IN THE COUNTY COURT OF VICTORIA

Revised
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Publication

AT MELBOURNE
COMMERCIAL LIST
GENERAL DIVISION

Case No. CI-14-03023

CELSIUS FIRE SERVICES PTY LTD — Plaintiff

v.

CBC FACILITIES MAINTENANCE PTY LTD — Defendant

JUDGE:	His Honour Judge Anderson
WHERE HELD:	Melbourne
DATE OF HEARING:	27 January 2015
DATE OF JUDGMENT:	30 January 2015
CASE MAY BE CITED AS:	Celsius Fire Services Pty Ltd v. CBC Facilities Maintenance Pty Ltd
MEDIUM NEUTRAL CITATION:	[2015] VCC 31

REASONS FOR JUDGMENT

Catchwords: Practice and procedure – Summary judgment – *Building and Construction Industry (Security of Payment) Act 2002* (Vic) – Increase in scope of work and fee to be paid following an audit and completion of "*due diligence*" – Whether a claimable variation under the Act.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr A. J. Laird	ERA Legal
For the Defendant	Mr J. Dawson	Maguire McInerny

HIS HONOUR:

1 Two applications are before the court. The plaintiff seeks summary judgment for part of its claim made pursuant to the *Building and Construction Industry Security of Payment Act 2002* (Vic) ("*the Act*"). The defendant seeks security for its costs of the proceeding and leave to file an amended defence and a counterclaim. The latter applications were not substantially argued by counsel at the hearing.

2 The claim relates to payments under a 2010 agreement for the provision of fire maintenance services to equipment at Department of Justice sites in Victoria. The defence admits the agreement and that it was contained in 3 documents comprising an agreement, a tender price schedule and a specification.

3 The statement of claim relevantly claims the total amount of $307,621.31 being the underpayment of a total of 45 invoices submitted to the defendant between 31 May 2010 and 31 October 2013. The amounts outstanding from the 8 invoices submitted after 29 July 2013 constitute about 60% of the total sum claimed.

4 By its summary judgment application, the plaintiff seeks judgment in the sum of $283,457, less $30,348.23 paid by the defendant on 31 January 2014. The difference between the sum claimed in the statement of claim of $307,621.31 and the $283,457 sought in the summary judgment application was said by plaintiff's counsel Mr Laird to result from the omission from the claim for summary judgment of all claims subsequent to the first claim in any calendar month. The reference period under the contract was the default monthly period, and the subsequent claims each month would therefore not satisfy the requirements of the Act.

5 The summary judgment application also excludes what are described in the statement of claim as claims for "*reactive work*", totalling $57,529.84, being for additional work directed by the defendant under the agreement and invoiced separately. This work involved the defendant issuing specific work orders and the plaintiff's staff attending in response.

6 The statement of claim also includes a claim for damages the plaintiff says it suffers as a result of the defendant's repudiation of the agreement which the plaintiff accepted. That claim is also not part of the summary judgment application.

7 The plaintiff relies upon affidavit material that establishes the following matters:

a. the plaintiff submitted a tender for the maintenance and reactive work. The maintenance work was to be performed at an annual fee of $402,250.20;

b. the tender was accepted and at a post-tender meeting it was agreed that the plaintiff would submit monthly payment claims calculated as one twelfth of the annual fee, subject to a later "*due diligence adjustment*";

c. the written form of agreement between the parties was never executed;

d. payment claims were issued monthly by the plaintiff for programmed maintenance services and posted to the defendant;

e. no payment schedules under the Act were ever served by the defendant in response to the progress claims;

f. after September 2012, the amounts of each payment claim was increased as the audit (or due diligence) redefined the scope of work and the annual maintenance fee was amended to $509,161.80.

8 The defendant submits that it has a real prospect of succeeding in its defence of the plaintiff's claim. The defendant relies upon the following matters:

a. the plaintiff's affidavit material does not comply with Order 22.2.03(b) by stating the belief of the deponent that there is no defence to the claim;

b. whether the agreement was a "*construction contract*" within the meaning of s. 4 of the Act, and the work required by the agreement was "*construction work*" within s. 5;

c. whether the tendered sum for the services was an annual fee, or for the full term of the agreement (three years plus any extensions);

d. whether the plaintiff has otherwise sufficiently established the agreement, as it was pleaded in paragraph 3 of the statement of claim;

e. whether the "*programmed maintenance fee*" was varied following the audit, or due diligence, as alleged by the plaintiff;

f. whether the variations claimed within the payment claims are "*claimable variations*" within the meaning of the Act, or whether the claims include "*excluded amounts*";

g. whether the payment claims complied with s. 14(2)(e) of the Act, as they refer not only to the Victorian Act but also to the New South Wales and Queensland legislation;

h. whether the invoices are valid payment claims issued for a reference date for

the purposes of the Act;

i. whether the payment claims were served in accordance with the agreement, by the 15th day of the month;

j. whether the interests of justice demand that the matter be determined at trial, rather than on a summary basis.

Failure to state that there is "*no defence*"

9 The plaintiff's supporting affidavit material does not unequivocally state that there is no defence to the action. This is required by order 22.03(1)(b). Many earlier decisions have regarded this as a fatal flaw to the bringing of a summary judgment application.

10 Mr Laid submitted that order 22.03(1)(b) was inconsistent with the requirements of ss. 63 and 64 of *Civil Procedure Act 2010* (Vic) or, alternatively, that in the circumstances of this case, the plaintiff should be relieved of the consequences of its non-compliance with the requirement of the Rules.

11 I do not consider that the Rule was rendered ineffective by the passing into law of the Civil Procedure Act. There is nothing inconsistent with the provisions of ss. 63 and 64 and the requirement that, as a condition of final judgment, the plaintiff attest to a belief that there is no defence to the action. In fact, that requirement would appear to be necessary or appropriate in order to establish that the defendant has no real prospect in its defence of the claim.

12 Notwithstanding, I considered that, if the plaintiff were to subsequently file an affidavit which remedied this defect, provided the defendant could not demonstrate that it had suffered, or was likely to suffer any prejudice, the plaintiff might be relieved from its failure, in this respect, to comply with the Rules.

Is the agreement a construction contract?

13 By its defence, the defendant admitted that "*the agreement is a construction contract within the meaning of the [Act]*". Defendant's counsel, Mr Dawson, conceded in agreement that in view of that pleading, unless and until leave were granted to withdraw the admission, the argument was not open to the defendant on the present application.

Annual fee for maintenance services?

14 In the plaintiff's affidavit material, Ms Norris says that Mr Telios of the defendant, at a post-tender meeting said words to the effect that "*monthly maintenance should be on a payment claim calculated as 1 / 12th of the annual fee*" and that the "*starting annual fee of*

the contract" was $402,250.20.

15 Ms Hunt stated her "*belief*", presumably based on negotiations and meetings in which she was involved before work commenced, that the plaintiff "*would be entitled to charge a monthly fee of $33,520.85 being 1 / 12th of the annual fee*".

16 The sum of $33,520.85 was claimed on a monthly basis from 31 May 2010 until 31 August 2011, after which the annual amount was increased. The payment claims were substantially paid, as were the increased claims from 12 September 2011 through to 25 June 2013. There is no affidavit material in opposition to the affidavits of Ms Norris and Ms Hunt.

17 The acceptance of the payments and their substantial payment over 3 years suggests that there is no substance to this matter. The suggestion that the one twelfth payments should be calculated over the whole of the contract period (with or without extensions) is untenable.

Pleading of the agreement

18 There is a difference on the pleadings as to what constituted the agreement. The defendant admitted in its defence that the parties entered into an agreement "*for the provision of fire safety measures and maintenance services…in respect of facilities controlled by the Department of Justice in the State of Victoria*".

19 In these circumstances, it is clear that the arrangement between the parties, to the extent admitted by the defendant, satisfied the definition of a "*construction contract*" in s. 4 of the Act. It is also clear that the maintenance works to the Department of Justice facilities would come within the definition of "*construction work*" in s. 5. No argument to the contrary was articulated at the hearing.

20 The discrepancy between the agreement pleaded by the plaintiff and the agreement admitted by the defendant is of no consequence in the consideration of the claim under the Act.

The revised maintenance fee

21 It seems clear from the analysis of the plaintiff's affidavit material, the absence of answering material and the claim and payment history, that there is no real dispute that the maintenance fee was increased following the audit or due diligence.

22 This involved a change in the scope of the construction work to be carried out, and would therefore appear to be a "*variation*" to the agreement, as defined in s. 4 of the Act.

Claimable variations or excluded amounts?

23 Mr Dawson submitted that in relation to the progress claims:

a. the claims were not for a "*first class of variation*" as, pursuant to s. 10A(2)(c) of the Act, the parties had not agreed that "*the doing of the work or the supply of goods and services constitutes a variation to the contract*";

b. "*the total amount of claims under [the contract] for the second class variations exceeds 10% of the consideration under [the contract] at the time the contract is entered into*";

c. therefore, pursuant to s.10A(4) the consideration under the contract at the time it was entered into is deemed to be $150,000 for the purposes of ss. (3)(d);

d. the variations cannot be regarded as the "*second class of variations*" as the consideration under the contract is not, as required by ss. (3)(d), less than $150,000;

e. the contract, by clause 27 of the draft proposed contract, provided "*a method of resolving disputes under the contract*" including a dispute as to whether, so far as the claims are concerned, they involve the doing of work or supply of goods which "*constitutes a variation to the contract*".

24 I consider that the critical issues for determination is whether the variation is within the first class and whether there is no agreement that the additional work the plaintiff was required to do following the audit or due diligence constituted a variation to the contract.

25 In my view, there is no dispute, from the matters I considered under the heading "*The revised maintenance fee*", that the scope of work was increased on the basis that, if that work were performed, the increased annual fee would be paid and could be claimed by equal monthly sums. This "variation" was agreed, in my view, prior to the submission of the relevant progress claims.

26 If I had determined otherwise, the claim for the varied amounts would not be first class variations, because of the lack of agreement on an essential requirement. They would not be second class variations because the deemed consideration of the contract was in excess of $150,000. Further, the plaintiff had not demonstrated that the agreement did not provide "*a method of resolving disputes*", as it is arguable that clause 27 of the draft contract could be relied upon.

Reference to other State Legislation in the progress claim

27 Each payment claim contained the printed words, "*This payment claim is made under the Building and Construction Industry Security of Payment Act 1999 (NSW) or the Building and Construction Industry of Payment Act 2002 (Vic) or the Building and Construction Industry of Payment Act 2004 (QLD) whichever applies*".

28 Mr Dawson submitted that this statement did not comply with the requirement in s. 14(2)(e) of the Act that the payment claim "*must state that it is made under this Act*".

29 In my view, the statement in the claim form is sufficient. The draft contract provided in clause 34.8(a) that, "*this agreement is governed by and is to be construed in accordance with law applicable in Victoria*". In the circumstances, particularly as the draft contract was proffered by the defendant and is alleged in the defence, to form part of the agreement for the performance of works, it could not be said that the defendant would have any difficulty determining which of the three states' legislation was applicable.

Are the claims issued for a reference date?

30 Mr Dawson relied upon clause E2.1. of the specification which provided that the plaintiff "*must ensure that an invoice is submitted to the Department [of Justice] by the 15th days of each calendar month for all the programmed maintenance services as scheduled and performed during the previous month*".

31 Mr Laird submitted that the draft contract was never adopted. In any event, the default position in s. 9(2)(b) of the Act effectively restricts the plaintiff to not making the first claim until 20 business days after construction work was first carried out, and subsequent claims, at a similar interval.

32 In my view, the plaintiff, insofar as it has restricted its claim under the Act to no more than the first claim it made each month, was entitled to submit claims for progress payments under the Act, calculated by reference to the work performed in the previous month.

The requirement to serve progress claims by the 15th of each month

33 Section 9 of the Act limits the right to a progress payment to the relevant reference date. Section 50 of the Act extends the manner in which documents, including a progress claim, under the Act may be served. Section 14(4)(b) permits the service of a payment claim within "*the period of 3 months after the reference date referred to in section 9(2) that relates to that progress payment*".

34 In the circumstances, even if the requirement in the specification has application to a contractual claim, for a payment claim made under the Act which otherwise complies with the Act, clause E2.1 of the specification would not affect the validity of the payment

claim. Further, in the absence of a payment schedule, the defendant cannot "*raise any defence in relation to matters arising under the construction contract*" (s. 16(4)(b)(ii)).

Whether the matter should proceed to trial in any event

35 In my view, there is no reason why the dispute raised for summary judgment should proceed to trial, if I am satisfied that there is no real defence.

36 I propose to enter judgment for the plaintiff against the defendant that the defendant pay to the plaintiff $283,457.05 together with appropriate interest.

The defendant's application

37 The defendant has foreshadowed applications for leave to file an amended defence and a counterclaim and for security for its costs.

38 The applications were given little attention during the hearing. In the circumstances, I determined to have my associate write to the parties as follows:

> "*Judge Anderson has asked me to write to the parties. He has reviewed the papers and is in a position to deliver judgment in relation to the plaintiff's summary judgment application.*
>
> *Please advise whether you wish to be further heard or to present further written submissions in relation to that application, and if so, the reason why you should be permitted to do so and the time within which you would wish to do so.*
>
> *Otherwise, Judge Anderson will deliver a written judgment later this week. Judge Anderson is prepared to excuse attendance by the parties when the judgment is handed down on the basis that immediately after the judgment will be emailed to the parties.*
>
> *It would then be appropriate for the parties to arrange with me a date and time for orders to be made on the plaintiff's summons following any agreement on consequential issues including costs. Full argument can then proceed in relation to the defendant's application.*
>
> *Judge Anderson considers that it is not necessary for the defendant to issue its summons and the documentation already served shall be sufficient notice of the application.*"

39 The plaintiff's solicitors responded enclosing three further affidavits including one affidavit purporting to remedy the default under order 22.03. Apart from that affidavit, I have

placed no reliance upon the other two affidavits.

40 The parties have been notified of the time this judgment will be handed down and that their attendance is not required.

41 When the parties have had the opportunity to study these reasons and liaise with my associate, a further date will be fixed for a hearing:

a. to make final orders on the plaintiff's summary judgment application, including the form of any order relating to the plaintiff's lack of compliance with order 22.03;

b. to consider the defendant's applications.

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Certificate

I certify that these 8 pages are a true copy of the reasons for decision of His Honour Judge Anderson delivered on 30 January 2015.

Dated: 30 January 2015

Olivia Bramwell
Associate to His Honour Judge Anderson