



Commercial and Consumer Tribunal

CITATION: *ASPHALT AND BASE CONSTRUCTION PTY LTD v DOHERTY* [2009] CCT BD435-07

PARTIES: ASPHALT AND BASE CONSTRUCTION PTY LTD
V
DOHERTY Dermot

APPLICATION NUMBER: BD435-07

DELIVERED ON: 12 November 2009

DELIVERED AT: Brisbane

HEARING DATE: 4 November 2009

DECISION OF: Mr R Oliver

CATCHWORDS: Money claim; determination of terms of contract entered into; breach of warranty as to depth of road base.

REPRESENTATION:

COUNSEL:

APPLICANT: Mr Topp of Counsel

SOLICITORS: Mr Doherty – self represented

DECISION CATEGORY CLASSIFICATION: C

NUMBER OF PARAGRAPHS: 47

REASONS FOR DECISION

Introduction

1 This is a claim by the applicant to recover the sum of \$8,494.20 for work done in partially constructing a driveway at the respondent's residence at 16 Sanctuary Drive, Forest Glen, Queensland in April 2007.

2 The respondent defends the claim on the basis that the work undertaken by the applicant was substandard in that, not a sufficient depth of road base was laid prior to the application of the hot asphalt contrary to the agreement he asserts.

Issues

3 The substantive issues for consideration in this proceeding are:

- (a) whether the contract entered into between the applicant and the respondent, both in writing and oral, was that the road base laid by the applicant had to achieve a compacted depth of 150mm; and
- (b) subject to any finding as to the actual depth of the compacted road base, whether the respondent was entitled to terminate the contract and claim damages.

Background

4 Mr Joseph Hell is a Director and Principal of the applicant. He has considerable experience in road construction having worked in the building and construction industry, in particular road building, in Austria for some 32 years. He migrated from Austria to Australia in or about 2002 and commenced operating the applicant's business in or about 2005. His evidence is, which I accept, that he had constructed a considerable number of driveways before undertaking the work for the respondent.

5 In early March 2007 the applicant was contacted by Mr Doherty to provide a quote for the construction of an asphalt driveway at 16 Sanctuary Drive. The parties met on site and measured and discussed the layout and specification of the work subsequent to which, Mr. Hell produced a quotation for the job¹.

6 Attached to the quote is a rough drawing of the driveway which shows that the total area is about 468m² with the quote itself noting the area is "*approximately 468m².*" With respect to the amount of road base to be put down, before the asphalt is laid, it states:-

"Supply and lay approximately 100mm - 150mm of road base and compact." (my emphasis)

7 The quote also makes provision for the application of "*Emoultion Tack Coat*" and the seal the surface with "*30mm of Hot Mix asphalt and compact*". The total quote was \$19,613.00.

8 The quote was left with Mr Doherty for his consideration and then a further meeting was arranged for 6 April 2007 at his property. Mr Doherty says that there was further

¹ Exhibit 1 - "JH-3"

² Exhibit 1 - "JH-2"

discussion about the depth of the road base and he made reference to some notes he made on a piece of paper which, he relies on to confirm the conversation had with Mr Hell on that date. On the note appears the following:-

1. 150mm road base throughout;
2. 30mm asphalt compacted depth finished level with grass;
3. Additional area;
4. Corrector on existing driveway;
5. Delete spoon drain.
"stamped edges"

9 Mr Doherty relies on this contemporaneous note to support his contention that the agreement went from the road base being 100mm - 150mm and then compacted (as per the quote) to a situation where the road base was supplied and compacted to a depth of 150mm. One of the difficulties with this contention is, that the contemporaneous note does not refer to the 150mm road base being "compacted" to that depth.

The laying of the road base

10 Subject to that, the applicant received the go ahead to commence the work which it did on 13 April 2007. Mr Hell attended the premises together with his son Jochaim Hell. Mr Hell also engaged his regular bob-cat operator to do excavation work to make the driveway ready, and spread the road base, Mr Steven Ryan.

11 The road base was ordered from Redimix, the supplier of the road base, and delivered to site in sequential truckloads as the work progressed. Exhibited to Mr Hell's statement are a number of delivery dockets confirming that 91.16 tonnes of road base was delivered with the last delivery at approximately 11.40am on that day.

12 The day prior to commencing the work, Mr Hell placed an order with Redimix, and in particular with Mr Randal Taylor who has provided a statement in this proceeding. He cannot recall what quantity was ordered on that day, Mr Taylor seems to think it was around 90 tonnes but could not be sure. Mr Taylor's statement made reference to an order of 91.16 tonnes however that arose by reference to the delivery dockets as to the actual amount delivered. This statement is not correct, however I draw no adverse inference as to the creditability of his evidence by reason of this reconstruction. He had reference to the delivery dockets when he made his statement. On the contrary I was impressed with his evidence, the manner in which he responded to questions and his knowledge of the industry.

13 What is clear, and what Mr Doherty submits which supports his case to a degree, is that Mr Hell paid the driver after 78 tonnes was delivered. It is contended that Mr Hell would have no reason for paying for this amount unless this was the amount initially ordered. As it transpired, 78 tonnes was not enough road base and a further load was ordered which took the total quantity to 91.16 tonnes. Mr Doherty contends that this is clear evidence that Mr Hell underestimated the quantity of road base needed and this ultimately impacted on the overall quality of the work done and the depth of road base laid.

14 During the course of the work Mr Doherty says he remonstrated on numerous occasions with Mr Hell about the depth of the excavation. He complained that the excavation was not deep enough for the amount of road base going down to achieve a depth of 150mm. This evidence is corroborated by his wife to a degree and also

corroborated by his actions the following day. Mr Ryan was cross-examined by Mr Doherty as to whether he observed such remonstrations but he said he did not so although he did have discussions with Mr Hell about doing some work behind his shed. I am prepared to accept Mr Doherty's evidence that there were protestations about the depth of the excavation being carried out.

15 Although this has little impact on the outcome of this proceeding, it is worth noting at this point, that the road base delivered to the property was in fact a higher quality product. Mr Taylor confirms this to be the case and even though the delivery dockets made reference to "NDCR" in fact what was delivered was CBR35. The latter product is the superior product according to Mr Taylor. For completeness, the reference to NDCR is "*Non Descript Crush Roadbase*" whereas CBR35 is "Californian Bearing Ratio". I am satisfied that the better quality product was in fact supplied despite Mr Doherty's cross examination of Mr Taylor by reference to the "material test report"³.

16 During the excavation part of the job, Mr Ryan removed a quantity of over burden and stockpiled it nearby. By reference to photographs produced by Mr Doherty, Mr Ryan estimated that the stockpile was about 10 - 12m³. The respondent sought to contend that this was also evidence of inadequate excavation depth because as the amount of road base required was something in the order of 58m³ there is a significant difference. However, I am prepared to accept Mr Ryan's evidence that the driveway had been used for some years and there were undulations throughout meaning that in places no material had to be excavated and in others only a minimal amount.

17 As Mr Ryan's invoice indicates, he spent 5.5 hours undertaking the work. Mr Doherty also relies on this evidence, as well as the quantity of over burden removed, to support his case that the whole job was rushed resulting in a larger area being covered with road base and at an inadequate depth. Also, he relies on the fact that seven loads of material were delivered to site within a short time frame from 7am.

18 I can accept, that in this time frame the work undertaken by the Mr Hell, his son and Mr Taylor must have been moving at a cracking pace, I also accept that Mr Hell has considerable experience in this work and coordinating the various activities to ensure that no time is lost.

19 The work was not fully completed on 13 April because, according to Mr Hell, there was amount 3 or 4 meters of road base needed to finish the job. It was his intention to do this small amount of extra work on the following Monday morning. He said that he had a job to start on the Monday morning nearby and would use his equipment and labour from that job to complete Mr Doherty's job.

The Saturday morning meeting

20 The following day, being a Saturday, Mr Doherty contacted Mr Hell to express his dissatisfaction with the work. He arranged to meet Mr Hell on site. On arrival, Mr Hell retrieved a crow-bar from the back of his van and went to a point, dug a hole which showed that the road base was every bit of 150mm deep. There was discussion about the height of the road base at various places including in front of the shed and the stairs (it being too high). Mr Hell indicated that when he returned to put the asphalt coat on in

³ Exhibit 4 - "RJT-2"

about 3 weeks time, he would then trim areas which were a little high and perhaps put more road base where it was a little low.

21 Mr Dougherty was critical of where Mr Hell dug the hole to prove his point because he says that was the very area where he remonstrated with Mr Hell the day before insisting that he was to excavate deeper. In any event, the meeting deteriorated into an argument and Mr Hell left the site on being told not to come back.

22 That afternoon, Mr Hell issued an invoice for \$8,494.20. That invoice has not been paid. On its face it indicates that approximately 468m² equates to 58.5m³ at an average depth of 0.125m. After compaction that is then reduced by 20% resulting in compacted fill to a volume of 46.8m³. This would then mean that 84.24 tonnes would be needed for the area. In fact 91.16 tonnes was used. Mr Doherty is critical of these calculations and uses this also to support his case that insufficient road base was used.

What was the agreed compacted depth

23 As I have indicated a central plank to the respondent's defence is that the road base was not compacted to a depth of 150mm. The respondent relies on the oral agreement which he asserts was reached on 6 April 2007 when he had the further discussions with Mr Hell. He contends that on receiving Mr Hell's assurances that the depth would be 150mm compacted he then gave him the go ahead to do the job.

24 The applicant's Counsel relies on the written quotation and plan as the agreed basis upon which the work was to be carried out. Although Mr Hell acknowledges some discussions on 6 April 2009, he does not accept that the agreement was varied to the point where the compacted depth increased from 100mm - 150mm before compaction to 150mm after compaction. I am inclined to accept his evidence on this point for the following reasons.

25 Firstly the quotation makes provision for road base to be supplied and spread to a depth of 100mm - 150mm with the price fixed for the complete job. This was provided to the respondent. It is uncontested that this quote means that if the road base was spread to a depth 150mm and then compacted, the height would be reduced by about 20%. Therefore, to achieve a compacted depth of 150mm, the height of the spread material (before compaction) would be something in the order of 190mm. Adopting the calculations made by Mr Taylor in his facsimile to the applicant⁴ a total of 88.9m³ would be required. Adopting a weight of 1.6 tonnes per cubic metre the result 142 tonnes of road base being needed for the job. By reference to the delivery dockets provided, it seems that the cost of the material was about \$18 per tonne. This would increase the total cost of the supply of road base by nearly \$1,000.00. In addition, extra time would be needed for excavation and to compact the deeper material with consequential extra charges for machine hire from Mr Ryan. Although I am not aware of the profit margin in the job but it would seem to me that a potential loss of something in excess of 5% would make inroads into the profit.

26 Secondly, the contemporaneous note provided by the respondent does not make reference to "*compacted*". The note simply refers to "*150mm roadbase throughout*". I accept there may have been some discussion about the uncompacted depth being as much as 150mm but certainly not the compacted depth.

⁴ Exhibit 1 - "JH-7"

27 Mr Topp was critical of the respondent for not having the contemporaneous note signed and adopted by Mr Hell as a variation of the quote but, I do not think the relationship between the parties for this type of transaction required that degree of formality.

28 Therefore, I have come to the conclusion that the contract the governed the relationship between the parties was that which is contained in the quotation and the plan attached, requiring an average depth of uncompacted material of 125mm.

Did the applicant comply with the contract

29 Photographs produced by Mr Doherty showed that there is a variation of compacted depth between 30mm at its lowest point to about 90mm at its highest point. Bearing in mind that the quote provided for an uncompacted depth of between 100mm - 150mm, the minimum depth after compaction would be between 80mm and 120mm however, given that range, one would reasonably expect that there would be an average compacted depth of around 100mm.

30 At the commencement of the Hearing the applicant sought to rely on a statement of John Stanfield, an Expert Engineer, who provided a report as to the depth of the fill and the fall of the driveway as prepared by the applicant. That admission of the report into evidence was objected to by Mr Doherty on the grounds that Mr Stanfield was not available to give evidence in person and the only way he could give his evidence was by telephone from France. The respondent relied on the fact that the applicant had plenty of notice of the Hearing and he required to put photographs and the plans to the Mr Stanfield in cross-examination. It would be unfair, it was submitted if he was unable to do this. I made a ruling during the hearing and considered that the failure to have Mr Stanfield available in person put the respondent at a disadvantage. I did not admit Mr Stanfield's report if the face of Mr Doherty's objection although, by consent, a schematic plan attached to his report was admitted and is Exhibit 3. The applicant was content to proceed on this basis, as was Mr Doherty. The depths of road base noted on Exhibit 3, which are identified with a square box, vary between 60mm to 100mm compacted depth.

31 This evidence is then contrasted with the photographs produced by Mr Doherty which show that the depth varies between 30mm at the lowest point to about 90mm at the highest point. The legend attached to Mr Doherty's photographs indicate that these tests were done in the approximate areas of those by Mr Stanfield. The respondent is critical that no photographs were produced of the type he has produced, using a tape measure and a level, and therefore argues that his photographs are more persuasive in determining whether sufficient material has been used.

32 Therefore, it does seem that the respondent, by virtue of the photographs taken which are persuasive, does have legitimate grounds for complaint about the depth of the road base and indicates that either, insufficient material was supplied or alternatively, that which was supplied was spread over a greater area.

33 The respondent produced a survey plan, which was also objected to by the applicant's counsel on the basis that the author was not available, but was admitted into evidence on the basis that Mr Dougherty's evidence was that the survey plan largely represented his visual appreciation of the area over which the road base was spread. This area is somewhat larger than the plan attached to the quote and is an explanation of why it is thinner in places.

Remedies

34 The respondent has particularised a counterclaim in his statement of evidence. It is obvious that most of the damages claimed are not recoverable as a matter of law. The counterclaim of substance is that the only way the driveway can now be effectively completed is to remove all of the road base in place and start again. He is essentially asserting that there has been a total failure of consideration in that he has not obtained what he bargained for.

35 Unfortunately for Mr Doherty, apart from his evidence, there is no independent evidence to suggest that the road base in place now cannot be used even if more were laid over to increase the depth.

36 The state of the evidence is such⁵ that there are many areas where the road base does comply with the minimum depth required under the contract and there are other places where it does not. In the absence of any evidence to suggest that the existing surface cannot be improved with the addition of further road base, and trimmed back where it is too high, particularly around the stairs, I cannot conclude that the respondent has not received, to a significant degree, that which he bargained for.

37 However, it is also clear, as I have said, that the road base is skimmed in places and therefore the respondent, as a matter of justice ought receive some recompense for the shortfall. What the respondent is essentially asserting is that the applicant warranted, in the contract, to lay the road base at an average compacted depth of 100mm and that this warranty has been breached. Although this has not been specifically claimed in his statement or the pleading, he should not be disadvantaged by reason of his choice of self representation, which I might say has been done in a very competent manner, as opposed to incurring the cost of legal representation which is undesirable in these types of cases.

38 The Mr Doherty will have to purchase more road base, and have it worked into the existing road base and further compacted. There are no costings on this but given the job to date cost \$8,494 and in places there is a reduction in compacted height of up to say 20%, I am of the opinion, doing the best I can and taking a broad-brush approach, that a reduction of about \$2,000.00 would be fair in all the circumstances. This would allow about \$1,000.00 for the supply of material and compaction having regarded the invoices from Redimix, as well as bobcat hire and labour.

Costs

39 I consider it appropriate to say something about costs at this stage. As seems to be the trend when representation is permitted, inevitably there will be an application for costs by the applicant particularly given that counsel was briefed. This will involve further costs on the part of the applicant and perhaps the respondent, therefore some observations about costs may avoid this further expense.

40 Mr Doherty would not be entitled to any costs as even though he has incurred legal costs, he was self represented at the hearing and has not succeeded fully in his defence. But as will be seen I am open to argument on this.

⁵ Exhibit 3

41 As for the applicant, this is a small claim. A principle reason for permitting legal representation was Mr Hell's language difficulties. Even so, the claim was uncomplicated and it is difficult discern any justification for the applicant to be represented on two days of hearing with both solicitors and counsel.

42 Section 70 of the *Commercial and Consumer Tribunal Act 2003* ("the Act") is quite clear in it's directive that the object of the Act "*is to have party pay their own costs unless the interest of justice requires otherwise*".

43 Section 71 sets out the criteria the Tribunal can have regard to in deciding whether an award of costs should be made. There is nothing in that criteria which would be immediately persuasive in making a costs order. I am also mindful of what Justice Keane said in *Tammawood Ltd v Paans*⁶ generally, and in particular that the fruits of a judgment in favour of a successful party should not be eroded by the cost incurred in pursuing the claim.

44 Therefore although, the parties are at liberty to be heard on the question of costs, these observations may, in the end, result in further savings on costs. An order will be made in the usual form to make submissions on costs.

Conclusion

45 Therefore, I propose to find for the applicant on the money claim but reduce it to take into account the shortfall in compacted height in various areas throughout the driveway and order that the respondent pay to the applicant the sum of \$6,500.00.

46 The applicant is also entitled to interest on this outstanding sum at a rate of 9%. I will allow 1.5 years because the delay in bringing this matter is not entirely the responsibility of the parties. This would add a further \$750.00 to the claim.

47 Therefore, the orders of the Tribunal is as follows:

1. The respondent will pay to the applicant the sum of \$7,250.00 by 31 December 2009.
2. Each party will deliver to the Tribunal one copy, email to cct@tribunals.qld.gov.au and deliver to each other one copy, of any written submissions on costs, by 4:00pm on 19 November 2009.

MR R OLIVER
MEMBER
Commercial and Consumer Tribunal

⁶ (2005) QCA 111