VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

CIVIL CLAIMS LIST VCAT REFERENCE NO. **C450/2022**

CATCHWORDS

Claim for payment by a subcontractor under a cost plus contract – assertions by the respondent that some work was performed without authorisation – no claim by the respondent that the allegedly unauthorised work was defective – consideration of the evidence presented – section 184(2)(b)(ii) of the *Australian Consumer Law and Fair Trading Act 2012* – section 115B(1) of the *Victorian Civil and Administrative Tribunal Act 1998*

APPLICANT	Mynd Electrics Pty Ltd
RESPONDENT	Mark Evans
WHERE HELD	Melbourne
BEFORE	I. Lulham, Deputy President
HEARING TYPE	Hearing
DATE OF HEARING	28 February 2023
DATE OF ORDER	3 March 2023
CITATION	Mynd Electrics Pty Ltd v Evans (Civil Claims) [2023] VCAT 237

ORDER

The respondent shall pay the applicant $8,833.00, plus damages in the nature of interest assessed at $963.16, and shall also reimburse to the applicant the filing fee on this application of $315.60. The total amount payable is $10,111.76.

I. Lulham
Deputy President

APPEARANCES:

For Applicant	Mr C Jones director, with Mr G Jones witness/advocate
For Respondents	In person

REASONS

1 This proceeding is a "small claim" within the meaning of that term in VCAT and accordingly the Tribunal has no power to award costs regardless of the outcome.

2 The applicant company is an electrical contractor. It claims $8,833.00 from the respondent for work and labour done. It issued an invoice to the respondent, number 0282 dated 21 December 2021, which set out hours worked by a tradesperson and an apprentice, and materials supplied. In substance the applicant says that it was contracted to perform minor electrical works for the respondent builder who was renovating an old house to ready it for sale. The applicant says that the contract was wholly oral, and was a "do and charge" / "cost plus" contract. The applicant says that it performed the services that it was requested to perform, that its charges were fair and reasonable and that its invoice should be paid. In addition to payment of the invoice, the applicant claims interest from 21 December 2021 and reimbursement of the filing fee on the Application.

3 The respondent denies liability, but the manner in which he has done so has been cavalier. The proceeding was issued on 27 January 2022 and has been somewhat delayed by the problems caused to the Tribunal by Covid-19. The case was listed for mediation on 4 July 2022. The respondent did not attend. The case could not be heard on 4 July 2022 because no Members of the Tribunal were available. An Order was made in Chambers by a Senior Member on 21 July 2022 setting out a timetable for the parties to file and serve important documents. At that time, the case had not been listed for hearing and so the time limits in the Order were set out in terms of "weeks before the hearing" rather than by stating dates. The applicant had filed and served Points of Claim and a significant number of relevant documents on 31 May 2022. In paragraph 3 of the Order of 21 July 2022, the applicant was required to file and serve Points of Claim eight weeks before the hearing – so that once the hearing was scheduled for 28 February 2023 the operative date became 27 December 2022 – and I can only conclude that when the Senior Member made the Order they were unaware that the Points of Claim had already been filed and served. Certainly, the applicant complied with paragraph 3 of the Order.

4 Paragraphs 4 and 5 required the respondent to file and serve Points of Defence, and allowed the respondent to file a Counterclaim, by 10 January 2023.

5 Paragraph 7 of the Order required the parties to file and serve copies of their relevant documents three weeks before the hearing, that is by 7 February 2023. The applicant had filed and served its discoverable documents on 31 May 2022, in the bundle containing the Points of Claim.

6 The respondent did not comply with the Order. He did not prepare Points of Defence at all. Only days before the hearing, on 24 and 27 February 2023, he emailed a few documents to the Tribunal.

7 At the beginning of the hearing the applicant complained of the respondent's flagrant breaches of the Order, but did not seek an adjournment of the hearing and did not seek any orders which would exclude the respondent's evidence or have the Tribunal treat the case as being undefended. Because of the Tribunal's obligations to afford the parties natural justice, the Tribunal would probably not have been able to exclude evidence or treat the case as being undefended.

8 Naturally, the Tribunal can only make findings of fact on the basis of evidence. The respondent's decision not to comply with the Tribunal's Order gave him the tactical advantage of surprise, but ultimately is to his disadvantage, because it limits the evidence which he might otherwise have presented. I do not draw any inferences against the respondent, but simply note that the Tribunal cannot reach conclusions on the basis of absent evidence.

9 In the hearing, Mr Clinton Jones director of the applicant and Mr Glenn Jones of Boston Group gave evidence. Mr Glenn Jones also acted as advocate for the applicant. In a small claim in VCAT this is acceptable.

10 The respondent gave evidence orally to the following effects:

a. He personally did not contract with the applicant. He only ever enters contracts using his company, which is not a party to this proceeding.

b. When the applicant was first hired, there was a meeting between the respondent, Zac Higgins who is an employee of the respondent's company, and the applicant at which they walked through the property and the respondent and Mr Higgins showed the applicant what work was to be done. Later, when the respondent saw the applicant's apprentice pulling out a light, which the respondent considered to be outside the scope of works, he called another site meeting and he again told the applicant the work he wanted done. The respondent also told the applicant what he did not want to be done.

c. The respondent's company was contracted by the executor of a deceased estate, who was represented by three solicitors. The respondent's company took over the renovation of the house from an owner builder. Glenn Jones of the firm Boston Group had been assisting the executor, and in that role had seen pre-contract documents between the respondent's company and the executor, and also a domestic building contract between them. The contract document was a Master Builders Victoria Cost Plus Contract, March 2018 edition, known as DCP-2.

d. The applicant issued its tax invoice number 250 dated 20 August 2021 in the sum of $2,948.00, for electrical work, and as that invoice was not disputed, it was paid.[1]

[1] A copy of this invoice is Exhibit 3 to the applicant's Points of Claim. It is a typed document of two pages. It commences on the applicant's letterhead, and the first page is addressed to Mark Evans. At the foot of the

e. The applicant's invoice number 0282 dated 21 December 2021, in the sum of $8,833.00, is significantly inflated because it includes charges for work which were not authorised; it charges for 82 hours of labour when in the respondent's opinion the work could not have taken that long; and the materials have been charged at excessive rates. As the labour charge is $5,280.00 excluding GST, the materials have been charged at $2,750.00 excluding GST. The respondent has obtained a quote from an electrical goods supplier – Middy's – for the same materials in the sum of $1,204.89 excluding GST. The respondent says that the applicant's charge for these materials, then, was at least twice what it ought to have been.

f. The applicant issued a Certificate of Compliance for its electrical work. The items listed on that Certificate are only the items which it was authorised to perform. Whilst the respondent does not deny that the applicant performed the 'extra' work, the fact remains that there is no Certificate of Compliance for that 'extra' work. That could cause difficulties in the future because a builder gives a guarantee to its customer, and if the 'extra' work proved to be defective during the currency of a guarantee, the builder would face difficulties proving that the applicant had performed that 'extra' work. It is also a breach of regulations by the applicant not to issue a Certificate of Compliance in relation to the 'extra' work. That said, the respondent does not assert that the extra work was not performed, that it was defective, or that it was removed. The respondent said that the house was sold by the executor in June 2022. In view of the fact that the extra work was performed, the respondent would have been prepared to pay the applicant $2,500.00 including GST to resolve the dispute.

g. The respondent made a complaint to the electrical regulator. An employee, Ms Pearson, wrote the complaint on the respondent's behalf.

h. After the respondent received the applicant's invoice number 0282 and refused to pay, the house was broken into and some items were removed. The respondent made a complaint to the Police and made a Statement. After the break in, the respondent spent $316.20 on an electrician and $225.00 on a locksmith.

11 By way of reply and/or cross examination the applicant said the following:

a. One of the examples of allegedly unauthorised extra work was that the applicant had fitted eight external lights. He had done so on the specific instructions of Zac Higgins because live wires were sticking out from the eaves, and fitting the lights was a way to make them safe. The respondent denied this.

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second page, there is a section which could be cut off and attached to a payment – a style of document of more used when people paid in cheques rather than by EFT – and that section of the document recorded the customer as Force 10 – Mark Evans.

b. He had not been charged by the Police and had not been prosecuted in any sense by the electrical regulator.

c. If the respondent was genuine about his preparedness to pay $2,500.00, the absence of any such payment was telling.

d. He agreed that regulations required him to issue a Certificate of Electrical Compliance in relation all electrical work performed. The applicant impliedly conceded that he had not issued such a Certificate in relation to the allegedly 'extra' work. He agreed that regulations required him to issue a Certificate of Electrical Compliance in relation to all electrical work performed. However he noted that the respondent did not deny that that 'extra' work had been performed, and that the respondent did not allege that it was defective.

12 Doing the best I can with the evidence presented, I reach the following conclusions:

a. The respondent simply did not file or serve Points of Defence. This gave him a tactical advantage in the hearing because it resulted in the applicant not being on notice of any grounds on which the claim might be defended. The respondent then asserted in the hearing that he never contracted personally. The respondent did not disclose any documents which could objectively prove that he never contracted personally. The respondent paid the applicant's first invoice, which was addressed to him personally. I conclude from the applicant's evidence, and the lack of a meaningful denial by the respondent, that the applicant was entitled to sue the respondent personally and that the respondent was the relevant contracting party.

b. Whilst the respondent gave evidence that he twice met the applicant and instructed the applicant on the work that the applicant was to perform, and that in the second meeting he instructed the applicant as to what work the applicant was not to perform, and whilst the applicant conceded that these two meetings occurred, I conclude that the applicant performed work which it was authorised to perform. It was telling in my view that when the respondent gave his evidence about the two meetings, he used those broad expressions of work the applicant was, and was not to perform without giving any particulars. The respondent effectively conceded that Zac Higgins was on site when the applicant was working. As I have said above, the respondent does not allege that the applicant's work was defective. The respondent does not allege that the builder's principal failed to pay for the building works on the basis of defects in the applicant's work. The respondent gave evidence that the house had been sold. I am satisfied that the respondent received the benefit of the applicant's work.

c. The respondent's assertion that the applicant overcharged for the number of hours worked is no more than an assertion. The applicant's evidence was that the tradesperson, Clinton Jones himself, and the

apprentice worked the 82 hours which are stated on the invoice. I must prefer that direct evidence to the respondent's statement of opinion.

d. The respondent obtained the quotation from Middy's. However the respondent did not give evidence, or otherwise assert, that the subcontract required the applicant to purchase materials from Middy's, or only purchase materials for a particular price. Given that the applicant's claim is small, and that its charge for materials is only $2,750.00 compared to Middy's quote of $1,204.89 (both excluding GST), on the evidence I am not in a position to conclude that the applicant overcharged for materials.

e. The respondent's evidence that he would have been prepared to pay $2,500.00 to resolve the matter is unconvincing. He did not attend the mediation. He did not pay the 'undisputed amount' of $2,500.00 leaving only the balance to be determined by the Tribunal. This proceeding has been on foot for some 13 months. Objectively, the only significant fact is that the applicant was required to take this matter through to a hearing in order to claim payment of its invoice number 0282.

13 In the circumstances, I must find for the applicant. Invoice number 0282 has been outstanding since 21 December 2021.

14 Section 184(2)(b)(ii) of the *Australian Consumer Law and Fair Trading Act 2012* (Vic) empowers the Tribunal to order "the payment of a sum of money by way of damages (including … damages in the nature of interest)". I am satisfied that the applicant has suffered damages through the loss of use of its money, caused by the respondent's failure to pay its claim from the date of commencement of this proceeding, and that it is appropriate that I assess those damages by applying the interest rate set under the *Penalty Interest Rates Act 1983* (Vic). The interest rate throughout the period 27 January 2022 to today is 10% per annum, and 398 days have elapsed between those two dates. The penalty interest is therefore $963.16.

15 The applicant also claimed reimbursement of the filing fee on the Application, which was $315.60. That claim was made under section 115B(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic). To consider whether to order reimbursement, I consider the criteria set out in section 115B(3), which include the respondent's failures to comply with Orders of the Tribunal and the relative strengths of the claims made by each of the parties, which fall within sub-sections 115B(3)(b) and 115B(3)(c). Those criteria warrant an order for reimbursement being made.

I. Lulham
Deputy President