QCAT

Queensland **Civil and Administrative Tribunal**

CITATION:	*Warden t/as RCW Plumbing & Excavations v Camporeale Holdings Pty Ltd* [2016] QCAT 12
PARTIES:	*Raymond Clive Warden and Coral Lynett Warden t/as RCW Plumbing & Excavations* *v* *Camporeale Holdings Pty Ltd*
APPLICATION NUMBER:	BDL058-15
MATTER TYPE:	Building Matter
HEARING DATE:	9 October 2015
HEARD AT:	Townsville
DECISION OF:	**W Pennell, Member**
DELIVERED ON:	19 January 2016
DELIVERED AT:	Townsville
ORDERS MADE:	**The Applicant's application is dismissed.**
CATCHWORDS:	BUILDING MATTER – Contract – decision by one party to unilaterally alter the contract conditions – alterations not communicated to other party – no communication of acceptance – assumed acceptance EVIDENCE – evidence filed after hearing – fresh evidence – denial of natural justice to allow *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), ss 28 and 97 *Orr v Holmes* (1948) 76 CLR 632 *Wollongong Corporation v Cowan* (1955) 93 CLR 435

APPEARANCES and REPRESENTATIONS:

APPLICANTS:	Self Represented
RESPONDENT:	Mr Mark Valente, Solicitor, Preston Law

REASONS FOR DECISION

Introduction

[1] RCW Plumbing & Excavations (the Applicant) is a family business operated by the Applicant. Camporeale Holdings Pty Ltd (the Respondent) is involved in the construction of residential properties. Michael Camporeale is the Respondent's Director.

[2] In December 2014, the Respondent undertook construction of a number of houses in the Townsville area. The Applicant submitted a quote to carry out certain plumbing and drainage work on those properties. The parties negotiated a price. The Respondent sent the Applicant a letter indicating that the quote placed by them was accepted.

[3] The Respondent then sent to the Applicant a Subcontract Agreement (the contract) for execution with the value of the contract indicated as $141,000 (GST included)[1]. After the Applicant received the contract, the parties negotiated some of the conditions of the contract. An agreement was reached on those initial negotiations and the clauses altered in accordance with those initial negotiations[2]. It seems that their agreement at that time only went so far as to allow for the altering of the conditions discussed at that time.

[4] After that initial agreement to alter some of the conditions of the contract, the Applicant made a unilateral decision to alter or change some other conditions of the contract[3]. The Applicant does not dispute this, and neither does the Applicant dispute that in making those alterations or changes, it was communicated to the Respondent that those alterations or changes had been made.

[5] The Applicant returned the contract to the Respondent's office in Cairns, where it arrived on 8 January 2015. On 12 January 2015, the Applicant commenced work on the building site on the assumption that the Respondent had accepted the unilateral changes they had made to the conditions of the contract.

[6] On 4 February 2015, the Respondent asked the Applicant for a copy of the signed contract. This was provided the following day[4]. The Respondent says that it was only then that Mr Camporeale became aware of the alterations or changes made to the contract. Over the next few days, emails were exchanged between the parties, text messages were sent and there were telephone conversations. The relationship between the parties deteriorated over that time and there was a dispute over the Respondent's payment of the work already undertaken by the Applicant[5].

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1 Respondent's Statement of Evidence at Exhibit MC1.
2 Clause 1(a) relating to the installation of gas or solar electricity.
3 Respondent's Statement of Evidence at Exhibit MC2.
4 Statement of Raymond Clive Warden at Exhibits RCW17 and RCW20.
5 This does form part of the Applicant's case as they have been paid for this work.

The Applicant's position

[7] Because of the breakdown in the relationship between the parties, the Applicant now seeks an order that the Respondent pay damages. The amount of damages varies from between $105,692.35 to $110,292.35 as discussed below.

[8] In their Application, the Applicant explained that the above figures were reached after calculating:-

(a) $95,702.35 for the loss of profit the Applicant would have otherwise received under the terms of the contract; calculated after taking into account materials, wages, equipment (machinery, maintenance, fuel, running costs) workcover, public liability and administration costs;

(b) $7,990 being the amount of loss incurred in the forced sale of a motor vehicle. The vehicle was valued at $17,990 and sold for $10,000; and

(c) $2,000 being the amount paid to a Solicitor for advice about this matter.

[9] That initial figure quoted above differs slightly to that which was disclosed in the Applicant's Statement of Evidence. That figure was $110,292.35, and is said to include[6]:-

(a) $95,702.35 for income lost because of the termination of the contract and the Applicant's commitment to ensuring that all works were completed. The Applicant turned down other work available outside the work for the Respondent, which was either offered to the Applicant or quoted on by the Applicant.

(b) $12,590 being damages for the losses incurred by the Applicant in the forced sale of assets.

(c) $2,000 being the amount paid to a Solicitor for advice about this matter.

[10] At the hearing, the Applicant explained that the latter figure disclosed included the loss incurred because of a forced sale of a motorcycle.

[11] The Applicant said that because of the breakdown in the contractual relationship with the Respondent, the Applicant was left without expected income. The Applicant also lost other potential income because work was turned away, or other work or other sources of income were not sought because the Applicant was committed to the contract.

The Respondent's position

[12] The Respondent did not become aware of the unilateral alterations or changes made by the Applicant to the contract until on, or about, 4 February 2015.

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6 Applicant's Statement of Evidence at page 1.

[13] The Respondent says that there was no existing contract between the parties and the amendments or changes made to the essential terms of the contract including amendments to clauses 5(b), 7(c), 12(c), 12(d) and 24(a)[7] were never discussed between the parties. The Respondent did not accept the altered or amended contract.

[14] Notwithstanding the discussions about the amendments in the exchange of emails, text messages and phone calls[8] the parties were unable to agree on the final terms of the contract. On 12 February 2015, the Respondent withdrew from the negotiations on the contract[9].

[15] The Respondent contends that the only binding agreement between the parties occurred when the parties were endeavouring to negotiate and settle the terms of the contract. During that time, the Respondent engaged the Applicant to carry out certain preliminary works on the site due to construction deadlines. The Respondent paid the Applicant for the preliminary work. It is the Respondent's argument that the preliminary work constituted a separate contract and do not constitute acts of part performance of the contract.

Damages sought

[16] The Applicant seeks damages ranging from $105,692.35 to $110,292.35 and says that this would have been the net profit from the contract, after taking into consideration all expenses relating to materials, wages, equipment (machinery, maintenance, fuel, and running costs) workcover, administration costs and public liability.

[17] Noticeably, the Applicant's material, and the oral evidence given at the hearing was silent as to how that figure was arrived at. The Applicant could only say that evidence to support the calculation of that amount was at home and not at the hearing[10].

Other damages

[18] The Applicant also sought an order that the Respondent pay for the loss they incurred after they were required to sell a motor vehicle to pay living expenses. The Applicant said that the vehicle was valued at $17,990 and had to be sold for $10,000, incurring a loss of $7,990.

[19] The vehicle was sold on 19 March 2015 to a Townsville used car dealer. The car dealer paid the Applicant $10,000. The Applicant relies upon two documents arising from the sale of that vehicle, both from the same used car dealer.

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7 Applicant's Application at Exhibit RCW 7.
8 Respondent's Response at Exhibit 2.
9 Ibid, at Exhibit 3.
10 Hearing Transcript, p. 86, lines 1 – 5.

[20] While the first document[11] indicates the amount that the Applicant was paid for the vehicle, the other document (dated the same day) shows that the vehicle was valued at $17,990. Despite relying upon the argument that the vehicle was valued at $17,990, the Applicant willingly sold the vehicle for $10,000.

[21] The Applicant has not shown any evidence of a nexus between the termination of the negotiations for the contract and the decision to sell the vehicle.

[22] The Applicant also failed to demonstrate that any fault lay with the Respondent for the sale of the vehicle. The Tribunal does not accept that any loss incurred by the Applicant from the sale of the vehicle was the fault of the Respondent.

[23] At the hearing, the Applicant was asked to explain the differences in the amount indicated in their Application and the Statement of Reasons for the sale of the assets. The Tribunal was told that the latter figure quoted in the Statement of Reasons included the sale of a motorcycle.

[24] The inclusion of the motorcycle sale at that latter stage appears to have been an afterthought. Notwithstanding that, no evidence was provided by the Applicant to substantiate this sale took place, or indeed that the Respondent was responsible for any loss.

[25] The Applicant also sought an order that the Respondent pay damages of $2,000 for expenses they incurred in consulting with a Solicitor. In the Application[12] and the Statement of Evidence[13], the Applicant said that legal advice was sought on this matter. As yet, the Applicant had not received a bill from their Solicitor. The Solicitor had apparently spent several days on the matter at $450 per hour (plus GST). The Applicant believed that $2,000 was a fair claim.

[26] No evidence was contained within the Applicant's material to show that any letter or other correspondence was written by any Solicitor on its behalf. Nor was there any disclosure of any account rendered in the form of an invoice by the Solicitor showing that legal costs had incurred. The Tribunal is not satisfied that any legal costs were incurred and this part of the Application is denied.

Other evidence

[27] Evidence at the Hearing was provided by Raymond Clive Warden and Coral Lynett Warden for the Applicant. Their evidence in chief was their written statements[14]. Only Mr Warden was cross examined by the Respondent. The Respondent's Director, Mr Camporeale, provided a written statement. He was cross-examined by the Applicant.

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11 Customer's Copy of the Vendor's Statement to the Dealer dated 19 March 2015.
12 Dated 1st April 2015.
13 Filed 8th July 2015.
14 Dated 8th July 2015.

[28] The Tribunal had earlier made directions with regard to evidence not contained within the Statements of Evidence and the attendance of witnesses[15]. In particular, at the request of the Applicant, the Tribunal issued a "Notice to Attend"[16] for Mr Glenn Jaques of Alice River[17] to appear and give evidence.

[29] Mr Jaques was a former employee of the Respondent. The Applicant wanted him to appear before the Tribunal and had '*tried for months*'[18] to secure a statement from him. Every time he was telephoned (if he answered the phone), he would say that he was busy and he would call back, but he never did. It would appear that Mr Jaques was reluctant to provide a written statement, preferring to later tell the Applicant that he would be happy to give a statement to the Tribunal over the phone.

[30] The Applicant said that Mr Jaques was an important witness because he could provide information to assist their application. The Applicant told the Tribunal that the Respondent had responsibility for another building site, and work on that other site had been suspended because of unsafe work practices. The Applicant said that the dispute between the parties only arose because Mr Camporeale blamed them for notifying the relevant workplace health and safety authority.

[31] The day prior to the hearing[19], QCAT's Registry received an application from Mr Jaques for his attendance at the hearing by remote conferencing. He said in that application that his wife (who lives in Townsville) had been served with the Notice to Attend and she passed the notice onto him. He lived and worked in Brisbane and could not personally attend.

[32] The Applicant told the Tribunal that to their knowledge, Mr Jaques was not in possession of any documents, such as the contract or other material relevant to this matter. Because Mr Jaques had not provided a written statement, his evidence was unknown at that point, but at its very highest, it related to an entirely different matter. This placed the Respondent at a disadvantage in not being able to respond to any allegation raised by him.

[33] Although the Tribunal is not bound by the rules of evidence, or any practices or procedures applying to courts of record, it must observe the rules of natural justice[20]. Under those circumstances, to allow Mr Jaques to give evidence by phone would have been a denial of natural justice to the Respondent.

Supplementary evidence

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15 Senior Member Browne's Directions of 5th August 2015 and 23rd September 2015.
16 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act') s 97.
17 Alice River is an outer suburb of Townsville.
18 Transcript, page 3 at lines 40 – 44.
19 Received 8th October 2015.
20 QCAT Act, s 28(3)(b).

[34] Some weeks after the hearing date for this matter, the Applicant emailed supplementary material to the Tribunal[21]. It is unknown how or when this material came into the possession of the Applicant. The Applicant sought to rely upon that material, and wanted the Tribunal member to read the material with the obvious intent to influence the decision making process[22].

[35] The supplementary material consisted of two sets of documents. Both sets are adjudication decisions. The Respondent in each set is the Respondent in this matter. The first adjudication decision is dated 27 May 2015. It relates to a project undertaken in 2014 at Cairns. The second set of documents is dated 24 August 2015. It relates to the same building site involving the dispute between the Applicant and the Respondent.

[36] The *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) (the Act) provides that in all proceedings the Tribunal must act fairly and according to the substantial merits of a case. As was earlier commented on, the Tribunal is not bound by the rules of evidence or any practices or procedures applying to courts of record. It may inform itself in any way it considers appropriate and may admit into evidence the contents of any document despite the noncompliance with any time limit or other requirement under the Act[23]. Notwithstanding all of those points just mentioned, the Tribunal must observe the rules of natural justice.

[37] In considering the supplementary material, the Tribunal must turn its mind to whether the material can be accepted as fresh or new evidence.

[38] Numerous authorities have explored the admission of fresh or new evidence. Two main principles have been established to restrict the circumstances in which new evidence can be accepted. The first is that the evidence sought to be admitted could not with reasonable diligence have been obtained for use at the initial hearing. The second is that the evidence would probably have an important influence on the decision. Generally, new evidence will not be allowed unless it is "almost certain"[24] or at least "reasonably clear"[25] that the new evidence would influence any decision.

[39] The filing of the supplementary material by the Applicant could be for no other reason than to advance its position. The fresh material is dated prior to the requirement for the filing and service of the Applicant's Statement of Evidence[26]. As such, the Tribunal is satisfied that this material could have been discovered and disclosed prior to the hearing date and introduced to into evidence, of course subject to any opposition raised and any decision as to its admissibility.

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21 Email dated Thursday 3rd December 2015.

22 The Applicant wrote *'….we believe this additional information will assist him in making his decision'.*

23 QCAT Act, s 28.

24 *Orr v Holmes* (1948) 76 CLR 632 at 640.

25 *Wollongong Corporation v Cowan* (1955) 93 CLR 435 at 444.

26 Directions of Senior Member Brown dated 5th August 2015.

[40] For the Tribunal to now admit and consider this evidence in favour of the Applicant without affording the Respondent the opportunity to respond at the time of the hearing would be grossly unfair to the Respondent, and a denial of natural justice. It would deprive that Respondent of the fundamental right to test its admissibility or its relevance at the hearing.

[41] In conclusion, the supplementary material relied upon by the Applicant is considered inadmissible in these proceedings.

The contract

[42] In returning to the contract, it is not in dispute that the parties entered into negotiations with the intention of being bound by the conditions of the contract. The dispute is whether there was a binding contract.

[43] The joining of the offer and the acceptance as an agreement is the basis of forming any contract. Principally, offers are only effective and can only be accepted after they have been communicated.

[44] The general rule is that what must be accepted is what was offered, without deletion, alteration or addition. Acceptance is a final expression of approval to the terms of the offer. The parties do not dispute that the Applicant submitted a quote. Negotiations took place between the parties and arising from those initial negotiations was the Respondent sending a signed contract to the Applicant, from which there were further negotiations between them about certain conditions contained therein. Those initial discussions resulted in the alteration to some of the conditions.

[45] Furthermore, there is no dispute that after those initial changes to the conditions, the Applicant unilaterally made alterations or changes to further conditions and then mailed that altered contract back to the Respondent's office in Cairns.

[46] The Applicant then acted under the assumption that the Respondent had accepted those further alterations or changes to the contract because the Respondent did not later contact the Applicant and discuss those alterations or changes.

[47] In those circumstances, the Applicant cannot rely upon the Respondent's silence to constitute acceptance, particularly where they have made changes to the conditions of the contract and the Respondent was not told. To be effective, acceptance must be communicated. An agreement is concluded when and where communication of acceptance is received. In relation to this matter, the method of acceptance was by post and as such, the question then arises, does the postal rule for acceptance apply to this matter. In answering that question, the Tribunal is satisfied that it does not. Under ordinary circumstances it may have applied, but the circumstances of this matter were that the Applicant altered or changed the conditions of the contract without communicating those alterations or changes to the Respondent. When the contract arrived at the

Respondent's office, it was a vastly different contract to that which agreement had earlier been reached.

[48] The Respondent, having not been informed of those alterations or changes, would have reasonably expected that when the contract was returned it was the same as agreed.

[49] Given the nature of the discussions which had earlier taken place between the parties when arriving at an agreement, the Tribunal is satisfied that had notification of the alterations or changes been duly transmitted to the Respondent, the Respondent would not have agreed to those alterations or changes.

[50] The Tribunal is satisfied that acceptance was not completed; therefore, there was no contract between the parties and the application is dismissed.

Decision

[51] The decision of the Tribunal is that the Applicant's application is dismissed.