

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP632/2019

CATCHWORDS

Sub-contractor contract dispute, whether contract ended by agreement or by acceptance of repudiation, sub-contractor's claim for unpaid invoices, whether other party entitled to set-off loss and damage against claim, consideration of loss and damage set off against the sub-contractor's claim.

APPLICANT	Melbourne Finest Plastering Pty Ltd (ACN 617 788 253)
RESPONDENT	Pro Image Plaster (Aust) Pty Ltd (ACN 153 409 299)
WHERE HELD	Melbourne
BEFORE	Member J Sharkie
HEARING TYPE	Hearing
DATES OF HEARING	6 June 2019, 25 July 2019, 30 July 2019 and 12 September 2019
DATE OF ORDER	21 November 2019
CITATION	Melbourne Finest Plastering Pty Ltd v Pro Image Plaster (Aust) Pty Ltd (Building and Property) [2019] VCAT 1832

ORDER

1. The application is dismissed.

J Sharkie
Member

APPEARANCES:

For Applicant	Mr. P. Hu, Director, in person
For Respondent	Mr. P Halfhyde, Director, in person

REASONS

Background

- 1 The Applicant, Melbourne Finest Plastering Pty Ltd (Melbourne Finest) seeks an order against Pro Image Plaster Aust Pty Ltd (Pro Image) for unpaid invoices for work and labour done.
- 2 Melbourne Finest undertook framing and plastering works for Pro Image as a sub-Contractor on a site known as the “Abbot Apartments” in Abbotsford.
- 3 The parties had previously enjoyed an amicable working relationship on various development and construction sites. Due to this relationship Pro Image requested Melbourne Finest to provide an expression of interest for framing and plastering work at the Abbotsford site. Melbourne Finest indicated a willingness to do the work save for the MDF pelmets which Pro Image acknowledged would be carried out by another Contractor.

What were the terms of the Contract?

- 4 The Contract is in writing and is dated 31 August 2018. Melbourne Finest received a signed copy of the Contract via email dated 3 September 2018.
- 5 The Contract contains a Scope of Works which is described as “Stop access panels (installed by others), Hang and stop all plasterboard walls and ceilings as per drawings including bulkheads, Reveals to external doors and windows, Install all wall and ceiling installation.”
- 6 The Contract provided for payment of a fixed lump sum of \$271,330.92 excluding GST to Melbourne Finest.
- 7 The Contract provided for fortnightly payment claims.
- 8 The drawings referred to in the Contract were not produced the hearing.

Were the Pelmets within the Scope of Works or were the Pelmets a post-Contract variation?

- 9 The pelmets were not specifically referred to in the Scope of Works. I find however that pelmets were part of the plans and drawings because Melbourne Finest raised an issue concerning the pelmets after the drawings were received.¹
- 10 Prior to executing the Contract Melbourne Finest requested Pro Image to delete the MDF pelmets from the job.² In response Melbourne Finest agreed that the MDF pelmets would be removed from the Scope of Works such work to be carried out by another Contractor.³
- 11 After the work had commenced on site Pro Image clarified the situation regarding the pelmets. Pro Image advised Melbourne Finest that the “rates”

¹ Email from Melbourne Finest to Pro Image dated 29 August 2019.

² Email from Melbourne Finest to Pro Image dated 29 August 2018.

³ Email from Pro-Image to Melbourne Finest dated 29 August 2018.

had been adjusted to include plasterboard pelmets. Originally the pelmets were MDF but by 17 October 2019 “most” of the pelmets were to be plasterboard. There had been a change. Melbourne Finest subsequently acknowledged that the plasterboard pelmets were included in the Contract.⁴

- 12 The Pelmets had a flat section and an upstand section. The flat section of the pelmet was regarded by Pro Image as part of the ceiling and therefore “plasterwork’ for the purposes of the Scope of Works. The upstand would be charged at the “Pelmet rate”⁵ and was regarded as extra work.
- 13 I find that initially the pelmets referred to in the drawings sent to Melbourne Finest seeking an expression of interest were MDF. I find that Melbourne Finest was not prepared to fit and install the MDF pelmets and upon request Pro Image deleted the MDF pelmets from the Contract. I find that as the building works progressed the upstand portions of the pelmets (previously MDF) were changed to plasterboard. I find that as at the date of the Contract the pelmets (being the upstand portions) were not part of the Scope of Works but were added to the Contract as a post-Contract variation.
- 14 Melbourne Finest did undertake work on the pelmets and rendered tax invoices accordingly to Pro Image.⁶
- 15 On 23 November 2018 Melbourne Finest sought a "new rate" for the pelmets. Pro Image offered to increase the rate for the pelmets.
- 16 On 27 November 2018 Melbourne Finest asserted that the pelmets were not in the Scope of Works and requested Pro Image to engage another Contractor to carry out the works on the pelmets.
- 17 On 28 November 2018 Pro Image responded that part of the pelmets was in the Scope of Works, being the flat section of plasterboard.
- 18 On 2 December Pro Image 2018 indicated that it would undertake the works in relation to the balance of the pelmets. I find that this email is an acceptance of the request from Melbourne Finest on 27 November 2019 to delete the balance of the pelmets from the Contract.

Difficulties encountered by the Melbourne Finest

- 19 As the work progressed complaints were made by Pro Image in respect of the apparent lack of manpower⁷ and the job falling behind⁸.
- 20 Melbourne Finest admitted it was behind schedule.⁹

⁴ Email from Melbourne Finest to Pro-Image dated 23 November 2018.

⁵ Email from Pro Image to Melbourne Finest dated 23 November 2018.

⁶ Emails from Melbourne Finest to Pro Image dated 27 November 2018, 28 November 2018 and 2 December 2018.

⁷ Email dated 17 December 2018.

⁸ Emails dated 14 December 2018 and 21 December 2018.

⁹ Email dated 23 November 2018.

- 21 Pro Image asserted on a number of occasions that the quality of work was unacceptable.¹⁰ Melbourne Finest acknowledged that there were instances of poor workmanship.¹¹
- 22 Pro Image informed Melbourne Finest that defects existed, which would require fixing and re-painting, and further, that once the “full extent” was known Pro Image would back charge Melbourne Finest in accordance with the terms of the Contract.¹²

End of the Contract

- 23 On 15 January 2019 a site meeting took place. At this meeting Chapo and Nick Rodokal represented Pro Image and Stephen Hu represented Melbourne Finest. At the meeting Melbourne Finest advised that it could not provide further works at the Abbotsford site. Chapo acknowledged the position of Melbourne Finest and advised that the Contract would be terminated.
- 24 Following the on-site meeting Melbourne Finest sent an email to Pro Image which explained why it was unable to continue and stated that “Chapo agrees to allow me (*sic* Melbourne Finest) to finish”.¹³ From that date Melbourne Finest no longer attended or carried out any work on the Abbotsford site.

Was the Contract ended by agreement or was it ended by Pro Image accepting the repudiation of Melbourne Finest?

- 25 Repudiation of a contract is conduct by one party to a contract which evinces an intention to no longer be bound by the terms of the contract¹⁴ Repudiation needs to be clear. It must convey a lack of willingness to perform the contract.¹⁵ In determining whether renunciation has occurred the position of the other party to the contract is paramount. Where a clear statement of intent is conveyed to the other party that the party no longer wishes to perform its obligations under the contract, then repudiation will occur. Where a party states that it is no longer willing to perform its obligations¹⁶ this will be regarded as a clear statement of intent.
- 26 At the site meeting on 15 January 2019 Stephen Hu on behalf of Melbourne Finest informed the representatives of Pro Image that Melbourne Finest could not meet the requirements under the Contract and “could not provide any further works”. This statement was repeated by Melbourne Finest in an email sent to Pro Image later that day. I find that the statement which occurred on site constituted a clear statement by Melbourne Finest that it no longer wished to perform its obligations under the Contract.

¹⁰ Emails dated 12 December 2018, 19 December 2018 and 10 January 2019.

¹¹ Email dated 9 January 2019.

¹² Email dated 7 January 2019.

¹³ Email dated 15 January 2019.

¹⁴ *Koompahtoo Local Aboriginal Land Council & Anor v Sanpine Pty.Ltd* (2007) 233 CLR 115.

¹⁵ *Shevill v Builders Licensing Board* (1982) 149 CLR 620.

¹⁶ *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245.

- 27 The statement of intent was accepted by Chapo on behalf of Pro Image and, as a result, the Contract came to an end on 15 January 2019.
- 28 I find that the Contract was not ended by mutual agreement. Whilst it is true that Pro Image accepted that Melbourne Finest could not continue with its obligations under the Contract, such acceptance did not amount to a mutual agreement to end the Contract. Rather it was an acceptance of the repudiation by Melbourne Finest, being the unwillingness of Melbourne Finest to continue to be bound by the Contract which brought the Contract to an end.
- 29 On the final day of the hearing Melbourne Finest submitted that it was forced off the site by the unrealistic demands of Pro Image and for that the reason the Contract came to an end. Essentially Melbourne Finest submitted that it was the conduct of Pro Image which caused Melbourne Finest to withdraw from the Contract.
- 30 I do not accept Pro Image's submission. The parties had a long-standing working relationship on other sites. Melbourne Finest was aware or should have been aware of the requirements and standards of Pro Image. I find that Melbourne Finest repudiated the Contract. The repudiation was accepted by Pro Image and the Contract ended as a result of the acceptance of the repudiation.

Consequences of the end of the Contract

- 31 Melbourne Finest is entitled to be paid the work up to the time of acceptance of the repudiation. However, Pro Image is entitled to set off as against the amount claimed its losses and damages incurred to remedy defective workmanship and the cost of completing uncompleted work.
- 32 I find that Melbourne Finest had undertaken plastering works to the ground floor level and Level 1. It had also carried out a small amount of work to Level 2.
- 33 Melbourne Finest Pro Image was able to source another contractor who agreed to complete the works for the amount for Levels 2 and 3 referred to in the Contract. No loss was therefore incurred by Pro Image to complete Levels 2 and 3.
- 34 I find that Pro Image is liable for the costs to complete the ground floor and Level 1 and for the cost of rectifying defects.

The Claims

- 35 Melbourne Finest claimed the amount of \$68,148.24 inclusive of GST in accordance with its unpaid invoices.
- 36 Pro Image asserted that it was required to rectify defective work and complete the works on the ground floor and Level 1.

37 Pro Image claimed that the costs and damages incurred exceeded the amount of the claim of Melbourne Finest and therefore by way of set off it has no liability to Melbourne Finest.

Evidence of Defective and Incomplete Works

- 38 Both parties provided photographs of portions of the works carried out by Melbourne Finest.
- 39 Melbourne Finest provided photographs which it claimed demonstrated that it was required to proceed in areas where framing and other building works had not been completed and were out of square. The suggestion being that due to these issues the progress was delayed. I find the argument advanced in relation to these photographs unconvincing. I was not persuaded that the photographs provided an explanation for the lack of progress of the works or of the unrealistic demands of Pro Image. I have found that Melbourne Finest was not "forced off the site" by the unrealistic demands of Pro Image.¹⁷
- 40 Pro Image's photographs were the subject of close examination on the third day of the hearing. The parties made submissions in relation to each photograph.
- 41 Having considered each bundle of photographs and the respective submissions I find that the photographs demonstrate that considerable instances of defective workmanship existed which required rectification.
- 42 Pro Image tabled a spread sheet of the work carried out. The spreadsheet was not challenged by Melbourne Finest. The spreadsheet determined that an amount of \$44,738.00 was required to complete the ground floor and first floor stages. I find that the figures contained in the spreadsheet in relation to the work completed and the value of the work to be completed are accurate. I further observe that the spreadsheet included the post-contract pelmet variation.
- 43 On the final day of hearing the parties analysed the invoices and costs provided by Melbourne Finest in respect of completion of the works and rectification of defects. The invoices can be assembled into four groups, namely: -
- (a) The invoice of CM Labour relating to work to complete the pelmets;
 - (b) The invoices of All Melbourne Plaster relating to the work to rectify defects,
 - (c) The invoices of Whitehorse Interior in relation to the works required to complete the ground floor and level 1, and

¹⁷ See paragraphs 29 & 30.

(d) Painting costs.

44 In relation to these invoices and costs my findings are as follows: -

A. The CM Labour Invoice relates to work carried out to complete the pelmets. The invoice is dated 10 December 2018. On 2 December 2018 Pro Image elected to complete the pelmets when Melbourne Finest advised it did not wish to complete the pelmets.

According to the spreadsheet Melbourne Finest had completed 40% of the pelmets on the ground floor and 43% of the pelmets on level 1. According to the spreadsheet an amount of \$3819.22 inclusive of GST is required to complete the pelmet work.

The pelmets needed to be completed. Having regard to the spreadsheet and the fact that another Contractor was engaged to complete the pelmets the amount of \$4180.00 referred to in the invoice is fair and reasonable in all the circumstances and must be regarded as a cost to Pro Image to complete the work;

B. The invoices of All Melbourne relate to rectification of defects. Some of the invoices included additional work which was adjusted and deducted from the invoices by Pro Image so that the balance of those invoices was submitted by Pro Image as an accurate cost of rectification work. The invoices and the amounts adjusted and deducted were not realistically challenged by Melbourne Finest. I find that the adjusted total amount of these invoices as submitted by Pro Image, being \$78452.00 inclusive of GST should be set off against the amount claimed by Melbourne Finest.

C. In respect of the works undertaken by Whitehorse Interior I accept the evidence of Pro Image that these were works required to complete the ground floor level and Level 1. Melbourne Finest submitted that the invoices of Whitehorse Interior were invoiced at an hourly rate whereas the Contract between the parties was calculated at a per metre rate. I do not accept the submission of Melbourne Finest. There was no evidence before me that the calculation in the Contract was on a per metre basis, and even if it was, there was no evidence as to how a per metre rate was to apply having regard to the various components of the plastering work. Melbourne Finest failed to persuade me or provide any evidence as to an alternate formula or calculation of the reasonable cost to the complete of the unfinished work. The work on the ground floor and the first floor needed to be completed. Pro Image was charged at an hourly rate.

Pro Image submitted that only the work relating to the ground floor and level 1 should be considered and according submitted the adjusted invoices as representing a fair cost to complete.

I accept the adjusted invoices of Whitehorse Interior as a fair measure of the cost of completing the ground floor and Level 1 with following exceptions:

- (a) Invoice 003 provided no detail and will be excluded;
- (b) I will allow only \$750.00 of Invoice 016 as being fair and reasonable

In the absence of any other material I regard the invoices of Whitehorse Interior, apart from the exclusions referred to above, to be fair and reasonable, having regard to the need to complete the works to the ground floor and level 1.

After the deductions and adjustments referred to an amount of \$72721.00 inclusive of GST will be allowed in respect to the Whitehorse Interior invoices.

D. Painting costs were incurred in the sum of \$1,785.00. This painting work involved the painting to over rectified defective work. Pro Image indicated that further painting invoices had been incurred, however, these further invoices were not produced in the course of the hearing. The total for the painting costs was not challenged by Melbourne Finest. I find that this expense is fair and reasonable. I find that the painting cost is a cost associated with rectifying the defective work of Melbourne Finest and should be set off against the amount claimed by Melbourne Finest.

45 The cost to complete the work I find was \$76901.00 inclusive of GST. This amount is made up of the CM Labour invoice plus the amount I have accepted in respect to the Whitehorse Interior invoices. This amount however cannot be fully claimed against Melbourne Finest by way of set-off. Had the Contract been completed Pro Image would have paid Melbourne Finest \$49212.82 for the work required to complete the ground floor and Level 1. This figure is set out in the spreadsheet produced by Pro Image. I have accepted that the spreadsheet contains accurate calculations.¹⁸ It sets out the cost of each level. Further, I accept the spreadsheet as an accurate assessment of the cost of work to be completed to the ground floor and level 1.

46 I find the loss therefore incurred by Pro Image to complete the works to the ground floor and Level 1 is \$27,688.18.

¹⁸ See paragraph 42.

- 47 I find that the level 2 works which had been undertaken by Melbourne Finest have been included in the invoices submitted by Melbourne Finest.
- 48 Melbourne Finest is entitled to the claim for its unpaid invoices. However, the ground floor and Level 1 were not finished. Contractors were engaged to complete the works on the ground floor and Level 1. Contractors were engaged to rectify the defects and repaint rectified areas on the ground floor and Level 1.
- 49 Melbourne Finest have claimed for the invoices \$68,148.24. Pro Image asserted, and I agree with this assertion, that Melbourne Finest must allow the losses incurred by Pro Image to complete the works to ground floor and Level 1 and to rectify defects.
- 50 I find that cost of the work necessary to rectify the defective works is \$80237.00. The loss to Pro Image for completing the works to Level 1 and the ground floor is \$27688.18
- 51 The total loss incurred by Pro Image to rectify the defects and complete the works is \$107925.00.
- 52 The loss to Pro Image exceeds the amount of the claim of Melbourne Finest and must be set off against that claim.
- 53 The net effect is that no amount is owed by Pro Image to Melbourne Finest.
- 54 The claim is dismissed.

J Sharkie
Member