROCEDURAL POINTS

- 9 Following orders made on 16 March 2007 this matter was set down for hearing on 2 May 2007 for two days.
- 10 That hearing on 2 May came before me and at an early point I agreed to a submission I should determine as a preliminary or separate question – who, in law, were the contrasting parties? That compresses the question somewhat, but gives its essentials nonetheless. I agreed to this course because it was obviously an issue needing determination and it had the potential, in my view, to resolve the matter, or the most important aspect of it. In turn, that had cost-savings implications for everyone, I had hoped.
- 11 At the hearing I conducted (which concluded on 7 June 2007) I heard evidence from a number of witnesses. The most important witnesses, I consider, however, were the parties themselves – that is the First and Second Respondents and Mr Virduzzo on behalf of the Applicant. The Applicant was represented by Mr Mackinnon, independent Counsel, and the Respondents by Mr Isles, of Counsel. Each witness was thoroughly examined and cross-examined and at the conclusion of the hearing the parties made detailed submissions (but not in writing as I had requested). I was well placed during the course of the hearing to observe each witness and to form opinions about their veracity and otherwise. Consequently I am satisfied that I can reasonably make the findings I do make in this matter having heard and seen each give evidence. I bear in mind also the duty of the Tribunal under s97 of the *Victorian Civil and Administrative Tribunal Act 1998* to proceed fairly and according to the substantial merits of the case.

D. THE EVIDENCE

- 12 Mr Virduzzo gave lengthy evidence. He said the Applicant, of which he was director, was a developer of the site at 310 Camp Road Broadmeadows. He said he met the First Respondent who said “I can do the concreting work for you”. He said he had done it before and that he would get his “other family” to help out. He gave Mr Virduzzo a quote for \$20,000.00 (to be paid in lots of \$5,000.00). The work was to be done over a period of 2 weeks. He paid him a “deposit” as he called it on 5 September 2006. He was asked to make out a cheque to SMK Developers Pty Ltd, which he did. The First Respondent said this was his “other family’s” company and that this was being done for tax purposes. He assured Mr Virduzzo, however, that he would still be doing the job. The next payment was made on 22 September 2006 - also to the company at the First Respondent’s request. With the First Respondent on that occasion on site was the Second Respondent. The First Respondent said the Second Respondent would be taking over the work. He, Mr Virduzzo, said he was not very happy about

this. He felt that the First Respondent was normal to talk to; had no physical disabilities; and no intellectual disabilities; and was a very good worker. The Second Respondent, however, he found gruff and inattentive. The First Respondent when on site usually would be in the company of his father Stephen Duhovic. He considered, he said, the First Respondent “very conscientious”.

- 13 Mr Virduzzo said that the works performed had had problems. He said he had written 2 letters on 16 October 2006. Both such letters were addressed to “SMK Developers” underneath which was written “Hasan & Sabina Coller”. The reference to “Hasan” is a reference to the Second Respondent.
- 14 In cross-examination Mr Virduzzo said that the First Respondent did the “athletic work” on site. As far as he was concerned, he contracted with him: he did not, he said, intend to form a contract with any other person. He said he did not, himself, contract with the Second Respondent. He said at the time of contracting the First Respondent never mentioned any company.
- 15 I have compressed the evidence given in chief and in cross-examination by Mr Virduzzo but I consider he maintained his position, of relevance in the present context, that it was the First Respondent with whom he contracted.
- 16 The Second Respondent then gave evidence. He said the First Respondent was his step-son. He said he and the First Respondent had discussed the work on site to be done. He said he went on site in late August 2006 where he spoke to Mr Virduzzo. He was handed a cheque, he said, for \$5,000.00 payable to SMK Developers Pty Ltd. He said Mr Virduzzo had asked: “Who am I going to pay?” and the Second Respondent said: “Pay SMK as that’s the company I am working for”. The Second Respondent said he is not a director of that company but is, rather, a manager of it. He said the First Respondent did only light work and was not engaged as a paid worker.
- 17 In cross-examination the Second Respondent admitted he was not a registered builder. He said he had had his licence cancelled over matters which he acknowledge involved providing false information. He said the First Respondent did “odd jobs” and that he did not get paid. He said the First Respondent introduced the work to him but that he, the First Respondent, did not represent SMK.
- 18 I must indicate that far from the impression I was given by Mr Virduzzo, it seemed to me that the Second Respondent was not other than politely spoken.
- 19 I heard from 2 further witnesses before I heard from the First Respondent. I shall refer to their evidence later.
- 20 The First Respondent gave evidence that he is on a disability pension following a serious motor cycle accident on 21 August 2000. He said he did not like to think of his “injuries”, however, as “disabilities”. He said when he is on site he tries to help out his father (Stephen) and others. He said he has never done any concreting work and he denied saying “I can do

concreting”. He said he had said to Mr Virduzzo: “I know someone who can do concreting”. He then introduced him to his step-father, the Second Respondent.

- 21 In cross-examination, he said he thought that Mr Virduzzo was prepared to perjure himself. He denied doing work on account of his injuries. He said that he had said to Mr Virduzzo that he would introduce him to someone who could do concreting work (meaning his step-father, the Second Respondent).
- 22 I consider that the First Respondent was very careful in the way in which he set about answering questions. He gave me the impression of choosing his answers carefully, I note there were a number of questions – particularly relating to loan applications – which he declined to answer on self-incrimination grounds.
- 23 Mr Virduzzo was then re-called. He said again that as far as he was concerned his contract was with the First Respondent. He said his father (Stephen) had said to him: “If you go after [the First Respondent] I will lie on the stand”. This was indicating he (Stephen) would give false evidence. He said the Second Respondent had threatened to kill him if he proceeded against the First Respondent. He had reported this to the police.
- 24 The First Respondent also was recalled upon resumption of the hearing in June. He said he was asked by Mr Virduzzo whether he knew anyone who could do the concreting and he said that he said to him that he would let his step-father (the Second Respondent) know about this. He said he introduced the Second Respondent to him. He said he was not involved in conversations between Mr Virduzzo and the Second Respondent but merely “tagged” along. He said he had perhaps 5 or 6 “other” families. He said everything Mr Virduzzo had said was a “lie”.
- 25 In cross-examination, again, he denied he was “like a monkey” on the scaffolding. It was something “conjured up” he said. He said other witnesses had been “trained well” in what to say: that all the other witnesses had got together and perjured themselves. He said it was possible he had been mistaken on site for his brother.
- 26 Mr Stephen Duhovic, the First Respondent’s natural father, also gave evidence. He said he had been contracted to do work at the Camp Road premises. He said his son, the First Respondent, was on site only occasionally but had no role there and was not in paid employment. He described it as “hogwash” that the First Respondent did most of the work there. He said, following his son’s motor cycle accident, his son’s mental capacities had been affected and he had “never been the same since”. On a good day, he said, his son could help by passing up materials but he never saw him going up a ladder. He admitted he was annoyed with his son for introducing the Second Respondent to Mr Virduzzo because he knew of the standard of his workmanship.

- 27 In further evidence in chief, given on 7 June, Mr Duhovic said he believed Mr Virduzzo was suing his son because he had found out he had assets. He denied that he had ever said he would lie in evidence for his son.
- 28 In cross examination, Mr Duhovic said his son “basically” annoys people on site and he did not assign him any tasks. He did not know his son had borrowed large sums of money. He said he did not want his son involved with the Second Respondent – who was living with his (Stephen Duhovic’s) former wife whom he divorced in 1991 – especially in concreting. He said he regards his son as having a 10% reduction on his pre-accident capacities. He said his son would not know how to arrange concreting.
- 29 In further cross-examination he denied that his son was working like a carpenter on site. He did not think his son could have been recognized on site by any neighbour who said he was there. He denied his son could get up a ladder very far. He agreed, though, he was “sympathetic” to Mr Virduzzo in relation to the concreting works on site. These works, he said, were not up to standard.
- 30 In evidence in chief Peter Duhovic said he was the First Respondent’s brother. He said the First Respondent would bring lunch but would not be doing any of the athletic work.
- 31 Cross-examination of this witness was, I consider, uneventful. I noted, though, that he and his brother - the First Respondent – do not look very much alike at all.
- 32 Mr Reece (or Rhys) Maher also gave sworn evidence. He said he had seen the First Respondent doing “chippy” work as he put it; cutting timber; putting up eve-sheets and skirting. He said he saw him using a nail gun and a drop saw. He certainly was not standing idly doing nothing. In all he would have had the site under observation for a good 2 or 3 days spread out over a 2 week period.
- 33 Under cross-examination, Mr Maher denied he was mistaken in what he saw. He had seen the First Respondent wearing a nail bag. He had seen him on a ladder working above his head height.
- 34 The next person to give evidence was Mrs Virduzzo. She swore that the First Respondent was definitely working at the premises. He was putting scaffolding together and climbing up on it. She said she saw him using a hammer and a nail gun. She said she regarded him as performing normally and that he did not seem slow on the uptake.
- 35 Under cross-examination she said she regarded the First Respondent as the hardest working “of those on site”. She said he was “like a monkey on the scaffolding”. It was not true that he could not lift above his head. She recognized him because she said she thought him “hot”.
- 36 Mr Maurice Virduzzo (brother of Mr Salvatore Virduzzo) gave evidence that he saw the First Respondent (whom he identified) on site straightening walls and using tools above his head. He had explained to him what was

involved in straightening walls. He did not seem unduly slow in being able to converse or explain such like.

- 37 Cross-examination was, in my view, uneventful except that under cross-examination he denied his brother had told him to say any of these things.
- 38 The remaining two witnesses were Ms Holmes and Mr Harvey (partner of Ms Holmes).
- 39 Ms Holmes gave evidence that she could identify the First Respondent. He was working next door to her property. She saw him on a ladder; using a nail gun; and directing a “Bobcat”. He definitely was “working” in her view.
- 40 Under cross-examination she said she had had a disagreement with the First Respondent over temporary fencing. She said she could see right through her kitchen window to the first of the 3 units under construction. It was in that unit that she saw the First Respondent on the ladder.
- 41 Mr Harvey, who gave his address as 308 Camp Road, said that he saw the First Respondent at the building works of the Applicant. He was on a ladder. He was using a nail gun and was reaching up over his head. He could not see he had any physical disability. He said he saw the First Respondent and his father working together on site.
- 42 Under cross-examination Mr Harvey said that Mr Virduzzo had his mobile phone number and that was how he had come to contact him to give evidence. He denied he had any business dealing with Mr Virduzzo.

E. THE EVIDENCE

- 43 For the Applicant it was submitted that this matter turned on the essentials of a contract. Was there agreement or not and, if so, between whom? It was submitted I should find in favour of the Applicant that the contract was with the First Respondent who, as alleged, engaged the Second Respondent. It was submitted that Mr Virduzzo was an impressive witness who gave clear evidence and was not evasive. I should not accept the evidence of the Respondents where it was in conflict with his, it was submitted. Their evidence, it was submitted, was unsatisfactory in a number of respects. In particular the evidence of the First Respondent was completely contradicted and it would be perverse to say that all the witnesses saying he was seen working on site were mistaken. His evidence was simply not credible. The Second Respondent moreover was not frank with the Tribunal in the evidence he gave. He was belligerent and argumentative while the First Respondent was deceitful and dishonest.
- 44 The Respondents’ Counsel described the Applicant’s case as having a “stench” around it – as a “cynical exercise in reverse engineering”. I took this to mean, as was made apparent, that the Applicant was making the facts out to fit the situation having discovered the First Respondent’s apparent property interests. It was submitted I should find that the Second Respondent was contracting on behalf of SMK Developers Pty Ltd. The

First Respondent was clearly an impaired person it was submitted. It was submitted I should find that Mr Virduzzo knew that the First Respondent was only ever introducing him to the Second Respondent and that the latter was only ever acting on behalf of the company. This was the more probable version of events. There was no basis, it was submitted, for me to accept as credible the “parade” of witnesses who gave evidence they saw the First Respondent working on site.

F. ANALYSIS

- 45 The versions of events of the Applicant and its witnesses and of the Respondents and theirs’ are diametrically opposed in many respects. The Applicant asks me to find the contract in question was made with the First Respondent involving the Second Respondent. I am asked to find the First Respondent is lying to the extent to which he maintains otherwise. The Respondents, however, ask me to find the contract was made between the Applicant and the company. They are asking me to find that the Applicant via Mr Virduzzo has contrived the case against them and, in particular, against the First Respondent.
- 46 I am asked to believe the Applicant’s version because I should find the First Respondent is lying. I should find he is lying because I should find he was working on site when he has denied that he was. I should not accept the evidence of the Second Respondent because, amongst other things, he has been found guilty of providing false information. I should not be placing any weight on what he says.
- 47 On the other hand, I am asked to reject the Applicant’s version of events. The First Respondent says those who say they say him working on site are lying. He has certain injuries which would prevent him from doing so. His father says he is sympathetic to Mr Virduzzo. But he says the First Respondent could not have been working in the ways alleged. The First Respondent’s father also seeks to make it clear to me that he is no friend of the Second Respondent who has taken up living with his former wife.
- 48 In all of these conflicting circumstances it is difficult to draw any definite conclusions. Fortunately my role is to decide the case on the balance of probabilities. I do not have to draw definite conclusions.
- 49 One thing, however, is clear. The existence or not of a contract is an objective phenomenon. Consensus ad idem must exist and in considering whether there is consensus in practice the law generally ignores the subjective expectations and the unexpressed mental reservations of the parties. See *G Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd’s Rep 25 at 27.
- 50 In this regard I must make mention of the evidence concerning the First Respondent. I do not reject the evidence of those who say they saw him working on site. I do not regard them as having conspired together to give false evidence over and over again. I reject his evidence that he was not working on site. Gathering as much as I can from loan documents in

evidence before me – and his declining to answer questions in relation to the same on self-incrimination grounds – I consider he has engaged in deceitful and dishonest dealings. In his evidence to me, he did not impress me as someone who was mentally impaired to any degree. Indeed, I would describe him as thoughtful.

- 51 It follows I must reject also the evidence of his father – Stephen Duhovic – that he was never engaged in work on site. I am not satisfied his evidence was truthful but equally I am not satisfied he told Mr Virduzzo that he was prepared to lie on oath if he (Mr Virduzzo) should proceed against his son. He may have said this, but I simply do not know. Certainly Mr Virduzzo says he said it. Because I am not satisfied Mr Duhovic was giving truthful evidence to me; I cannot accept his evidence that the evidence given by those who said they saw his son working on site is itself false.
- 52 I consider though, that, despite making findings about the honesty of the evidence of the First Respondent, I am still left with the problem of deciding who were the contracting parties in law and on the balance of probabilities. From the fact that he has not told me the truth – as I find – about working on site, it does not follow the First Respondent must therefore be lying when denying he was the contracting party. In that respect I accept his evidence in view of what I have yet to say. Most likely, I think, he was prepared to tell me lies about working on site because of implications for his disability pension. Most likely also, I think, that his father was prepared to give untruthful evidence in support of his son to protect him. The motor cycle collision on 21 August 2000 was, most evidently, a major event in the lives of both of them. I am satisfied or my suspicions are that Mr Duhovic adopts a protective role still as far as the First Respondent is concerned.
- 53 The likely scenario, on the evidence, which I have compressed, is that in this instance, if not in others also, the First Respondent procures work for the Second Respondent who is his step-father. But the Second Respondent carries out work on behalf of SMK Developers Pty Ltd because he is or has been forbidden to do so in his own right. There may well be other arrangements existing between the First and Second Respondents – of a nefarious nature – which I and others do not know about. In that regard I must indicate also that I did not accept most of what was said in evidence by the Second Respondent as far as it related to the First Respondent. It was his evidence that the First Respondent only did light unpaid work. I reject this. It is implausible in the light of the evidence given by those who said they saw the First Respondent working on site. It is also inconsistent with loan documents describing the First Respondent as having an annual income of \$55,000.00 or so. Once more, it is possible the Second Respondent was motivated to tell untruths in order to protect the First Respondent's disability pension. Or it may be he was motivated to protect the First Respondent for reasons I know nothing about. Their relationship it seems to me had commercial aspects to it and was not focused primarily on step-father and step-son.

- 54 I should also wish to make it clear though that while I accept the evidence of the witnesses who say they saw the First Respondent working on site, I consider some parts of their evidence exaggerated. This includes Mr Salvatore Virduzzo who described the First Respondent as a very good and very conscientious worker. It also includes the evidence of his wife who said the First Respondent was the hardest working of those on site and that he was like a monkey on the scaffolding.
- 55 Again, from the fact that I should find the Second Respondent is lying to me about the activities on site of the First Respondent, it does not follow that he is lying to me in everything he says. His credibility is, in my view, low but I accept his evidence that he made it clear to Mr Virduzzo that SMK Developers Pty Ltd was the company he was working for. This, it seems to me, should have put Mr Virduzzo well and truly on notice.
- 56 Perhaps the only two items of any real evidence I can rely on in the case, considering all the conflicting testimonies otherwise, is the cheque which was paid by Mr Virduzzo and the letters of demand he sent. The cheque was paid to SMK Developers Pty Ltd and the letters of demand are both addressed to that entity (allowing for some informality of description). Paying over a cheque to that company is, I consider, objective evidence that supports a view that Mr Virduzzo regarded that entity as the other contracting party. Why else would he pay a not insubstantial sum to a company otherwise unconnected with the site? Mr Virduzzo impressed me as a man who is skilled and intelligent and not easily fooled. I reject his evidence that he paid over that sum to the First Respondent simply accepting his explanation that it was for tax purposes. Why would he accept an explanation like this, about tax liability, from the First Respondent? What would the First Respondent know about “tax” that had been made evident to Mr Virduzzo? Why would Mr Virduzzo accept what the First Respondent said about “tax?”. I consider, if SMK Developers was not regarded by him as the other contracting party, he would not have made out a cheque to that entity. He did not say, for instance, “You are the party to my contract; not SMK”. Or: “You are in the contract with me and I do not care about satisfying someone else’s tax concerns”. To my mind, his explanation seems most unlikely. At the time, he was focused, clearly, on assuring himself that the First Respondent would still be doing the work. But pay the money, to the company he did. I assume he is not in the habit of paying not insubstantial sums to individuals who have no real connection with his business dealings. The evidence he gave would give me every reason to make that assumption. I do not accept Mr Virduzzo’s evidence when he says the First Respondent said to him to pay over the money for tax purposes. But I accept his evidence that he was told to pay it to SMK Developers, which he did. To my mind that means he knew SMK Developers had a real connection with him in his business dealings on behalf of the Applicant at the Camp Road site. In my opinion, his payment to the company indicates, very persuasively, that he knew the other contracting party with him was the company. And not the First Respondent. Nor the Second Respondent. For, in that regard, I accept the

Second Respondent's evidence that he said to Mr Virduzzo: "Pay SMK as that's the company I am working for". This, too, should have confirmed in Mr Virduzzo's mind that it was SMK Developers Pty Ltd which was the party he was in contractual relations with, and not anyone else.

- 57 This is confirmed, in my view, by Mr Virduzzo's later actions of sending out the letters of demand. Why would he address them to the company if he thought the company had no business relations with him? Why would he seek payment, or other, from the company, or from those involved with the company by letter addressed to the company, if the company had no involvement in the matter? These considerations, I think, support this view and only this view: he considered the company as the other contracting party. And I so find, on the balance of probabilities.

G. CONCLUSION

- 58 I have come to the conclusion, by reason of the foregoing, that I should find that the contract in this case was made, in law, between the Applicant and SMK Developers Pty Ltd. I have done so despite rejecting most of the evidence of the First Respondent as untruthful and despite forming the same view about most of the evidence of the Second Respondent. I do so, therefore, rather regretfully but not without anxious consideration. This is unusual in that having such misgivings about their evidence would normally suffice for me to be able to reject their evidence altogether. But if I was to do that, the payment of the money to SMK Developers, and the letters of demand addressed to that entity, could not be explained rationally if also I reject the notion that Mr Virduzzo accepted the explanation he says he was given by the First Respondent to pay the moneys to the company for tax purposes. Yet, in my view, if I do reject that notion their only rational explanation is that Mr Virduzzo thought and knew he was contracting with the company.
- 59 In other words, this is, an instance of actions speaking louder than words – the payment of the money and the sending of the letters of demand. But I consider this is what I must utilize if I am to follow out the well-established rule that consensus is an objective phenomenon and not less than that.
- 60 I rule accordingly.
- 61 I reserve costs. Reserve liberty to apply for the same.
- 62 Exhibits to be returned to the parties.

SENIOR MEMBER D. CREMEAN