IN THE COUNTY COURT OF VICTORIA

Revised
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Suitable for publication

AT MELBOURNE
COMMERCIAL DIVISION
BUILDING CASES LIST

Case No. CI-16-01194

LANDMARK BUILDING SERVICES PTY LTD — Plaintiff

v.

ANASTASIA TSEKOURAS & ORS — Defendants

JUDGE:	His Honour Judge Anderson
WHERE HELD:	Melbourne
DATE OF HEARING:	29 April 2016
DATE OF JUDGMENT:	29 April 2016 (revised 2 May 2016)
CASE MAY BE CITED AS:	Landmark Building Services Pty Ltd v. Tsekouras & Ors
MEDIUM NEUTRAL CITATION:	[2016] VCC 501

REASONS FOR JUDGMENT

Catchwords: Building contract – Payment claim under the *Building and Construction Industry Security of Payment Act 2002* (Vic) – Reference date under the contract for a "*final claim*" – Whether defective or incomplete work meant that the works had not reached completion – Whether construction work the subject of the final claim sufficiently identified.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr N. Phillpott of Counsel	Ward & Co.
For the Defendants	Ms L. Keily of Counsel	Turks Legal

HIS HONOUR:

1 Landmark Building Services Pty Ltd ("*Landmark*"), as the builder, entered into a construction contract with Anastasia, Bill and Theodore Tsekouras ("*the Tsekourases*"), as the owner, in 2010 for the construction of 4 residential apartments above 2 shops in Richmond ("*the contract*").

2 Landmark seeks judgment pursuant to section 16 of the *Building and Construction Industry Security of Payment Act 2002* (Vic) ("*the Act*") for the "*final claim*" under the contract for $53,900 including GST. Landmark relies upon tax invoice no. 00274 dated 18 December 2015 as its "*payment claim under the Act*". No payment schedule was served by the Tsekourases in response to the payment claim.

3 Ms Keily, the Tsekourases' counsel, submitted that the payment claim was invalid for the purposes of the Act for two reasons:

a. the payment claim did not "*identify the construction work… to which the progress payment relates*", as required by section 14(2)(c) of the Act;

b. the payment claim had not been made "*on and from*" the reference date as determined pursuant to section 9 of the Act. Under clause 17 of the contract, the final claim could not be submitted by Landmark to the Tsekourases until "*completion*".

Construction work not identified in the payment claim

4 In the payment claim, the "*construction work… to which the progress payment relates*" was identified as follows:

> "*Final claim as per building contract 'completion of building works'…total including GST $53,900.00*".

5 Clause 11.8 of the contract provided that, "*the owner will make progress payments to the builder in accordance with the agreed and completed progress payment table as set out in item 23 of the appendix*". The table in the appendix set out as the final eighth progress payment:

> "*8. Final - 5%* [of total contract price] - *$53,900*".

6 In my view, the payment claim adequately identifies the construction work to which the progress payment related. The construction work was the work required to bring the project to "*completion*" under the contract, and which entitled Landmark to make the final claim under clause 17.1 for the eighth and final stage of the project for the amount of

$53,900 as set out in the appendix to the contract.

7 Landmark's counsel, Mr Phillpott relied on the decision of Vickery J in *Mackie Pty Ltd v. Counahan* [2013] VSC 694. Vickery J said at paragraph 74:

> "*As far as the qualitative considerations embodied in s 14(2)(c), it is sufficient if the construction work (or related goods and services) to which a final payment claim relates is defined at least in the following manner:*
>
> *• A statement (express or implied) that the claim is a final payment claim;*
>
> *• A statement (express or implied) that the works under the construction contract are complete; and*
>
> *• A statement of account which sets out with sufficient clarity precisely what is claimed, and how the claim has been calculated or arrived at*".

8 In my view, all these requirements are provided for in the payment claim; the first and third expressly, and the second impliedly, by reason of the contractual provisions I have referred to.

9 In my view, this conclusion also accords with Vickery J's statement of the general principles to apply when considering whether there has been compliance with the requirements of section 14(2) of the Act. These principles are set out in paragraph 46, particularly at (d), (e) and (f), as follows:

a. "*it must be clear from the contents of the document that it contains the required information, when those contents are properly considered in their context*". In this case, the context includes the fact that this was the eighth progress claim made pursuant to a schedule of payments set out in a written construction contract;

b. the approach "*should not be unduly technical or critical and the requirements should be applied in a commonsense practical manner*";

c. "*reasonable specificity in the payment claim is required… to enable a respondent to consider and respond*" to the claim.

10 In my view, if the Tsekourases had wished to dispute the claim on the basis that the works were not complete, in the sense that any aspect had not be "*completed in accordance with the plans and specifications*", they were in the position to do so, knowing that they had been served with the "*final claim*" under the contract.

11 In fact, an earlier "*final claim*" had been made by Landmark on 29 July 2015. It was not paid by the Tsekourases because "*an occupancy certificate had not yet been provided*". On about 13 August 2016, an occupancy permit was provided to the Tsekourases. On 9 September 2015, the Tsekourases provided to Landmark a 55 page report prepared by their consultant, Mr Peter Mackie which set out "*defects and incomplete work*". The claim dated 29 July 2015 was withdrawn on about 7 October 2015 and Landmark returned to site to carry out further work. It is clear, therefore, that when Landmark resubmitted the final claim dated 18 December 2015, that the Tsekourases were fully conversant with the consequences of the service of a final claim under the contract.

12 Clause 17.5 of the contract provided that the owner may, after being served with a final claim provide a written list specifying defective or incomplete work not in accordance with the plans or specifications. Ms Keily referred to evidence that the Christmas shutdown of the site prevented the Tsekourases having access to the site until 21 January 2016.

13 Mr Mackie inspected the site on 21 January 2016 with representatives of Landmark and with the Tsekourases. He apparently revised his earlier report on that day noting which items had been completed and which items were outstanding. The revised report was not provided to Landmark until 1 March 2016.

14 These matters are not, in my view, sufficient reason for the Tsekourases not having served a payment schedule under the Act "*within 10 business days*" indicating whether the payment claimed was disputed and any reason for withholding payment.

The payment claim was premature as the works were not complete

15 Ms Keily submitted that the final claim dated 18 December 2015 was premature as the works were not "*complete*" on that date and Landmark was not entitled to serve the claim as the "*reference date*" had not been reached.

16 By section 9(2) of the Act, the relevant reference date was to be determined by the terms of the contract; in this case by clause 17.1 which provides that the "*final claim*" is to be given "*on completion*".

17 "*Completion*" is defined in clause 1 of the contract as meaning "*when the works to be carried out under the contract: have been completed in accordance with the plans and specifications; and if a building permit was issued for the works, the owner is given an occupancy permit, if required, or in any other case, a copy of the certificate of final inspection*".

18 In the present case, there is a dispute about whether there has been "*completion*" or not. Ms Keily relied upon –

a. the evidence of Mr Mackie, particularly the comments contained in his revised report dated 21 January 2016;

b. the statement in paragraph 16 of the affidavit by Landmark director, Mr Christopher Moutidis, sworn 24 March 2016, that in Mr Mackie's revised report, "*there are 27 out of the 147 items which the defendants allege are 'incomplete', but these items are predominantly maintenance items or items which fall within the contractual defects liability period. They do not impact upon the completion of the works under the contract. These are not incomplete works*".

19 I have referred earlier to clause 17.5 of the contract which entitles an owner to give to the builder a written list of alleged defective or incomplete work. Clause 17.6 gives the builder 21 days to "*complete any necessary outstanding items*" on the list. Clause 17.7 provides that, "*Upon completion of all necessary outstanding items stated in the defects list given under clause 17.5 the owner will pay the final claim to the builder*" within 7 days.

20 Perhaps, Mr Moutidis was referring to clause 19, and item 14 in the appendix to the contract, which provide for a defects liability period of 13 weeks which is to commence upon completion or the owner taking possession of the works, whichever is the earlier. Before the period expires, the owner may provide to the builder a list of defective works which the builder must complete.

21 Ms Keily submitted that clause 17.7 was a condition precedent to final payment under the contract and a payment claim for a final payment could not be made before the defects list had been completely rectified.

22 In my view, this submission must fail. I am satisfied that the payment claim was made in accordance with the appropriate reference date for the following reasons:

a. Landmark is a person who, under section 14(1) of the Act, "*claims to be entitled to a progress payment*";

b. the progress claim dated 18 December 2016 was served after Landmark considered that the works had been completed and therefore in accordance with the "*reference date*" specified in the contract;

c. the assertion to the contrary was not made until Landmark received a letter from the Tsekourases' solicitors dated 1 March 2016 enclosing Mr Mackie's revised report. Mr Moutidis said at paragraph 13 of his affidavit that on 21 January 2016, "*at this inspection, each item in the first Mackie report was re-inspected and approved as completed by the end of the day*";

d. the claims of defective or incomplete work, or work excluded from the contract by separate agreement would ordinarily be matters not to be taken into account on an application under section 16 of the Act, being excluded from consideration by section 16(4)(b);

e. clause 17.7 of the contract may provide a pre-condition to payment in respect of a claim made in contract, and if a defects list had been served. However, by reason of section 48(2)(a) of the Act, to suggest that a claim under the Act, was subject to such a precondition, would "*modify or restrict*" the operation of section 14 of the Act, and would therefore be void.

23 Further, having examined each of the comments made by Mr Mackie in his revised report, it is clear that the Court should not, within the context of a claim under the Act for a progress payment, attempt an evaluation of the merits of what are essentially cross claims or defences arising under the construction contract. These matters should have been raised in a payment schedule.

24 Accordingly, I consider that Landmark is entitled to judgment.

Proposed orders

25 In the circumstances, I will order that there be judgment for the plaintiff against the defendant for $53,900 together with appropriate interest and costs.

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Certificate

I certify that these 5 pages are a true copy of the reasons for decision of His Honour Judge Anderson delivered on 29 April 2016 and revised on 2 May 2016.

Dated: 2 May 2016

Mi-Lin Chen Yi Mei
Associate to His Honour Judge Anderson