Galaxy Construction & Development Group P/L v Clarke & Sons Plumbing (Home Building) [2006] Adj.L.R. 08/03

Decision : G G O'Keeffe, Member, Consumer, Trader and Tenancy Tribunal. Home Building Division. at Hurstville 3rd August 2006

APPLICATION

1. The application seeks an order for the **payment** of money.

PROCEEDINGS

2. The application was filed on 5 January 2005 and sought an order that the respondent pay the builder the sum of $25,000.00. At the hearing the parties gave evidence and tendered documents as particularised in submissions filed following directions made on 10 February and 24 March 2006.

BACKGROUND

3. On or about April 2003, the parties entered into an oral contract to carry out plumbing and drainage work at premises being "...", Sylvania NSW. The premises are owned by Mr Keir, director of the applicant. The work was residential **building work within the meaning of the Act**. The contract price of $28,600.00 was based on certain plans (though not plumbing or drainage plans) supplied by Mr Keir and negotiated between Mr Keir and Mr Clark. The parties had worked together in the past and this familiarity would appear to explain why the contract was not reduced to writing. The respondent commenced work in April 2003.

4. In early 2004, the relationship between the parties began to sour. A dispute arose as to whether **payments** were due and owing. When the dispute failed to settle, the respondent sought an adjudication pursuant to s22 of the **Security** of **Payment Act** and on 16 June 2004 obtained a determination in his favour of the total sum claimed being $7,623.90 (plus Adjudicator's fees and administration costs of $1,540.00).

5. As it is apparent that an overlap exists between at least part of the applicant's claim in these proceedings and the Adjudicator's determination, it is necessary to examine the particulars of the **payment** claim which was put before the Adjudicator. The **payment** claim specified two invoices being #10596 and #10599. Invoice #10596 claimed a balance owing of $3,593.75 and invoice #10599 claimed a balance owing of $5,355.90 (or a total of $8,949.65). The difference between this figure and the Adjudicator's determination is $1,325.75 (being a credit allowed by the respondent and referred to at paragraph 55 of the applicant's submissions dated 20 February 2006). On or about 16 August 2004, the respondent obtained judgement in the Local Court. The applicant did not seek to have the judgement set aside and has been paying off the debt by instalments.

6. The applicant seeks, *inter alia*, to have the Tribunal offset the total of the Adjudicator's determination being $7,623.90 plus the fees etc of $1,540 or $9,163.90 (the applicant does not claim the additional 90 cents which is assumed to be a typographical error), on the grounds that the work claimed in the relevant invoices tendered to the Adjudicator was part of the contract price and not variations or extras as claimed (see schedule of 'Applicant's Loss and Damage').

EFFECT OF ADJUDICATOR'S DETEMINATION

7. On 24 March 2006, the parties' attention was drawn to ***Linprint Pty Ltd v Hexham Textiles Pty Ltd*** (1991) 23 NSWLR 508 and directions were made for the filing of submissions as to whether the judgment debt, 'constitutes *res judicata* or issue estoppel'. In submissions filed on 4 April 2006, the applicant relied upon ***Falgat Constructions Pty Ltd v Masterform Pty Ltd*** [2005] NSWSC 525, as authority for the proposition that: *'the Local Court judgment does not give rise to a res judicata or issue estoppel and the Tribunal "must" allow for the amounts paid by the Applicant pursuant to that judgment, as required by section 32(3) of the* ***Act****.' (at [12])*.

8. In ***Falgat*** the court cited ***Linprint*** and stated: '*It is plain that a judgment obtained by default, like one obtained by consent, will, unless and until set aside, conclude between the parties the matters expressly decided by its operative or declaratory parts.*'

9. It is common ground that the judgment obtained by the respondent has not been set aside (nor has the applicant sought to do so). In circumstances where a court of competent jurisdiction has not set aside judgment, the question arises as to whether, 'the decision of the Adjudicator, to the extent that it is represented by the adjudication certificate, was a final judicial decision on the merits.' (at [33]). However, the court in ***Falgat***, whilst finding that 'there is res judicata as to that matter', considered that 'the real question ... is the extent of the estoppel resulting from the res judicata.' (at [33]), and adopted 'a genuine dispute' test so that where there exists 'a genuine claim' ... (such a claim)...would be a foundation for an off-setting restitutionary claim to be brought pursuant to the contract' (at [38]). The court found a genuine dispute existed on the facts and set aside the statutory demand.

10. Of course, unlike the court in ***Falgat***, this Tribunal does not have the power to set aside the judgment debt in order to hear the 'genuine claim' as sought by the applicant. The applicant has submitted that it is open to the Tribunal to hear afresh the merits of the **payment** claim before the Adjudicator (although whether or not the setting aside of the judgment debt is a necessary precursor to such a hearing is not addressed). The respondent referred the Tribunal to ***Shellbridge Pty Ltd v Rider Hunt Sydney Pty Ltd*** [2005] NSWSC 1152, in which the court stated:

    '*...if the principle has a claim for defective work or can show that work charged for was not done or that there has been some other breach of contract or other actionable wrong by the contractor, the principal is free to pursue that claim in the ordinary way; and this is so regardless of the findings of the adjudicator. The principal might, if though fit, institute proceedings seeking not only to advance the claim in question but also, perhaps, to obtain, by reference to a right of set-off, a stay of the judgment that s25 has had the effect of creating. The s25(4) limitations do not apply to an application to a stay, as distinct from an application to have a judgment set aside*.' (at [37]).

11. Section 25 is set out below.

> **25 Filing of adjudication certificate as judgment debt**
> *(1) An adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly.*
> *(2) An adjudication certificate cannot be filed under this section unless it is accompanied by an affidavit by the claimant stating that the whole or any part of the adjudicated amount has not been paid at the time the certificate is filed.*
> *(3) If the affidavit indicates that part of the adjudicated amount has been paid, the judgment is for the unpaid part of that amount only.*
> *(4) If the respondent commences proceedings to have the judgment set aside, the respondent:*
> *(a) is not, in those proceedings, entitled:*
> *(i) to bring any cross-claim against the claimant, or*
> *(ii) to raise any defence in relation to matters arising under the **construction** contract, or*
> *(iii) to challenge the adjudicator's determination, and*
> *(b) is required to pay into the court as **security** the unpaid portion of the adjudicated amount pending the final determination of those proceedings.*

12. Furthermore, the court in ***Shellbridge*** pointed out that in ***Falgat Constructions Pty Ltd v Equity Australia Corp Pty Ltd*** (2005) 62 NSWLR 385, it was said that a judgment entered under s25 is, by reason of s32(3)(b), effectively a provisional judgment, both in what it grants and what it refuses (and at [21]): *'A builder can pursue a claim in the courts although it was rejected by the Adjudicator and the proprietor may challenge the builder's right to the amount awarded by the adjudicator and obtain restitution of any amount it has overpaid.'*

13. Notwithstanding that no action has been taken to have the judgment set aside, the respondent concedes that the authorities permit the applicant to 're-ventilate' the issues which were before the Adjudicator. (See concluding paragraph of submissions dated 5 May 2006.)

THE ADJUCIATED CLAIMS

14. As recounted above, the applicant seeks restitution of the whole of the Adjudicator's determination being $9,163.90. However, the substantive award is $7,623.90, the balance being made up of the Adjudicator's fee and the administrative cost. There is little reliable documentary evidence of the scope of works agreed upon by the parties; there is a general arrangement of the proposed **building**, but no plumbing or drainage plans. There was no written quote (at least not when the deal was struck in April 2003 and the applicant says it did not sight a quotation until these proceedings commenced). Considerable opinion evidence was given by the principal player's in the dispute being Mr Keir and Mr Clark. The documentary evidence consisting of invoices tendered by Mr Clark was hotly disputed by Mr Keir. All such evidence was self serving, and accordingly, the veracity of any or all of it on either side is so unreliable as not to permit the Tribunal to make a finding that the work, the subject of the adjudication, was not in fact extra work as claimed by the respondent. Of course the onus remains from beginning to end on the applicant to prove on the balance of probabilities that the work claimed by the respondent was either not done, or if done, was encompassed in the contract price. Having taken all the evidence into account, the Tribunal finds that the applicant has failed to make out its case for the restitution as sought. Accordingly, that part of the applicant's claim is dismissed.

THE DEFECTIVE WORK CLAIMS

15. The applicant tendered **building** plans which were marked exhibit 1. The Tribunal notes that the plans do not include details of the plumbing. The principal evidence in support of the applicant's claim for defective work is set out in a report prepared by Mr P R Sim, **building** consultant of Australian **Building** Services and dated 2 February 2005. Mr Sim was, at the relevant time, a licensed builder with some 40 years experience in the **building industry**. His report was tendered into evidence as exhibit 2. In addition there were a bundle of photographs tendered on 4 October 2005. Also tendered on behalf of the applicant was a letter dated 1 July 2005 from JMG Consulting & **Building** Approval advising that an occupation certificate could not be issued until certain defective plumbing work was rectified. That letter was marked exhibit 3.

16. In his statement dated 8 March 2005, Mr Clark submitted that as Mr Keir did not want him to return to the site, he has not replied to the report served on him. Accordingly, there is no independent expert report to contest Mr Sim's findings.

17. The substance of Mr Sim's report is found at pages 9, 10, 11 and 12. Supporting photographs are attached being photographs A, B, C, D, E, F, G, H and I. The report focuses mainly on the installation of vanities and their associated plumbing but covers also the location of certain plumbing and gas pipes outside the **building** and near the pool. It is apparent from the photographs in particular, that joinery work inside those vanities where plumbing penetrates has not been carried out in a good and workmanlike manner. However the applicant also claims that leaking plumbing work has resulted in water damage to the vanity. There is evidence in some of the photographs that the vanities have been subject to considerable use and also to neglect: i.e. leaking water has been allowed to cause damage to the vanity. Such damage ought to have been avoided by timely rectification work so as to minimise losses consequent upon the plumbing failure (see photographs A, B x 2, C & D and also the bundle of photographs tendered on 4 October 2004). It is noted that the photographs were taken on 2 February 2005 i.e. many months after the applicant first complained about leaking vanities which was in April 2004. (See paragraph

14 of Mr Clark's statement and paragraph 22 of Mr Keir's statement.) Photograph E shows a large hole in a bathroom floor into which a laundry chute was to be installed. The applicant says the respondent has placed plumbing in the wrong place. The respondent says the applicant drilled the chute in the wrong place and that no defect exists with respect to the plumbing complained about. Likewise the backwash drain pipe in photograph G and gas pipes shown in photographs H and I were, according to the respondent, placed in the position shown prior to the applicant changing the plans. The respondent says that the back wash drain in photograph G was to have a brick pit built around it. The wall to the right in the photograph did not exist when the plumbing was installed and was not in the original drawing. With respect to photographs H and I the respondent says that when he carried out the work depicted therein, there was no retaining wall nor a step and that further changes have been made to the original plans. In any event there does not appear to be a quote for the rectification of the gas piping.

18. Mr Sim's report does not deal with the applicant's claims with respect to the sewer blockage and the sewer shafts. The respondent states that no damage exited to the sewer when he installed it. At page 9 of his statement he says: 'They were not damaged when I finished installing them and finished my work on the site. Further, Mr Keir never called me before pouring the concrete. He never called me to tell me that the shafts were broken.' The Tribunal notes that no expert evidence was tendered to support the applicant's contention that the damage complained about with respect to this issue was a result of the respondent's bad workmanship. The quotes by Neil's Plumbing, as such, do not constitute expert evidence of the respondent's liability. Furthermore, if Mr Keir's claims in paragraph 48 of his statement are correct that 'Mr Clark did not complete his work on the sewer shaft' despite being asked to do so 'numerous times between January to March 2004', why did the applicant proceed to lay concrete over the incomplete plumbing work which it now says will cost at least $12,140.00 to rectify (being Neils Plumbing $5,390.00 and Effective General Concrete $6,750.00)? The absence of any inspection points would have been obvious at the time the concrete was laid. The respondent's evidence, in particular, at pages 9 and 10 of his statement, is to be preferred to that of the applicant. As an entity licensed under the **Act**, the applicant has shown a remarkable degree of ineptitude in the management of the works and accordingly is almost entirely responsible for the losses sustained. Perhaps the most graphic example of this is photograph I of Mr Sim's report which shows a completed and paved step with a gas pipe protruding from it! This is obviously a safety hazard.

19. Having taken all the evidence into account, both oral and documentary, and having considered submissions by both parties, the Tribunal is satisfied that the applicant has made out its claim only for part of the cost of rectifying the damaged vanities. In so doing the Tribunal notes that much of the work complained about with respect to the vanities is aesthetic in nature and is located behind closet doors. There is no justification for the replacement of all the vanities as claimed by the applicant.

20. The remedy is one of damages. In *Robinson v Harman* (1848) 1 Ex 850 at 855, it was said that: '*where a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed*'.

21. However, **in *Burns v MAN Automotive (Aust) Pty Ltd*** (1986) 161 CLR 653 at 667, the High Court found that this general rule is limited to the rule in ***Hadley v Baxendale*** (1854) 9 Exch 341 at 354; 156 ER 145 at 151, that the loss must not be too remote. In ***Bellgrove v Eldridge*** (1954) 90 CLR 613, the High Court held that the measure of damages recoverable for a breach of a **building** contract, is prima facie the difference between the contract price of the work (credit being given for any unpaid portion of the contract price) and the cost of making the work conform to the contract, subject to the qualification that the rectification work necessary to produce conformity to the contract, must be a 'necessary' and 'reasonable' course to adopt.

22. Accordingly, in applying the law to the material facts as found, the Tribunal finds the respondent is liable to the applicant for damages measured at $2,000.00. From this figure is to be deducted the unpaid balance of the contract price which the parties agree is $690.00.

Mr A R Zahra, of counsel, for the applicant.
Mr G Willis, solicitor for the respondent.