TRANSCRIPT OF PROCEEDINGS

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ACT CIVIL AND ADMINISTRATIVE TRIBUNAL

MEMBER COLEMAN

XD 628 of 2024

TURNKEY CREATIONS PTY LTD
and
BLAZEY

CANBERRA

4.29 PM, FRIDAY, 24 JANUARY 2025

MS E. KEANE appeared on behalf of the Applicant via AVL.

MR R. BLAZEY appeared on his own behalf.

AUDIOVISUAL LINK ESTABLISHED [4.29 pm]

MEMBER: Good afternoon, Ms Keane.

MS KEANE: …[Not transcribable]…

MEMBER: I only just heard the last little bit of your last word then. So I will just call Mr Blazey. He may have attended.

MR BLAZEY: Good afternoon.

MEMBER: Hello, Mr Blazey. Just for the transcript, can I get each of the parties to introduce themselves? For the applicant?

MS KEANE: Emily Keane. I'm appearing on behalf of Canberra Granny Flat Builders whose corporation name is Turnkey Creations.

MEMBER: Right. And Mr Blazey?

MR BLAZEY: Robert Blazey, respondent.

MEMBER: Thank you. Right. I have brought the parties here to give my decision in this matter. So as the parties aren't represented, I will just explain that - I'm going to run through the decision and my reasoning in the matter for your benefit but it is not an opportunity to - we are not going to be debating the whys and wherefores. We did all that on the last occasion. So I'm just going to run through how I have reasoned through the matter and whether I have landed on the matters in dispute.

So, for the transcript, this is Turnkey Creations Pty Limited trading as Canberra Granny Flat Builders v Robert Blazey. So this is a contractual dispute. There are not many facts in dispute but there is a substantial dispute about the significance of those facts.

The parties entered into a contract for the provision of a contour plan and design of an additional dwelling on the respondent's property in Isaacs. That contract appears at pages 6 to 8 of the applicant's bundle. That contract was entered into on 22 June 2023 after some meetings between representatives of the applicant and the respondent.

It is common ground that after some iterations to the plans in the time following that on 12 September, the respondent indicated the applicant did not wish to proceed, as evidenced in an email that date. The applicant had submitted the last iteration of the plan they had produced to the respondent on 11 September 2023 and it is relevant to note that the email from Mr Griffin on that day

acknowledges that there are still some issues to be worked out and that the process is not complete.

There is no dispute that the contour plan was produced. The applicant says that means that the $1,100 for that contour plan provided in the contract is payable. The respondent submitted that since he did not proceed with the applicant to have the additional residence built, that contour plan was useless to him. The respondent did not put any evidence about how he'd had to have that redone for the alternative arrangements that he went forward with, and he was not able to point to any concern or issue with it.

The respondent did make references to Mr Griffin, the person from the applicant dealing with him over the design process, expressing the view that it might need redoing because of the way the design was unfolding, but there was no other evidence that there were any concerns with it. So, therefore, I find that the applicant carried out this part of the work and is entitled to payment for it.

It is not disputed that the letter accompanying the design agreement is part of the contract. The applicant points to and relies on two particular clauses of that letter. On page 37 of that letter, clause QAID 353 states, 'If you decide to cancel our first meeting, then we will invoice the associated fees.' The applicant submitted that the respondent's cancellation of the contract after the first meeting means that this clause operates to make the fees payable in full.

The applicant also mentions QAID 343 to note that the process proposed does not promise involvement by the builder at the design stage, and also, QAID 344 to note that the indicative timing of custom design, being 10 to 12 weeks, the applicant submits that the point at which the respondent cancelled the control at about 12 weeks was still within the time. So it was not reasonable to stop the contract at that point on the basis of the lapse of time.

The respondent does not directly address the contract clause QAID 353 in his evidence or in his submission, however, his case is that the misrepresentations made by the applicant and the lack of care and skill and the failure of the plans to be fit for purpose mean that the applicant has not delivered on the contract, and so he doesn't have to pay. I will deal with each of those in turn.

The misrepresentations put by the respondent is that there would be involvement of the builder, Mr Constable, throughout the process. He pointed to a document allowing for an option to have weekly meetings with the builder, which appear at page 22 of his bundle, but he acknowledged that he did not take that option up. That page is page 32 of the 48-page document, the totality of which was not tendered so I don't have a complete copy of that document.

The applicant submitted that this document was about the building process, not the design process, but I think the point is moot, as the respondent did not make a request for those meetings and so had not invoked the clause that would have

had Mr Constable attend on more occasions or any occasions. The respondent does not point to any other contractual or other material that amounted to a representation that Mr Constable or the architect would attend meetings.

In any event, even if I could find such a statement and characterise it as a misrepresentation, it is not one that appears in the list in section 29 of the Australian Consumer Law on which the respondent was relying. It is not a representation that the services are of a particular standard or grade which would come under 29(1)(b) or some kind of representation about sponsorship or approval in section 29(1)(g). So I do not find that there was a material representation by the applicant in breach of section 29 of the Australian Consumer Law or otherwise.

In relation to fitness for purpose and due care and skill, the applicant pointed out the Australian Consumer Law obligation to provide services fit for purpose does not apply to the professional services provided by a qualified architect or engineer. The respondent says that there is no evidence that the architect that worked on these designs was actually qualified and so the exception does not apply. I don't need to decide the point. There is no similar exception for due care and skill and the way that the respondent put his case about these two issues relies on substantially the same facts.

In his evidence in the documents before me, the respondent states that the plans did not adequately address his instructions for a residence to be for his daughter with a disability. In the August version of the plan, and even the final version of the plans in September, there was a provision for steps.

The entrance to the premises was positioned in such a way as to require walking near the top of a retaining wall and there was no fence provided for in the plans between the residence and the pool in the back yard. The respondent says that all these features mean that the design is not suitable, and it did not address the fundamental requirement for the build and that it be suitable for the purpose as a residence for his daughter with a disability.

The respondent also says the car park was not appropriate in the August or September plans. I notice, however, that the plans lodged by the respondent for the build he is proceeding with have substantially the same car park arrangements as the September plans, so I don't give that issue about the position of the car park much weight.

In response to this, the applicant says that the plans meet the relevant disability standards and the matters raised by the respondent could have been remedied by further iterations in the design. That is, that the respondent could have pointed out these concerns and an additional set of plans could have been made to address them. The applicant says that these are relatively minor matters that could have been remedied and did not justify termination of the contract.

The respondent asserted the planning law required there be fencing but couldn't give me particular provisions about it. The applicant says that those requirements for the pool fence, in these circumstances, only came into force after 1 January 2024 so it was not a breach of those requirements. The applicant says there was no record of instructions for any of these matters but the respondent says that he gave them verbally to Mr Griffin, who he says did not take good notes.

None of the email correspondence from the respondents to the applicant expressing any concerns about the matter raised any of these matters, and so I wasn't assisted by that to come to a view about whether or not these instructions had been given and in what way. The respondent points to some other errors, or other things he says are errors in the documentation, but a number of those predate his signing of the contract such as concerning - he pointed out problems with Mr Walmsley's letter of 13 April 2023 referring to a two-storey structure.

I would have thought that had these been concerning to the respondent and had the significance that he now attributes to them, that he would not have proceeded to sign the contract in June of 2023, some two months later.

I'm persuaded that the outstanding issues could have been addressed. The applicant was willing to do further work for the agreed price and had not exceeded its time estimate for the process, even when it was not justified to terminate because of the length of time it was taking.

The respondent points to the quality of the documentation in the overall process as evidence of lack of care and skill. These do not assist me in coming to a view on care and skill. The respondent needs to point to features of the plans provided that show a lack of care or skill. The respondent, essentially, says that the fact that the plans still required work to address matters he had been raising from the beginning means there was a lack of care and skill.

These matters were not, however, raised in writing but only verbally, and so there is no documentation relating to that to assist me in coming to a view on that. Even if I accept that the August and September plans still required further work and did not reflect the instructions given early in the process, I accept that the applicant was willing to make necessary changes to the plans and to meet the respondent's requirements.

I don't need to decide the issue concerning the pool fencing. Even if it was a requirement of the planning law to have it in place, it was an easily remedied matter and a provision could have been added easily to that plan to allow that to occur on the next iteration if that, indeed, was a requirement.

The respondent also relies on his dissatisfaction with the estimates provided by the applicant for the build work. He notes that they seemed very high and changed without explanation, noting that the site works went up from 20,000

to 35,000 between iterations of those estimates without much explanation. He says he does not accept the explanations given for the cost of that work.

The applicant says that this contract is about the design work. The estimates are, therefore, not relevant to the question of whether or not they met their obligations under the design contract. The respondent, in turn, argues that the matters cannot be separated, and that to be satisfied with the design, he must necessarily have to be satisfied with the estimates being provided.

The history of the estimates issue might help clarify the situation. On 23 August, the respondent had questions about the difference in price between the proposed design and one of the standard designs, and on 31 August, the respondent expressed further concerns on the price per square metre and asked for some itemisation. In that email, he made an incorrect statement about being charged by the hour, presumably forgetting that this was a fixed price contract for the design.

An exchange following that on 1 and 4 September has the parties agreeing that the first estimate is high and the respondent saying that the costings are not transparent. But he, nevertheless, agreed to meet to progress the project, and on 4 September, there is a further exchange of emails that ends with the respondent saying he thinks the costings are all over the place. That is the last piece of evidence I have in relation to the costings and the exchanges on that.

The next items in the correspondence are the exchange on 11 September 2023 with provision of the latest plans. And on 12 September with the respondent saying he does not wish to proceed, as I referred to at the beginning of these reasons. The applicant gave evidence that in the week between these two events, he engaged another builder to give an estimate and prepare designs for him, and he decided to go with that provider instead.

The respondent points to the car park issue as to how the costs are inextricably linked. The August plans appear to show a car park next to the existing garage where substantial earthworks would be required to do it. The respondent appears to have raised this with the applicant though and they appear to have responded, and the issue is addressed in the September version of the plans with the car park placed not on that hilly piece of ground.

I tend to agree with the respondent. There were some unsatisfactory aspects of the costing provided by the applicant, although I note the applicant was offering to provide more detailed costings as the design was settled. Given the chance, these issues may have been able to be addressed.

However, much as the costing might be the basis to decide not to have the applicant do the building, the respondent has not shown that the costings show the plans were not prepared with due care or skill or were not fit for purpose,

or that he has provided any other justification for not allowing the applicant to complete the design process.

So taking these things together, I find the applicant was willing and able to complete the design process with the respondent, and the respondent has not shown that the applicant did not complete the plans with due care and skill or, to the extent that it applies, that they were not fit for purpose. I therefore find the respondent has no justification for terminating contract and is in breach.

So either the respondent is due to pay the entire fee, as per clause QAID 353, cancellation after first meeting, or the applicant is entitled to payment of the fees as damages for breach of contract. They would have been able to complete the contract had they been permitted to do so and would have received the money. I, therefore, find in favour of the applicant and order the respondent pay the applicant the sum of $4,600 on the invoice and the filing fee of $352.

The applicant has claimed interest but I don't think I have been given a interest calculation. I did work out the interest myself and the - I think the invoice was due on 14 October 2023 so the interest would start accruing on 15 October. I think that means that the - I have done a calculation which I can take the parties through, if they wish, but I think that means there is $490.03 of interest due. Have you calculated the interest, Ms Keane?

MS KEANE: I believe the interest was submitted in the first instance when - in the original application but I'm happy with your calculation.

MEMBER: All right. So as at today then, my order is that the respondent pay the sum of $4,600 plus $352 filing fee plus the $490.03 interest, coming to $5,442.03. I give the respondent 14 days to pay that amount.

So that is my order. Thank you, parties.

MR BLAZEY: Okay.

MS KEANE: Thank you.

AUDIOVISUAL LINK TERMINATED **[4.45 pm]**

ADJOURNED **[4.45 pm]**