

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP203/2018

CATCHWORDS

Contract for design service – fee a percentage of estimated total construction cost payable by agreed instalments – additional fee to be paid if actual construction cost more – all agreed instalments paid – designed asserting lien over documents for further payments because actual cost likely to be more – no right to further payment until actual cost known – no right of lien.

APPLICANT	Stephen Smith
RESPONDENT	Sunpower Design Pty Ltd (ACN 006 814 393)
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Hearing
DATE OF HEARING	1 March 2018
DATE OF ORDER	1 March 2018
CITATION	Smith v Sunpower Design Pty Ltd (Building and Property) [2018] VCAT 323

ORDERS

1. Order the Respondent to provide the following documents and information to the Applicant on or before 15 March 2018:
 - (a) the name and practitioner registration number of Mr Sederof;
 - (b) the required report and consent under Regulation 414 for the first floor side setbacks;
 - (c) The Six Star Energy efficiency rating report, stamped plans and certification repaired by a suitably qualified energy rater;
 - (d) A copy of the Regulation 1507 Compliance Certificate from the structural engineer;
 - (e) The structural engineer's design computations, drawings and certification for the required bracing and tie-own requirements.
2. Liberty to the parties to apply in regard to the enforcement of this order.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant

In person

For the Respondent

Mr A. Sederof, Director

REASONS FOR DECISION

Background

- 1 The Applicant is the owner of a house and land in East Brighton. He proposes to demolish the existing house and construct a new house on the land.
- 2 The Respondent carries on business designing ecologically efficient housing. Its director is Mr Sederof.
- 3 This proceeding was commenced by the Applicant on 19 February 2008, seeking an order that the Respondent provide him with certain documents and information required by a building surveyor to enable him to obtain a building permit for a house the Respondent had designed to be constructed on his land.
- 4 The grounds for the application are stated as follows:

“My architect is holding up granting of a building permit by withholding final planning documentation pending payment of extraneous fees.”

He seeks an order that the Respondent be required to hand over the remaining documents and information relating to his development.

The Agreement

- 5 The agreement that the parties entered into for the design of the new house was produced using a standard form Building Designer Engagement Agreement said to have been published by the Designer’s Association Victoria (“the Agreement”). It was completed by Mr Sederof and signed by the Applicant.
- 6 The services to be provided by the Respondent under the Agreement are set out in Annexure B. They are described as follows:
 - (a) Preliminary design services, being production of preliminary layout sketches and an indicative budget;
 - (b) Site analysis services, being assistance in selection of site, site measurement and preparation of Existing Conditions Plan, consultations with relevant authorities and site analysis;
 - (c) Preliminary design development, being preparation of preliminary concept sketches suitable for subsequent detailed development, budget considerations of anticipated construction cost, consultation with relevant authorities and perspectives presentation;
 - (d) Planning applications and submissions, being appointment of consultants, where appropriate, and preparation of flood analysis for Melbourne Water;
 - (e) Design development and working drawings, being appointment of consultants, where appropriate, preparation of advanced stage of design development, review and refinement of advanced stage with

clients, preparation of working drawings, preparation of detailed drawings of internal details, preparation of electrical layout plan, preparation of project specification and schedule of finishes (schedules to be nominated by the Applicant), interior design, selection and coordination of finishes, colours and/or furnishing, preparation of thermal performance assessment.

Payment

- 7 For these services the Respondent was to be paid in accordance with Clause 3.5 of Annexure A to the Agreement, which specified that the fee was to be 10% of the Estimated Total Construction Cost. In that clause, the Estimated Total Construction Cost is stated to be \$650,000 and the fee is stated to be \$65,000, being 10% of that figure. GST was also to be charged in addition to that amount.
- 8 Clause 7(a)(i) of the Agreement provided that, where the fee was based on a percentage of the Estimated Total Construction Cost, the Applicant was to pay the Respondent the fee by the instalments set out in Clause 3.6 of Annexure A. That clause sets out a table of instalments which add up to the figure of \$65,000.
- 9 Clause 7(a)(i) continues as follows:
- “Where the Total Construction Cost is higher than the Estimated Construction Cost, the building designer’s fee shall be referable to the Total Construction Cost. Where the Estimated Construction Cost is higher than the Total Construction Cost, the building designer’s fee is referable to the Estimated Construction Cost.”
- 10 The term Total Construction Cost is defined earlier in the Agreement as follows:
- “Total Construction Cost shall include all of the following:
- (a) the final adjusted contract price payable to the building contractor under the building contract for the works;
 - (b) the final adjusted contract price payable to other contractors and/or consultants engaged to carry out and complete the works;
 - (c) the final adjusted contract price payable to other contractors for any other associated site works which the Designer was required to take into account in performing the design services; and
 - (d) all fittings, fixtures and equipment relating to the works.”

Interpretation

- 11 It is apparent from the wording of this clause that the Total Construction Cost can only be known when the final adjusted contract price payable to the building contractor under a building contract for the works is known. Quite obviously, that cannot occur until the owners have entered into a contract with a building contractor. At that stage it appears that the Respondent’s fee is to be re-calculated as a percentage, in this case 10%, of

the Total Construction Cost and that sum would then have to be paid to the Respondent, less whatever the Applicant had already paid.

- 12 It is important to note that there is no provision at all in the Agreement for any adjustment to be made to the fee instalments set out in Clause 3.6 in the meantime.

The additional charge

- 13 During the course of the work, on 30 January 2017, Mr Sederof informed the Applicant that the lowest projected cost for the work was at least \$775,000 and therefore there was a “catch-up fee” of \$4,900 to be paid. Subsequently, invoices were rendered for amounts in addition to the instalments provided for in the Agreement.
- 14 I can find no justification for this claim in the terms of the Agreement. There is no provision for the Estimated Construction Cost to be revised or for the instalments to be increased during the course of the work.
- 15 It may be that this is a significant omission from the document because it appears that there have been a number of changes to the design, although the extent of these is disputed in the correspondence.

Request for documentation

- 16 The Applicant has requested that the Respondent provide the following documentation and information which is now required by the building surveyor in order that a building permit can be issued:
- (a) the name and practitioner registration number of Mr Sederof;
 - (b) the required report and consent under Regulation 414 for the first floor side setbacks;
 - (c) The Six Star Energy Efficiency Rating Report, stamped plans and certification prepared by a suitably qualified energy rater;
 - (d) A copy of the Regulation 1507 Compliance Certificate from the structural engineer;
 - (e) The structural engineer’s design computations, drawings and certification for the required bracing and tie-own requirements.
- 17 Mr Sederof has refused to provide this documentation and information, claiming that the Applicant is indebted to the Respondent in the sum of \$14,612 with respect to these additional fees. He said in an email of 11 January 2018 that, if this amount were paid, he would provide the requested documentation and information within 10 working days.
- 18 The Applicant denied that anything was owed to the Respondent, stating that he has paid the whole of the \$65,000 plus GST to the Respondent and says that nothing else is due at this time. It is not disputed that all of the instalments required, plus GST, have been paid by the Applicant.

Conclusion

- 19 Since the Total Construction Cost cannot be known until a contract has been entered into and since it is unlikely that a contract would be entered into until all of the working drawings and other documentation that the Respondent was to prepare had been provided, it is clear that the Applicant is entitled to the drawings and documentation once all of the instalments and GST set out in Clause 3.6 have been paid. Quite obviously, when the Total Construction Cost is calculated the Applicant may then have to pay an additional amount, if it turns out to be more than the Estimated Construction Cost, but that is in the future.
- 20 In the meantime, the Applicant is entitled to the documents and information that he has paid for.
- 21 Written reasons have been prepared in order to make it clear that I have not determined in this proceeding that the Respondent will not be entitled to any further payment in the future.

SENIOR MEMBER R. WALKER