

12/10/2009

Case: CC 883 / 2009

SAT Judge: T.Carey

**Cooper V John Baxter** [manufacturer, supplier and registered builder of Bradford  
precast Panel and post retaining wall]

## Transcript

C8



Matter No: CC 883 of 2009 & CC 479 of 2006

Mr Afsaneh Cooper

Email: [elarning@ewindfly.net](mailto:elarning@ewindfly.net)

Dear Mr Cooper

Thank you for your email received at the Tribunal on 16 December 2020.

Your request for transcripts regarding CC 479 of 2006 and CC 883 of 2009 which were matters that were previously heard in 2006 and 2009. The Tribunal is unable to obtain these transcripts as we do not keep recordings of proceedings which are more than 7 years old. Due to the transcripts not being available your request for transcripts regarding CC 479 of 2006 and CC 883 of 2009 is therefore refused.

The Tribunal does have a partial copy of the transcript of CC 883 of 2009, which is the reasons for decision which was requested by you. Another copy of this section of the transcript is enclosed for your information.

The Tribunal is not able to provide legal advice and therefore cannot comment on the additional questions and other issues outlined in your email. You may wish to seek independent legal advice to assist you with these issues.

Yours sincerely

A handwritten signature in black ink, appearing to read "Kathleen Halden".

Kathleen Halden  
**EXECUTIVE MANAGER**

4 January 2021



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STATE ADMINISTRATIVE TRIBUNAL

COMMERCIAL AND CIVIL INTERESTS

CC 883 of 2009

AFSANEH COOPER

Applicant

- and -

JOHN BAXTER

Respondent

BEFORE: MR T. CAREY, MEMBER

DATE: MONDAY, 12 OCTOBER 2009

VENUE: STATE ADMINISTRATIVE TRIBUNAL, PERTH

12/10/09  
(s&c)

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**CAREY, MR:** I will give my reasons for decision and then pronounce the order. This is an application for leave to review a decision of the Building Disputes Tribunal dated 20 May 2009, whereby the Disputes Tribunal ordered that the complaint before it be dismissed. The applicant sought to challenge that decision under section 41 of the Builders' Registration Act. Before being entitled to a review, it is necessary to obtain the leave of the Tribunal and that was the subject of the application heard before the Tribunal this morning.

The application before the Tribunal was filed on 17 June 2009. In that application, seven orders were sought by the applicant arising from the decision of the Disputes Tribunal. In a supplementary memorandum of orders sought, another seven orders are sought. However, as I have said, the sole subject of today's hearing is whether or not there should be granted to the applicant leave to proceed with a review of any decision of the Disputes Tribunal.

There was some issue before me as to what in fact was the subject matter of the applicant's complaint to the Disputes Tribunal. In particular, one of the grounds for review is that the Disputes Tribunal focused upon one complaint that was raised to the exclusion of some 13 other complaints of the applicant.

The complaint with which the Disputes Tribunal did concern itself was in relation to the construction of a concrete retaining wall by the respondent, in particular, that panels at the bottom of the retaining wall sank from five to 12 centimetres into the ground, meaning that the height of the wall was lower than that for which provision was made in the relevant building licence and that the resultant wall was lower than the ground level of the adjoining property. It was said that by reason of requirements of the local shire, it was necessary for the applicant to construct a second retaining wall, which she did at a cost of \$15,256, and this was the maximum amount sought from the respondent before the Disputes Tribunal.

The other 13 complaints were said to be referred to in an annexure to the standard complaint document. That document is found in the book of documents which was before the Disputes Tribunal. It is a document headed "Workmanship Details", which comprises pages 5 through to 13, both inclusive, of the complaint document before the BDT. It is also of some significance that the book of documents included the applicant's preliminary notice, which is a requirement of applications under the Builders' Registration Act and also the Home Building Contracts Act, where the thrust of the complaint is consistent with the first complaint which I have indicated was considered by the BDT.

Regarding the complaints which are said to have been raised in the other document, although it was clearly before the BDT, there is conjecture as to how that document was treated and dealt with by the Disputes Tribunal. The reason that that is the subject of conjecture is that the applicant elected not to obtain and file and serve the transcript of the hearing before the BDT, despite a direction to that effect having been made.

As the matter proceeded before me this morning, it became quite apparent, and hopefully in particular it became apparent to the applicant, that in order for any of those additional claims to form the basis of a leave application, it was essential that the evidence of how any of those claims was dealt with before the Disputes Tribunal, including the contents of any evidence of any witness in relation to any of those claims, be before this tribunal.

The hearing of this matter has now been the subject of a listing since 25 June 2009. The original date for the application was subsequently postponed until today. However, the applicant's continued reluctance, and ultimate omission, to obtain the transcript is a matter for which she must bear the brunt of the consequences of that failure. It is simply not possible for there to be a finding of any failure on the part of the Disputes Tribunal to have regard and deal with any allegations in the nine-page document to which I have referred without knowing what was said about that document at the hearing.

The other point that I would make is that having read the document, there is nothing which suggests to me that the complaint that the BDT clearly did have regard to and dealt with was not the major complaint item of the applicant before that tribunal and the test of that is that there is nothing in that document which adds to the main relief sought by the applicant before the Disputes Tribunal as being recovery of the cost of the work to construct a second retaining wall of a bit over \$15,000.

So to the extent that there is anything new in that document and any different relief is sought, no substantial injustice would arise from any failure on the part of the BDT to consider it. However, for the reasons I have indicated, it is simply not possible for the applicant to establish any error on the part of the BDT, in the absence all of the evidence which was heard and dealt with by the BDT and to that extent, this application cannot succeed.

That being so, the necessary inquiry then became whether or not the finding of the Disputes Tribunal on what I have described as the principal complaint of the applicant is one that was supportable on the evidence or not. Again, this was an issue the onus of which rested upon the applicant.

The Disputes Tribunal's reasons for decision dealt with the issues relating to that primary complaint over a matter of some pages, culminating in page 13, where it set out a number of findings and those findings were set out cumulatively from (a) to (f). So the issue for the Tribunal was whether the applicant was able to establish that any of those findings was open to doubt on the evidence and even if that was the case, whether by reason of the rest of findings it made any difference.

The first finding was that, "The concrete retaining wall constructed by the respondent was straight, true and level and that the top of the wall when constructed measured 1.5 metres above the top of the sand on the terraced area to be retained by a proposed limestone block wall from the datum point instructed by the complainant."

The complainant, that is the applicant before me, sought to raise a number of matters as to why that finding was wrong or attended by doubt. Some of those arguments depended upon, at least in part, fresh evidence which she wished to place before this tribunal. Whenever such an attempt was made, I ruled that it was not possible in a leave application to rely upon fresh evidence and I did not allow the applicant to develop any such argument.

Another aspect of the response was that the applicant sought to refer to things said by witnesses or otherwise before the BDT. Taking all of those submissions as to what was said before it into account, it was said that the finding I have just recited was not one that was open to the Disputes Tribunal. The fact is that the Disputes Tribunal has accepted the evidence of the respondent Mr Baxter concerning the result of the work he did at the applicant's premises and there has been either an explicit or implicit rejection of evidence to the contrary effect relied upon by the applicant.

On my reading of the decision, this aspect of the evidence has been explained in a cogent fashion and there is no basis upon which that reasoning is to be criticised. The gravamen of the applicant's complaint is that there was no proper consideration of the evidence and submissions before the Disputes Tribunal. Unfortunately, in the absence of the transcript, it is impossible for her to make good that contention.

In relation to the next finding appearing at page 13 of the reasons for decision, "The concrete retaining wall constructed by the respondent did not sink and could not have sunk." That was a finding with which the applicant has no issue.

The next finding, "The concrete retaining wall was never going to be high enough to retain the earth." This issue again threw up a number of subsidiary ones. One such

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issue was that it was said by the applicant that the Disputes Tribunal got wrong the sequence as to whether the concrete retaining wall constructed by the respondent was constructed before or after a limestone wall. There is a suggestion in the decision, at the bottom of page 12, that the result may have been affected by the subsequent construction of a limestone block wall which occurred since the respondent was on site and that therefore it was not a proper basis for rejecting the complaint. I will just put that to one side, until I deal with one of the subsequent findings of the BDT.

The next finding, (d), was, "The respondent complied with all of the complainant's instructions." The response of the applicant was to make reference to matters raised before the Disputes Tribunal and evidence given in the Disputes Tribunal about which this tribunal has no evidence. This finding it appears does have some relevance to the matters contained in the eight-page document to which I have referred before and therefore does indicate that the Disputes Tribunal was aware of that document and perhaps regarded this aspect of it as being one which required specific response. In any event, the aspect in relation to which the applicant says that it is unsatisfactory depends on what happened at the Disputes Tribunal, which is not before me.

The next item, which is, "The failure of the wall to retain the full height of the earth was caused by the complainant's failure to accurately measure the depth of the cut and failure to devise a suitable retaining wall for the full height of the cut and additional loading for the concrete fibrous dividing fence;" the depth of the cut was clearly an issue which was the subject of submissions going both ways before the Disputes Tribunal and also evidence. The reasons for decision go to some extent to address the evidence on that issue.

The evidence of the applicant was discounted on the basis of its inaccuracy. For example, some of the measurements were performed by a combination of poly pipe and a 30-centimetre long level. Further, the drawing of the applicant depicting the various measurements was not accepted as being an accurate representation. Apart from the unreliability of the methods of measurement used, the Disputes Tribunal referred to the drawing including figures that were most preferable to that of the complainant and the complainant as being an unreliable witness, who tended to give evidence in a way that would support her preferred outcome, rather than dealing with what were said to be the plain and obvious facts of the case.

The evidence that was relied upon by the applicant and third parties was also dealt with and discounted on other grounds. So it is simply not the case that the Disputes Tribunal did not consider the evidence that was



produced by the applicant. It was considered, but other measurements and evidence were preferred. So it was on the basis of that other evidence that the finding (c), that the concrete retaining wall was never going to be high enough to retain the earth, was accepted.

Turning to finding (f), "The bottom panel on the concrete retaining wall was level and built at the level instructed by the complainant, but was covered over by the complainant when constructing the limestone block wall and paving the terraced area retained by that limestone block wall. The limestone block wall is not true and level and undulated considerable" - that should be considerably - "as does the level of the pavers to the terraced area retained thereby."

Once again, this was a finding about which the applicant raised a number of matters, but which at their heart relied upon the conduct of the matter and evidence given before the Disputes Tribunal. I would add though that even if there was some misconception by the Disputes Tribunal in relation to the timing of the construction of what is described in that finding as the limestone block wall and the concrete wall constructed by the respondent, the other findings reached in relation to the depth of the cut and the instruction given to the respondent, that is the work for which the respondent contracted itself to perform, in my view make good what appears at page 10 in the reasons for decision - that a 1.5 metre high concrete retaining wall would never have been capable of retaining the full cut and that this is the primary reason why the precast concrete panel and post wall does not retain to the top of the cut.

A further aspect relied upon before me relating to the level of the wall related to the wall constructed on the north boundary, where it was said that two panels had not been provided by the respondent and that was the reason that the north boundary wall was short. Again, the lack of evidence of how this aspect was dealt with before the Disputes Tribunal creates a difficulty for the applicant.

The respondent in relation to this aspect said that this was an issue that had been dealt with ad nauseam before the Disputes Tribunal, and that by reason of the topography, as far as Mr Baxter could recollect, some panels which were initially to be installed as part of the wall on the northern boundary were swapped to the southern boundary. However, what was quoted in terms of the five panels was what was supplied.

Without making any finding in that regard, for the same reason, that I do not have the transcript of what occurred before the BDT, this really illustrates the point that it is not open to this tribunal to speculate or guess as to the reasons why the disputes tribunal approached an

issue in a particular manner.

The final aspect of the submissions of the applicant was that, to use her words, the respondent's measurements of height and so on were measurements which "sounded right" rather than being based upon accurate scientific information. The very same point can be made against the evidence which was provided, as far as this tribunal knows, by her before the Disputes Tribunal and I have already dealt with the manner in which the Disputes Tribunal dealt with that evidence.

There are one or two other findings which it seems to me were very important to the final outcome before the Disputes Tribunal. At page 15, in relation to the measurement evidence, the BDT referred to the evidence of the respondent and a Mr Arias as to what they did to measure the location of the wall to be installed. The BDT then said they gave evidence that they witnessed the complainant acknowledge the correctness of the proposed height as indicated to her by the respondent prior to the construction of the concrete retaining wall.

I asked Mrs Cooper about that and she indicated that she denied making any such acknowledgment; that is, she denied it before the Disputes Tribunal. In the absence of the transcript, it is impossible for this tribunal to have regard to that, but in any event whatever her response, the fact is that the Disputes Tribunal has stated in its reasons the giving of an acknowledgment as to that very significant matter.

Then at page 12, the Disputes Tribunal referred to the wall constructed by the respondent as being true, straight, level and even and that the only thing that had changed from the time the respondent attended site is that the complainant constructed the limestone block wall and laid sand to that terraced area to support the pavers that were then laid thereto.

I have already noted what the applicant had to say about that and this tribunal's inability to have regard to contrary evidence before the Disputes Tribunal. In the absence of the transcript, it is possible that there is confusion regarding the limestone block wall being spoken of there. There were, it seems, two limestone block walls, the second one being the one constructed by the applicant or at her behest, by reason of the shortfall in terms of the retaining by the concrete wall being constructed by the respondent.

The evidence before me is not sufficient to clarify whether the Disputes Tribunal did make an error there. It may well be that had the transcript been available, that transcript would have assisted in that regard.

I want to make in closing some general comments in relation to the nature of leave applications and the attitude which I have detected of the way in which this application has been pursued. The Building Disputes Tribunal is the primary decision maker on issues within its jurisdiction. It was expressly set up as a quick and efficient arbiter, with a right of review initially to the District Court and now to this tribunal on the grant of leave.

It is not by definition an unlimited right of review and it is necessary for an applicant to be granted leave to establish that there has either been an error by the disputes tribunal in reaching its findings and conclusions, that those findings and conclusions are open to doubt or that there is simply no discernible basis for them. The onus of course in establishing any such matter lies upon the party seeking to argue it.

There is also the further feature which the cases say needs to be demonstrated either of a substantial injustice if the decision remains undisturbed, a point of law which needs clarification or some other aspect. In my view, the applicant has demonstrated a serious lack of understanding of these principles, notwithstanding that they have been explained to her on numerous occasions.

One example of many of this was her attempt to rely upon evidence which was not before the Disputes Tribunal. In a sense, the fact that she persisted in her attempt to rely upon fresh evidence, that is evidence on issues going to the merits before the Disputes Tribunal which was not before the Disputes Tribunal, generally because it had been obtained in recent times, indicates the difficulty which the application or the case for leave has and which is perhaps understandable in the absence of the transcript to which I have referred.

The other item of concern which I will mention is that the applicant in both her original application and a document entitled "Supplementary Orders" seeks a range of orders, some of which are outside the scope of any application to review a decision of the Disputes Tribunal.

Rather than concentrating upon the naturally limited number of claims that one expects on an application for leave to review, there has been a proliferation of complaints by the applicant against all and sundry, without regard to the principles applying to applications for leave and without limiting herself to reference to what was before the Disputes Tribunal in reaching its decision.

For all of those reasons, in my judgment, the applicant has failed to establish a right for leave to review the decision of the Disputes Tribunal.

The order therefore is: (1) the application for leave pursuant to section 41 of the Builders' Registration Act is refused; and (2) the application is dismissed. Thank you.

(End of extract)

## Transcript Statement

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