VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

domestic building LIST	vcat reference No. D310/2007
CATCHWORDS	
Domestic Building Contract – date of completion – final claim cannot be made before work completed - claim for liquidated damages – whether a penalty	

APPLICANT	Snowdon Developments Pty Ltd
RESPONDENT	Seval Biyan
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Small Claim Hearing
DATE OF HEARING	16 August 2007
DATE OF ORDER	11 October 2007
CITATION	Snowdon Developments Pty Ltd v Biyan (Domestic Building) [2007] VCAT 2241

Order

1. Order the Respondent pay to the Applicant $2,569.20.
2. The counterclaim is struck out.
3. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:	
For the Applicant	Mr. R. Sadler of Counsel
For the Respondent	Mr A. Sergi of Counsel

Reasons

Background

1 This proceeding concerns the construction of a dwelling house by the Applicant ("the Builder") for the Respondent ("the Owner") at Lot 115 Braeside Walk Caroline Springs.

2 The contract provided that, if the works had not reached "completion" by the end of the building period, as defined in the contract, the Owner would be entitled to liquidated damages at the rate of $250.00 per week.

3 It was common ground that the construction of the house commenced on 20 February 2006 and was to be completed within 260 days. The building period therefore expired on 8 November.

4 On 12 September 2006 the Builder sent the Owner a fax alleging that the house was finished, that the building inspector had issued an occupancy permit for it and that the balance of the contract price was to be paid by 19 September 2006. Accompanying this fax was a copy of the Occupancy Permit together with a tax invoice in the sum of $16,012.00 and a statement of some variations, the net effect of which was to reduce the amount claimed by the Invoice to $11,694.55.

5 An inspection occurred on 20 September at which a certificate of practical completion was proffered to the Owner by the Builder but the she refused to sign it. Handwritten notes on this document list four matters that the Builder was to attend to. These are in the handwriting of the Builder's representative, Mr Box. The Owner contended that the work was not complete and on 21 September 2006 she sent to the Builder a two page list of allegedly defective and incomplete work. Correspondence then ensued between the parties with the Builder maintaining that the work was complete and the Owner contending that it was not.

The Building Commission Inspection

6 Finally, by agreement between the parties, the house was inspected by a Mr Stuart McLennan from the Building Commission. In his lengthy report accompanied by colour photographs he accepted some of the Owner's contentions and rejected others. He identified seven items of defective work and one item of incomplete work. The defective items were as follows:

1. The vanity mirror was 110 mm short from each end of the vanity, whereas the specification required it to be the full width of the vanity.
2. No paving was provided for the front porch. The driveway had been removed from the contract by an agreed variation

and the Owner had received a credit for it but the scope of works removed by the variation did not include the porch. Mr McLennan listed this as a defect but I think it is more appropriate to describe it as incomplete work.

3. On the northern side of the balcony window there was a crack in the sealant approximately 5 mm wide extending for approximately 200 mm.

4. The filler used on the staircase was not properly stained.

5. There was a gap between the first tread and the second riser in the staircase of approximately 2 mm.

6. The splashback tiles behind the cook top were out of alignment with the adjoining tiles.

7. The balcony was slightly undersized. Mr McLennan did not suggest any remedial work for that because he thought the difference was minimal.

7 The single item of incomplete work he listed was the failure to install the solar panel on the roof but it appears to have been conceded by both Mr McLennan and the Owner that this, along with all the appliances, was to be installed immediately prior to handover to prevent theft.

8 Both parties accepted Mr McLennan's report and proceeded on the basis of it.

Completion / rectification work following the Report

9 Although the inspection took place in December 2006 the parties did not receive the report until early February 2007. Thereafter the Builder attended to the various matters referred to by Mr McLennan and, on 2 March, the Builder's solicitors advised the Owner's solicitors that they were instructed that all of the outstanding items had been attended to.

10 There was an inspection by the parties on 7 March. The Owner still considered that the defects had not been rectified and so a further inspection was carried out by Mr McLennan on 3 April when he found that all the work had been done except for the installation of the solar panel which would be attended to immediately prior to settlement.

11 The Builder now seeks payment of the sum of $11,694.55 which it contends is the final payment due under the contract. The Owner tendered a cheque for $6,251.73 claiming that the balance was satisfied by her right to liquidated damages under the contract. At the time of the hearing this cheque had not been banked but I was told that the parties had sensibly agreed that the Builder would bank the cheque and the Owner would occupy the house pending my determination of their

respective rights.

Submissions

12 As to its claim for interest, the Builder argues and it has consistently maintained that the Owner should have taken possession and then argue whether the work was defective or incomplete afterwards. The Builder contends that on an analysis of the clauses in the contract relating to liquidated damages and completion, it is the right to occupation that is the critical event. Mr Sadler said that, once the Builder delivered the occupancy permit the Owner had a right to take possession and could not say: "I am not going to take occupation. I am going to hold you to ransom for $250 per week until you fix up a minor defect". It is therefore necessary to consider these clauses in detail.

13 Clause 36.0 provides that, when the Builder considers that the building works have reached completion, it is to give to the Owner a Notice of Completion and a Final Claim. Clause 36.2 provides that the Builder and the Owner must meet on site within 7 days of the Owner receiving those documents in order to carry out an inspection in accordance with Clause 37. If the Owner does not meet with the Builder, Clause 36.3 provides that the Owner must pay the amount of the final claim within a further 7 days. In addition, if the Owner fails to attend an inspection of the building works Clause 36.4 provides that the Owner must pay the amount of the final claim within a further 7 days. These consequences are not specifically confined to situations where the failure to meet or the failure to attend is the fault of the Owner.

14 When the parties meet on site, Clause 37.0 requires the Owner to list the known defects and incomplete work and if she does not do so she must pay the final claim within 7 days. If she does give the Builder such a list the Builder is required rectify any defects or incomplete work in order for the works to reach "Completion" and the Builder is required to give the owner written notice when that has been done. The Owner must then pay the Final claim within 7 days after she receives the notice.

15 The wording of these clauses is curious because, apart from the comment already made, the whole process is triggered by the Builder giving the Notice of Completion and Final Claim and it is entitled to do that when it "considers" the works have reached completion, whether the works are actually complete or not. The other clauses then come into operation. Hence, by failing to comply with one or other of the requirements, the Owner might find herself obliged by the terms of the contract to pay the Final Claim even though the work is incomplete. The only limitation on the right to serve a Final Claim is Clause 36.1 which prevents the Builder demanding final payment until after it has given the Owner a copy of the

Occupancy Permit and a Certificate of Final Inspection.

16 Copies of the Occupancy Permit and the Final Claim were sent to the Owner on 12 September. Mr Sadler argued that the balance of the contract price became due upon completion of rectification of the defects identified at the inspection and the Owner could not then refuse to make payment because of the "minor" defects referred to by Mr McLennan.

17 He acknowledged that the date for completion under the contract was 8 November but said that, save for the defects identified in the report which were rectified in February 2007, the building works were completed by that date. He said that as from mid September the Owner could have occupied the property because she was given the Occupancy Permit on 12 September. He said that notwithstanding that she could have lawfully taken possession she chose not to do so.

The Act

18. Mr Sadler's arguments about the effect of these clauses ignores the operation of s. 42(a) of the *Domestic Building Contacts Act 1995*, which s as follows:

> **"42 When work is considered to have been completed**
>
> A builder must not demand final payment under a major domestic building contract until –
>
> (a) the work carried out under the contract has been completed in accordance with the plans and specifications set out in the contract; and
>
> (b) the building owner is given either –
>
> (i) a copy of the occupancy permit under the Building Act 1993, if the building permit for the works carried out under the contract requires the issue of an occupancy permit; and
>
> (ii) in any other case, a copy of the certificate of final inspection."

19. Even if the Builder considers that the building works have reached completion, it cannot give to the Owner a Final Claim pursuant to Clause36.01 unless the works are actually complete because that would be a demand for final payment. Hence the question is, whether the work was completed.

20. Having regard to Mr McLennan's report I am satisfied that the work was incomplete at the time of his first inspection in December. Whatever one might say about the various defects, the mirror was not as required by the specification and the front porch had not been constructed. Under these circumstances it is impossible to say that the work was complete. Hence it was not possible for the Builder to demand the final payment until the work was complete. The Builder was then required to give the Owner

written notice that the defects had been attended to and the Owner would then have been required to pay the Final claim within 7 days after she received the notice.

Liquidated damages

21. As to the claim for liquidated damages, Clause 40 of the Contract is as follows:

> "If the Building Works have not reached Completion by the end of the Building Period the Owner is entitled to agreed damages in the sum set out in Item 9 of Schedule 1 for each week after the end of the Building Period to and including the earlier of:
>
> - The date the Building Works reach Completion;
> - The date this contract is ended; and
> - The date the Owner takes possession of the Land."

22. Mr Sadler said that the Owner could have taken possession but did not do so. He referred to the former Domestic Building Tribunal's decision in *Mifsud v HGF* [1997] VDBT 8 where it was pointed out that, in assessing liquidated damages, an owner cannot benefit from a period of delay for which he is responsible. That is an unremarkable proposition but it has no application here because the relevant delay is the delay in completing the works, not a delay in taking possession.

23. The earliest of the three dates specified in Item 9 of Schedule 1 was 14 February. That is the relevant date under the contract for calculating liquidated damages because that was when the work was completed, even though the Owner was not advised of that at the time. That seems odd because the final claim was not then due until the procedure set out in Clause 36 was followed. Nevertheless, that is the way the contract is worded.

24. The end of the building period was 8 November, being 260 days from the date work commenced. From that day until 14 February is exactly 14 weeks which, at $250 a week amounts to $3,500.00 for liquidated damages. When deducted from the final claim figure of $11,694.55, that left a balance due to the Builder of $8,194.55.

Penalty

25. Mr Sadler argued that the liquidated damages clause was a penalty and so void. For the purpose of that argument it was agreed that the figure of $250 per week had not been the subject of any discussion and that it was the standard figure inserted into contracts entered into by the Builder. Mr Sadler referred to the exposition of Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 95 where, for the

purpose of determining whether an agreed damages clause was a penalty, his Lordship set out the following indicia:

(a) It will be a penalty "…if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that might conceivably be proved to have followed from the breach".

(b) It will be a penalty "…if the breach consists only in not paying a sum of money and the sum stipulated is a sum greater than the sum which ought to have been paid".

(c) There is a presumption (but no more) that the term is a penalty "…if a single lump sum is made payable …on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damages."

26. The first two of these would not seem to be applicable here. As to the third, Mr Sadler pointed out that the agreed sum was not arrived at as a result of any consideration of what damages would be likely to be suffered from a breach. It was just the standard figure inserted by the Applicant in all of its contracts. It also applied, not only where the Builder did not substantially complete the works but also where the Owner did not take possession because of the existence of minor defects.

27. As I pointed out during argument, the entitlement to liquidated damages arises from the works not having reached completion by the due date. The damage to which the clause is directed is loss of the use and enjoyment of the completed works. Whatever the reason for the Owner not having that use and enjoyment, the loss is the same. There can be no basis for finding that $250 a week for the loss of the use and enjoyment of a completed house is excessive. The penalty argument therefore fails.

Payment into the Fund

28. Mr Sadler pointed out that the Owner could have obtained an order under s.53(2)(ba) of the *Domestic Building Contracts Act 1995* to have the disputed sum paid into the Domestic Builders Fund. Certainly that provision was designed to prevent the sort of stand off that occurred in this case. The Owner could have sought such an order and did not do so but the same could also be said of the Builder.

Interest

29. The relevant date for the purpose of the interest claim is the date upon which the final claim became payable. The Owner was notified of the completion of the work on 1 March and an inspection as held on 7 March. Payment was then due 7 days later.

30. However, the Owner did not agree that the works had been completed and so payment was not made. When Mr McLennan returned to the site

he agreed the work was completed. A cheque in part payment was tendered by the Owner but not accepted. It was only at the hearing that the Parties agreed that the cheque would be banked. The Builder is therefore entitled to interest on the balance of the contract sum from 14 March 2007 until the date of the hearing, which is 155 days at the contract rate of 18%, which I calculate at $626.38.

Other claims

31. The Owner also included in her counterclaim claims for electricity and gas usage. It is unclear whether these are entirely for gas and electricity consumed or for the provision of a supply to the house. If the latter, they are included in the liquidated damages figure. If the former I would have needed evidence that the gas and electricity in question were consumed by the Builder and no such evidence would have been available.

Conclusion

32. There will be an order on the claim for $2,569.20, calculated as follows:

Final claim	$11,694.55	
Add: interest	$626.38	12,320.93
Less: liquidated damages	3,500.00	
cheque banked at hearing	6,251.73	9,751.73
Balance due		$2,569.20

33. Since this calculation takes account of the matters raised in the counterclaim there is no other order to be made so the counterclaim will be struck out. Costs will be reserved but since it was a Small Claim the usual practice is that no orders for costs are made.

SENIOR MEMBER R. WALKER