VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D142/2011

DOMESTIC BUILDING LIST

CATCHWORDS

Building dispute – whether certificate of practical completion required; Set-off claim – whether available if contract prohibits any set-off; Costs – s 109 of the *Victorian Civil and Administrative Tribunal Act* 1998, whether conduct preceding the issuing of an application is relevant to consider.

APPLICANT	Freedom Pools and Spas (ACN 101 657 167)
RESPONDENT	Lisa Maree Watts
BEFORE	Senior Member E. Riegler
HEARING TYPE	Hearing
DATE OF HEARING	4 August 2011
DATE OF ORDER	10 August 2011
CITATION	Freedom Pools and Spas (ACN 101 657 167) v Watts (Domestic Building) [2011] VCAT 1534

ORDER

1. The Respondent must pay the Applicant $2,070.

2. The applicant must, within 7 days of receiving payment of the judgement amount set out in Order 1 of these orders, deliver to the respondent the pool blanket and roller required to be supplied by the applicant under the terms of the contract between the parties.

3. The Respondent is at liberty to apply to have the proceeding reinstated in the event that the applicant fails to comply with Order 2 of these orders.

4. No order as to costs.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	Mr L Wirth of counsel
For the Respondent	Ms M Ball of counsel

REASONS

Background

1. The applicant is a builder specialising in the construction or installation of swimming pools. On 24 March 2010, it contracted with the respondent to construct a swimming pool at her property in Melton West.

2. The agreement between the parties is in the form of a printed contract entitled *Leisure Pools Contract* (**'the Contract'**). Attached to that agreement was a document entitled *Contract Specifications*, which described the scope of the works to be undertaken by the applicant for the respondent (**'the Works'**).

3. The Works commenced in or around April 2011.

4. In or about the middle of May 2011, two invoices were given to the respondent by the applicant. One invoice was described as *Variation - Provision of Solar* and claimed an amount of $250. The other invoice was a progress payment for $2,000 and was described as *Stage 4*. It stated:

> Stage 4 - Pouring of bond beam and if included laying of coping, pouring of concrete and/or laying of body pavers (if included in Contract)
>
> Payment is required on day of bond beam

5. *Stage 4* represented the final progress stage as set out in Item 9 of the Contract. As such, it and the invoice relating to the variation represented the balance owing under the Contract.

6. Those two invoices remain unpaid to date and represent the applicant's claim against the respondent in this proceeding.

The issues in dispute

7. The respondent denies that she is indebted to the applicant for any amount. She contends that the progress claim and the variation claim are not payable on two grounds.

8. First, she submits that the demand for payment of the *Stage 4* progress claim and the variation claim are in substance a final claim under the Contract, given that they represent the balance of monies remaining to be paid under the Contract. She contends that the applicant did not comply with the relevant provisions of the Contract that set out the procedure for making a final claim. In particular, she submits that the applicant has failed to comply with clause 11.25 of the Contract, insofar as that clause prescribes how a final claim should be made. She also relies on clause 17 of the Contract and contends that because no *Certificate of Practical Completion* was given to the respondent, no final payment can be due under the Contract.

9. Consequently, she argues that there cannot be any obligation to make final payment until such time as the applicant complies with the relevant provisions of the Contract that concern the making of a final claim.

10. Second, she contends that the Works are defective and incomplete. She submits that there is no entitlement to make any claim for payment in circumstances where the works are defective or incomplete. Alternatively, she argues that even if there was an entitlement to make a claim for payment, the cost to make good defects and complete the Works is more than the amount claimed by the applicant. Consequently, she contends that the cost to make good defects and complete the Works constitutes loss suffered by her which she is entitled to set-off against the applicant's claim, sufficient to extinguish that claim.

11. The issues in this proceeding can therefore be summarised as follows:

    (a) Is the applicant entitled to make a final claim?

    (b) If so, is the respondent entitled to set off an amount representing loss and damage said to be suffered by her as a consequence of defective or incomplete work?

Is the applicant entitled to make a final claim?

12. Ms Ball of counsel appeared on behalf of the respondent. She pointed to a number of provisions within the Contract to support her contention that the applicant was not entitled to payment of its *Stage 4* progress claim. She contends, correctly I think, that the progress claim representing *Stage 4* is, in substance, a final claim made under the Contract. Consequently, certain procedures are required to be followed under the Contract before there is any liability to make payment of that claim. She contends that the clauses dealing with final payment have not been complied with. In particular, no *Certificate of Practical Completion* has been given to the respondent, a fact not denied by Mr Cutugno, director of the applicant. Further, she says that the final inspection was not carried out in accordance with the express terms of the Contract, again a fact that is not in dispute.

13. Mr Wirth of counsel appeared on behalf of the applicant. He called Mr Cutugno who gave evidence that the provisions dealing with handover and rectification of any defects were varied by agreement between the parties. He said that he had made a ‘deal’ with the respondent that the applicant would handover the Works prior to her paying the *Stage 4* progress claim. He said that ordinarily, the contract required payment of all outstanding amounts before handover was given. However, that arrangement was varied by agreement between the parties. Consequently, he intimated that the provisions dealing with making a final claim, final inspection and the issuing of a *Certificate of Practical Completion* were of no consequence given the ‘deal’ made between the parties to vary the terms of the Contract.

14. In essence, he said that early possession was given to the respondent in consideration that she would make payment of the *Stage 4* progress claim immediately after handover. The respondent did not deny that the Works were handed over to her, although she criticised the manner in which handover was affected.

15. I find that the applicant's entitlement to the balance owed under the Contract crystallised upon the respondent taking possession of the Works, either because of the 'deal' made between the parties or in the absence of any such agreement because clause 17.9 of the Contract deemed that to occur. That clause states:

> 17.9 If the Owner takes Possession of the Works or any part of the Works when not entitled to do so under this Contract, the Works are deemed to have reached Practical Completion on the date of Possession and the Owner is liable to Leisure Pools for any loss or damage arising as a result and all monies are due and payable.

16. Accordingly, those provisions dealing with handover, inspection and the need to provide a *Certificate of Practical Completion* are no longer relevant, the parties having agreed to obviate the need to go through that procedure. I note that even if I had not found that there was an agreement to give early possession, then the taking of possession by the respondent would be absent any agreement, with the result that clause 17.9 of the Contract would take effect. In either case, the requirement to make final payment crystallises.

17. Similarly, I reject the argument that there is no obligation to make any payment at all pending rectification of defective work or incomplete work. As I have already found, the agreement reached between the parties was that the Works would be handed over and that payment of the final claim was to be made thereafter. Naturally, payment of the final claim did not destroy the respondent's right to claim damages against the applicant, in the event that the Works were not performed in a proper and workmanlike manner or in accordance with the terms of the Contract. That right being enshrined by virtue of s 8 of the *Domestic Building Contracts Act* 1995, which implies into every domestic building contract a warranty that the work will be carried out in a proper and workmanlike manner and in accordance with its terms.

18. In my view, this finding is consistent with correspondence forwarded by the respondent to the applicant on 20 October 2010 following handover. That e-mail correspondence stated:

> To whom it may concern,
>
> I am not refusing to pay the last payment of $2250.00, just withholding payment, til all goods are received as stated in the contract. I am also now looking for reimbursement
>
> For fee's relating to clean up to $260.00

19. Therefore, it would seem that following handover, the only issue preventing payment of the applicant's final claim, albeit reduced by $260, was the failure to supply *goods stated in the contract*. The evidence before me was that these goods comprised the pool blanket and roller. There is no suggestion in that correspondence that the final payment was withheld by reason of any defective work, which is consistent with the evidence of Mr Cutugno that the parties had agreed that payment was to be made following handover.

20. Consequently, absent any set-off claim, I find that the applicant is entitled to its final claim in the amount of $2,250.

Is the respondent entitled to set off an amount against the final claim?

21. Ms Ball submits that the Works were defective and incomplete. She submits that the applicant has no entitlement to make any claim against the respondent because the respondent's loss and damage caused by the presence of defective work and incomplete work effectively extinguishes that claim. In essence, Ms Ball submits that the respondent is entitled to raise by way of defence, the loss and damage said to be suffered by the respondent and set-off that loss and damage against the applicant's claim. There is no doubt that as a general principle, a contracting party has a right to claim damages, prove them and then set-off such damages against amounts claimed against it.[1]

22. As to the allegation that the Works were incomplete, the respondent gave evidence that she was not provided with the pool blanket and roller. Mr Cutugno denied that the pool blanket and roller had not been supplied. He said that those goods had been supplied but that they were retrieved by the applicant after the respondent refused to make payment of the outstanding balance owed under the Contract, following handover. He also said that the applicant was willing to return those items to the respondent after she paid the outstanding balance of the Contract price.

23. As to the defects alleged, Ms Ball contended that they comprise:

    (a) Cracking to the concrete coping beam around the perimeter of the pool.

    (b) Unevenness of the coping beam.

    (c) An inability to fit the skimmer box lid.

    (d) Scratches to the pool surface next to the coping beam.

    (e) A failure to cart away all rubbish.

    (f) Damage to the garden.

24. Mr Wirth contended that clause 11.7 of the contract expressly provided that no set-off was permitted. That clause states:

[1] *Novawest Contracting Pty Ltd v Taras Nominees Pty Ltd* [1998] VSC 2005 at [26]

> The Owner acknowledges that the Owner has no right of set-off under the Contract or otherwise that is to deduct any amount from a progress payment due to Leisure Pools under Clause 11.5 and 11.6 or to withhold any retention for defects or otherwise.

25. In *Novawest Contracting Pty Ltd v Taras Nominees Pty Ltd*,[2] Gilliard J stated:

> Whether or not the defendant can rely upon the defence of set-off to the plaintiff's claim depends upon the terms of the contract between the parties.

26. Consistent with that authority, Mr Wirth submitted that it was not open for the Tribunal to consider the respondent's set-off claim, given the effect of clause 11.7.

27. If I accepted that submission, it would mean that the Tribunal would have to adjudicate on the respondent's loss and damage (arising from the applicant's breach of contract) after a fresh proceeding was issued by the respondent. However, procedurally there is very little difference between evaluating that loss and damage under the auspices of a fresh proceeding to evaluating that loss and damage if raised by way of set-off in this proceeding. In either case, the same evidence is adduced to prove the respondent's loss and damage. Ultimately, the difference becomes one of timing. In particular, whether the respondent's claim for loss and damage is to be considered and determined within the proceeding issued by the applicant or as a separate proceeding issued by the respondent.

28. Section 53 of the *Domestic Building Contracts Act* 1995 states that the *Tribunal may make any order it considers fair to resolve a domestic building dispute*. In my view, it is fair to resolve this domestic building dispute by reference to each of the parties' respective claims adjudged in the one proceeding. This is because to do otherwise would create a situation where the two claims are heard and determined in separate proceedings. This is clearly an undesirable outcome, given the costs associated with that scenario.

29. In my view, it would be fair, in order to finally resolve the domestic building dispute between the parties, that the respondent's set-off claim be heard and determined in this proceeding, notwithstanding the existence of clause 11.7.

30. In coming to that conclusion, I reiterate that my finding is dictated by the circumstances of this case. I accept that the same outcome might not be fair in other situations. For example, where the construction contract contains a clause that excludes or curtails the right to set-off against a certified interim progress claim. I appreciate that the purpose of such a clause is to ensure the continuous flow of funds upon completion of certain stages of work. As such, the courts have on many occasions

[2] Ibid at [20]

determined that such a clause prohibits the right to set-off.[3] However that situation does not arise here. The applicant asserts that the Works are complete. This is not a situation where a contractor is seeking interim relief through an order for the payment of a staged progress claim. In this proceeding final relief is sought. Moreover, this is not a situation where the progress claim has previously been certified. In those circumstances, I find that it is fair to order that the respondent be permitted to raise by way of defence or set-off, her loss and damage as against the applicant's claim.

Site clean

31. The respondent gave evidence that the building site was not cleared of all debris following handover of the Works. I was shown a photograph of the debris left on site. The respondent gave further evidence that she spent $180 to remove the rubbish and debris, being the cost of tip fees and a digger. Mr Cutugno did not dispute that it was the applicant's responsibility to remove all rubbish and debris left on site. He said that the applicant would have undertaken that work had the respondent paid the final claim.

32. In my view, the work associated with cleaning the site of all rubbish and debris should have occurred prior to handover. I do not believe that the applicant was justified in refusing to undertake the work until payment of the final claim was made, given the agreement reached between the parties that handover would be given before the final payment was made. In my view, handing over the works carried with it the obligation to not only commission the pool and its associated equipment but also to clear the site of rubbish and debris. I find that the applicant was in breach of the Contract in failing to undertake the work and as a consequence, the respondent has suffered loss and damage in the amount of $180, being the cost of undertaking that work herself. I find that this amount is to be deducted from the amount owed under the Contract.

Other defects

33. In my view, there is insufficient evidence before me to justify a finding that the respondent has suffered loss and damage relating to the remaining items described in paragraph 23 above. In particular, there is no expert opinion evidence as to whether the cracks appearing on the coping beam are of any structural significance. It may be that they are simply shrinkage cracks, as suggested by Mr Cutugno, and of no structural relevance. Further, no evidence was adduced as to the cost to make good any of the alleged defects set out in paragraph 20 above, save and except for the evidence of the respondent that she spent approximately $180 in taking rubbish away from the site. In those

[3] *L.U. Simon Builders Pty Ltd v H.D. Fowles & Ors* (1992) 2 VR 189; *Novawest Contracting Pty Ltd v Taras Nominees Pty Ltd* [1998] VSC 2005; *Triden Contractors Ltd v Belvista* (1986) 3 BCL 203; *Sobemo Pty Ltd v De Troot* (1991) 8 BCL 132

circumstances, how can her alleged loss and damaged be set-off against the claim made by the applicant sufficient to extinguish that claim? There simply is insufficient evidence both in terms of liability and quantum to make a finding that the respondent is entitled to set-off her loss and damage as against the applicant's claim.

34. Further, there is a conflict in the evidence as to how the coping beam was to be finished. Mr Cutugno gave evidence that the rough finish of the coping beam and any scratches to the top surface of the pool edge was of no consequence because it was intended that coping tiles would be laid over it to the edge of the pool. The respondent denied this. She said that she had told the applicants contractors that she did not intend to lay any coping tiles and that she wanted the coping beam to be smooth finished.

35. I am unable to resolve this conflict in evidence without looking to the express terms of the Contract for guidance. On my reading of the Contract, I find that it contemplated that coping tiles would be laid over the coping beam, albeit that this work was to be undertaken by the respondent. In particular, the *Contract Specifications* expressly state that coping tiles were to be supplied by the owner. In my view, those words infer that coping tiles would be laid at some point in time.

36. Consequently, I find that the Contract did not require the applicant to apply any special finish to the coping beam. That being the case, I am of the opinion that non-structural cracks in the coping beam are of little consequence, given that the Contract contemplated that the coping beam would be covered over in due course.

37. For the reasons set out above, I dismiss the remaining aspects of the respondent’s set-off claim.

Other matters

38. I note that Mr Cutugno gave evidence that the pool blanket and roller would be provided by the applicant upon payment of the *Stage 4* progress claim. Accordingly, and having regard to section 53 of the *Domestic Building Contracts Act* 1995 I consider it fair, in order to finally resolve this domestic building dispute, that I should also order that the applicant supply and deliver the pool blanket and roller within a specified period following payment of the judgement sum.

Costs

39. Mr Wirth contended that should I find in favour of the applicant, costs should follow the event. Miss Ball argued that no order for costs should be made irrespective of the outcome of the proceeding.

40. The power given to the Tribunal to award costs is found in section 109 of the *Victorian Civil and Administrative Tribunal Act* 1998. That section states:

> (1) Subject to this Division, each party is to bear their own costs in the proceeding.
>
> (2) At any time, the Tribunal may ordered that a party pay all or a specified part of the costs of another party in a proceeding.
>
> (3) The Tribunal may make an order under subsection (2) only if satisfied that it is fair to do so, having regard to -…

41. The matters set out under subsection (3) of s 109 include whether the party has conducted a proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as failing to comply with an order, causing an adjournment, vexatiously conducting the proceeding or unreasonably prolonging the proceeding. Further, the Tribunal can also take into account the relative strength of the claims made, the nature and complexity of the proceeding or any matter the Tribunal considered relevant.

42. In my view, none of those factors are present in this proceeding. There is no evidence before me of any failure to comply with orders, the respondent causing an adjournment or vexatiously conducting the proceeding. Moreover, I do not consider this proceeding to be unusually complex such as to justify an order for costs.

43. Having said that, counsel made me aware that this proceeding was previously listed in the Magistrates' Court of Victoria but was stayed prior to it being heard, presumably pursuant to s 57 of the *Domestic Building Contracts Act* 1995. Consequently, the parties have each expended considerable sums of money, which would appear to have been thrown away. Although I sympathise with the parties, I do not consider that this factor should be taken into account in the exercise of my discretion under s 109. In my view, the factors that I must consider in exercising my discretion relate to what has occurred in this proceeding. I do not believe that it is appropriate for me to look back into time to a point prior to the issuing of this proceeding.

44. Having regard to s 109 of the *Victorian Civil and Administrative Tribunal Act* 1998, I do not consider that any of the factors set out under subsection (3) are enlivened. Therefore, I dismiss the application for costs.

Interest

45. At the conclusion of the hearing, Mr Wirth sought leave to amend the applicant's claim to include a claim for interest. Having regard to the lateness of that application and the fact that all witnesses had concluded their evidence, I refuse to give leave to amend the applicant's claim.

46. Consequently, I will not order any interest on the judgement sum.

SENIOR MEMBER E. RIEGLER