



Civil and Administrative Tribunal New South Wales

Medium Neutral Citation:	Guy and Anor v K J & W E McIlveen t/as K J McIlveen Builders [2016] NSWCATCD 77
Hearing dates:	5 April 2016 & 30 June 2016
Decision date:	15 September 2016
Jurisdiction:	Consumer and Commercial Division
Before:	J A Ringrose, General Member
Decision:	1. The applicants are to pay the respondent the sum of \$5,489.65. 2. Each party is to bear their own costs.
Catchwords:	Variations not in writing – quantum meruit compensation for rectification of defective works and for delays in completion.
Legislation Cited:	Home Building Act 1989 ss7, 10 and 18B
Cases Cited:	Woodward Pty Ltd v Kelleher (30 May 1989) Pavey and Matthews Pty Ltd v Paul [1987] 162 CLR 221 Pender v Robwephi Pty Ltd and Anor [2008] NSWSC 144
Texts Cited:	Keith Mason & J W Carter Restitution Law in Australia [1995] Butterworths at 914
Category:	Principal judgment
Parties:	Anne Elizabeth Guy and George Alexander Regent (Applicants) K J & W E McIlveen t/as J J McIlveen Builders (Respondents)
File Number(s):	HB 15/51195
Publication restriction:	Nil

REASONS FOR DECISION

- 1 In February 2014 the applicants approached the respondents to construct a kit home on their property at [***]Highway Kootingal and a building contract was duly signed on

- 26 February 2014. The applicants chose to hire temporary living arrangements in the form of a site office, a porta loo, a porta shower and shipping containers to live in on the property while the dwelling was being constructed.
- 2 On about 10 April 2014 power and water was connected to the site and at that time the applicants commenced living in their hired accommodation on the property. The respondent enlisted the services of Pro Cert to organise relevant council approvals so that the building works could commence. It is claimed that building approval was delayed until 11 July 2014 and building works commenced with under slab works undertaken by the plumber on 21 July 2014.
 - 3 During the course of the building works some variations to the contract were requested but no quotes were ever received or approved for these items.
 - 4 In November 2014 issues arose in relation to plumbing requirements and the need for a water tank and there were further issues in relation to the nature of the cladding as compared with the approval.
 - 5 On or about 24 November 2014 the respondents approached the applicants indicating that there were variations to a total extent of \$18,000.00 plus GST and that this was not the final amount as extras for plumbing had not been included. At the end of November 2014 the plumber approached the applicants requesting a direct payment from them with a deduction to be made to monies owing to the builder.
 - 6 On 3 December 2014 the builder issued a notice stating that practical completion had been reached but works were then suspended as a result of issues which had not been resolved on 24 November 2014. The applicants claim that at this stage plumbing had not been completed and the gas compliance had not been finalised. The water tank and septic tank had not been installed or properly filled and there were issues relating to the alleged variations in the contract. A second meeting to finalise contract variations was held on 9 December 2014 when the applicants claim that the builder was still unable to give a final amount for variation costing.
 - 7 A final inspection was held on 22 December 2014 but it is alleged that the occupation certificate was not issued until 15 January 2015 as it is claimed that the builder had not produced certificates relating to waterproofing, glazing, smoke alarms and other items. Final invoices for variations were not issued until 13 January 2015 and after 15 January the matter was referred to Fair Trading. The matter was then placed in the hands of solicitors and despite negotiations between the parties the matter was still not able to be resolved and the present application was filed in September 2015.

APPLICATION

- 8 By an application filed on 7 September 2015 the applicants sought an order for rectification and completion of works totalling \$7,591.00, together with an order that they should not be required to pay for variations claimed by the builder totalling \$22,887.89 and an order that compensation for costs and expenses also to be paid in a sum of \$19,366.52. The compensation claim appears to arise from losses sustained as

a result of delays in issuing an Occupation Certificate as well as what has been described as extreme emotional hardship and severe financial disadvantage.

- 9 The matter was listed for directions on 23 October 2015 when it was noted that the applicants had provided evidence in relation to the claim and the respondents were ordered to provide all documents including expert reports, witness statements and Scott Schedule by 20 November 2015.
- 10 At the request of the respondents the time for compliance with orders made on 23 October 2015 was extended to 30 November 2015 and on 13 November 2015 a further request for an extension of time was made on behalf of the respondent.
- 11 The matter was ultimately listed for hearing on 5 April 2016 but was then adjourned, part heard, for further hearing on 30 June 2016 when the evidence was finalised.

APPLICANT'S EVIDENCE

- 12 On 25 February 2014 the respondent K J McIlveen Builders provided a quote to the applicants to pour a waffle pod slab and erect and fit out a Roma Kit 2 as per plans on their property at [***]Highway Kootingal for a total cost of \$112,948.50. On 26 February 2014 the parties signed a contract for the works to be commenced on 17 March 2014 and completed in a period of 130 days thereafter for a total cost of \$113,938.50.
- 13 Clause 14 of the contract provided for the manner in which any variation or changes of the work should be deal with and it is claimed by the applicant that none of the variations had been signed off in writing by the owners or the builders although some items had been requested by the owners.
- 14 The applicants rely on the chronology and events which have been described briefly above in the Background. In relation to the variations claim they note that, although some items are agreed as to variation and as to price, the allowances claimed for others are disputed. In a table attached to the evidence by the owners, variations to the contract are accepted in a total sum of \$13,823.39 inclusive of GST and builders margin. This concession is made against a total claim by the builder of \$26,588.29 and the builder's claims have been set out in the same table. Reasons for the dispute have been provided in respect of each item and these have been taken into account and will be referred to as required.
- 15 The owners further rely upon an expert report prepared on 31 July 2015 by Jeffrey Cork of Cork Construction and Consultancy. That report makes comments in relation to variations to the agreement and further it addresses a problem of water claimed to be pooling on the front veranda and running back towards the dwelling. Mr Cork claims that rectification will require re-bedding of the verandas and tiling at a total cost of \$7,436.00. He further allows a sum of \$155.00 as the cost of supply and installation of flashing to the meter box which has apparently been omitted in the course of the works. It is claimed that a new Basix Certificate must be issued as the certificate issued earlier was no longer current. This required an additional cost of \$275.00 inclusive of GST.
- 16 The applicants contended that the completion of the works should have occurred on 18

September 2014 and that this date had been substantially delayed as a result of failures on the part of the respondents to provide an Occupation Certificate and to allow occupation of the property. It is noted that the cost of hire of a toilet and shower facilities together with a site office and a shipping container to enable the applicants to live on site, was a total of \$338.03 per week. Mr Cork pointed out that this was a more than reasonable hire cost in the circumstances. The applicants claim these costs for a period of approximately 45 weeks as a result of delays in the completion of the works.

- 17 Both the applicant and the respondent have included copies of communications between the parties and the attachments provided by both parties have been taken into account in determining any compensation for late completion of the works.

RESPONDENT'S SUBMISSIONS

- 18 Mr McIlveen on behalf of the respondents provided evidence in relation to the variations to the contract. He pointed out that the initial quote was for a sum of \$112,948.50 on 25 February 2014 and it was increased by a further \$990.00 when the applicants sent an email deciding to go with a colour bond roof. He claimed that the quote included an allowance for 112.08sqm² slab and a PC allowance of \$5,000.00 for a septic tank, internal plumbing and polyurethane. He noted that there were no Council approval costs, no engineer's costs and no site costs included in the quote as the applicants did not own the land at the time when the quote was given.
- 19 By an email of 3 April 2014 the back veranda was added including the cost of a slab, at a total cost of \$5,700.00 "excluding labour".
- 20 He pointed out that there were issues in relation to Council approval which continued until June of 2014 and road access issues also continued until about 20 June 2014. It was claimed that the loan from NAB did not reach the required security level until 26 June 2014 that the plumbers under slab works were accordingly not commenced until 21 July 2014.
- 21 The kit was delivered on 15 August 2014 and windows were picked up at about the same time.
- 22 By November 2014 the parties were in dispute concerning variations although it is clear that no specific quantifications of variations had been provided by that time. It was claimed that attempts were made to resolve issues in December but the dispute regarding variations had apparently come to a head by then.
- 23 A formal notice of practical completion was issued on 3 December 2014 and it was suggested that the contract may have been suspended at that time. The Occupation Certificate could not be issued by the certifier on 19 December 2014 because certain certificates had not been provided but this was issued on 15 January 2015 and the parties were still endeavouring to resolve the issues concerning the variations.
- 24 Mr McIlveen claims that he had further discussions with the applicants concerning payment of an amount which was not in contention on 2 February 2015 but the issue could not be resolved at that stage and a letter from the applicant's solicitors L B K

Solicitors dated 16 February 2015 was received on 19 February 2015.

- 25 An exchange of correspondence between the respective solicitors continued until on 13 April 2015 the applicant's offered to pay \$12,169.30 in full satisfaction of all claims. That offer was rejected and following a further exchange of offers L B K Solicitors offered to pay a sum of \$15,000.00 in full and final satisfaction of the claims by a letter dated 14 May 2015. The deed proposed in support of that offer contained a release for all future claims in relation to the building works by the applicants in favour of the respondents. The applicant's solicitors were not prepared to accept or provide that release on behalf of their clients. The matter remained unresolved and the present proceedings were commenced.
- 26 Mr McIlveen provided submissions in relation to each of the variations with references to attachments to his material. These submissions and attachments have been taken into account and will be addressed in the consideration of his submission that a sum of \$22,887.89 is owing for variations and interest should be payable on that amount at a rate of 12% per annum giving rise to a total claim of \$25,634.44.
- 27 In relation to the claim for defective and incomplete work, Mr McIlveen did not rely on an independent expert report but noted that flashings were to be installed around the windows even though they were not supplied in the kit and he noted that water pooling was not mentioned until after November 2014. Mr McIlveen stated that he had contacted the concreter who had agreed to come back and provide a further topping to the area to correct the fall. He pointed out in submissions that the tiling work proposed by Mr Cork in his report would have provided the applicants with a benefit of additional works for which they had not paid. He noted that a deduction should be made to cover that benefit but he made no attempt to quantify that deduction.

DECISION

- 28 The builder has claimed a total sum of \$22,887.89 together with interest in respect of variations to the contracts dated 25 February 2014. Clause 14 of the contract prescribes the method by which variations are to be effected in circumstances where the variation is made on the basis of instructions from the owner or where additional work is required to be undertaken by the builder.
- 29 Clause 14(d)(i) provides that if a builder agrees to undertake a variation requested or required by the owner, the variation is to be detailed in writing and signed by the owner (or the owner's agent) and the builder. Documents detailing the variation as appropriate, amended drawings or specifications become contract documents.
- 30 Clause 14(e) of the contract requires the builder, within a reasonable time of receipt of the instructions, to execute a variation (i.e. an instruction signed by the owner or the owner's agent) to notify the owner in writing of the value of the variation. It is noted that neither of these provisions have been complied with and precise details of the claimed costs for variation were not, on the evidence, provided to the owner until after the contract had been completed.

- 31 Section 7 of the Home Building Act 1989 prescribes the circumstances in which a written contract complying with that section is required and s 10(3) of the Act provides:-
- (3) a person who contracts to do work in contravention of this Division or who contracts to do work under a contract that does not comply with this division;
- (a) is not entitled to damages or to enforce any other remedy in respect of the breach of the contract committed by the other party to the contract but
- (b) is liable for damages and subject to any other remedy in respect of the breach of contract committed by that person.
- 32 In *Woodward Pty Ltd v Kelleher* (30 May 1989) Gleeson C J held:
- “as the decision of the High Court in *Pavey and Matthews Pty Ltd v Paul* [1987] 162 CLR 221 demonstrates, contravention of the Act produces only the specific and limited consequences referred to in the relevant provision. A builder may still sue on a quantum meruit. He may retain instalment paid on account of the purchased price, and of course, the contract may be enforced by the proprietor. If the builder fails to perform his contractual obligations in some respect there seems to be no reason in principle or logic why the proprietor’s damages should be measured on the basis of the hypothesis that the proprietor was entitled to have the work performed, under the contract, but at no cost to himself.”
- 33 In *Pender v Robwephi Pty Ltd and Anor* [2008] NSWSC 144 Hall J was required to consider an appeal under s 67 against a Tribunal decision in respect to a matter of law related to a discretion under the Home Building Act. His Honour observed:-
- 52 An action of quantum meruit lies where the work performed by one party constitutes a benefit and the other party accepts the benefit in circumstances where it would be unjust for the latter to retain that benefit without remuneration of the former party (*Keith Mason & J W Carter restitution law in Australia* [1995] Butterworths at 914).
- 53 The action may provide a builder with a right to recover fair and reasonable remuneration for the work which is actually being done and which has been accepted by the owner.
- 34 Bearing in mind these principals it is necessary to consider the claim by the respondent for each variation, noting that the provisions of the contract have not been complied with by the builder and no quantity surveyors report has been provided by either party to attempt to assess the value of the works. In such circumstances the builder bears the onus of establishing the extent of the variation on the evidence available.

Council costs

- 35 The builder has claimed a total sum of \$4,864.00 which includes the certificates, engineer’s certificates and council approvals. The applicants note that the builder completed the section of the contract detailing the council approvals necessary and required. The applicants acknowledge that a receipt from Tamworth Council in the sum of \$1,834.00 indicates that sum was paid by the builder and accordingly an allowance of \$1,834.00 plus a builder’s margin of 10% will be allowed. This represents a total for council fees in the sum of \$2,017.40. A separate claim for engineer’s certificates is also allowed in the sum of \$528.00 and I find that the total amount recoverable under that item is \$2,545.40.

Site costs

- 36 The builder has claimed a sum of \$2,221.50 for site costs including the hire of a bob cat

and provision of fill. The applicants claim that the finish of the site works is unsatisfactory and will require rectification works although there is no evidence from an expert to support this assertion or to quantify rectification costs. The respondent has produced two receipts for bob cat operators in respective sums of \$580.80 and \$435.60 together with costs for provision of road base in the sum of \$780.45. This represents a total sum of \$1,796.85 or \$1,976.54 including a builder's margin and this sum should be allowed for site costs which were specifically excluded from the contract.

Addition of back veranda

37 The respondent claims a sum of \$7,961.50 which includes extra concrete pump, colour bond, insulation, kit and erection. The applicant relies on the costing advised to her by telephone from the builder. A note of that call indicates a kit cost of \$1,500.00 together with installation costs of \$1,000.00 and concrete pad costs of \$3,200.00 representing a total of \$5,700.00 plus a builder's margin. That costing was confirmed by email to the builder and there is no evidence of any reply. As the builder has not produced evidence of a written quote or other evidence as to the value of the work I allow the sum of \$5,700.00 together with a builder's margin of \$570.00 representing a total claim of \$6,270.00.

Additional electrical works

38 The builder claims the sum of \$2,384.80 for additional power points, points to the dishwasher and to the back veranda. The applicants claim that the extra work was not requested however it is clear that additional points were requested and should be paid for. It is noted that the initial quote included 10 lights and 10 double power points along with one smoke detector. The items supplied included 22 lights and 26 double power points and when the costing is applied at the rates charged out by the electrician additional charges total \$1,644.00 together with a builder's margin of \$164.40 representing a total sum of \$1,808.40.

Kitchen cupboards

39 The respondent claims a variation of \$1,255.00 for kitchen cupboards. That variation is accepted by the applicants as the quote was provided verbally at a cost of \$1,140.00 plus GST. It is appropriate to allow the sum of \$1,255.00 for this item.

Dishwasher

40 The respondent builder claims a sum of \$672.58 for a dishwasher. The applicant submits that a Nover dishwasher was requested at a cost of \$480.00 plus GST and no additional cost was advised by the builder. The evidence suggests that there was no specific costing provided for the dishwasher and accordingly the sum of \$672.58 claimed by the builder is allowed as it is accepted the applicants were provided with the updated price schedule.

Shelving in robes

41 The applicants concede that they requested shelving in robes and although no price was quoted by the builder, the allowance of \$170.00 is accepted.

Floor and wall tiles

42 The applicants accept that they requested an extra row of tiles and the invoiced price of \$253.30 is accepted including GST.

Additional cost for hot water service

43 The applicants claim that no quote was provided for by the builder but they accept that they were advised that the hot water service was more expensive and the additional claim of \$105.00 is accepted.

Plumbing works

44 The respondent claims an initial sum of \$3,371.50 for plumbing work including roughing of the gas lines, storm water and sewer lines. The applicants claim that they did not request any extra work to be done by the plumber and that they were advised that it was a standard plumbing job. The septic tank was to be located the maximum distance from the house before additional costs could be incurred and it is claimed that this was done. It is conceded that the plumber approached the applicants asking whether a second outside tap could be provided and this additional tap was provided at an agreed cost of \$150.00 plus GST. The respondent builder has produced no documents to provide a breakdown of the costing and accordingly the claim is not allowed apart from the agreed sum of \$165.00.

Bathroom taps

45 The respondent claims a total of \$911.99 on a PC allowance for bathroom taps. The applicants claim that no invoices or extra charges for PC items were requested or quoted and no invoices or receipts had been provided. The applicant relies on Bunnings prices for the bath and tap ware in a total sum of \$432.42 with a builder's margin of \$43.24 representing a total cost of \$475.66.

46 The total cost of variations which have been allowed total a sum of \$15,889.67 when builder's margins of 10% have been included in each of the items and subject to any deductions for the claim made by the applicants, this sum would be payable by them to the builder.

47 The applicants claim the cost of rectification completion of works in accordance with the report of Jeffrey Cork dated 31 July 2015. A sum of \$155.00 has been allowed for the supply and installation of flashings to the meter box and this sum appears to be a reasonable cost for the provision of that work.

48 The remaining rectification costs relates to water ponding on the front veranda which falls back towards the dwelling at the south western end. Mr Cork notes that the

contract drawings show that both concrete verandas are to have a minimum 1:100 fall away from the dwelling and works to the area have not been completed as per the approved plans which requires the veranda slabs to fall away from the dwelling. Mr Cork suggested that this can only properly be remedied by tiling of the slabs and a total cost of \$7,436.00 is estimated as the cost of this work involving both the front and rear verandas.

- 49 It is noted that the concreter engaged by the respondent has offered to return and top the concrete slabs to achieve the appropriate fall but there is a general view that topping in the absence of other works is an unsatisfactory result as the topping may come away quite readily. Clearly if tiles were added to each of the verandas the applicants would obtain a benefit to which they are not entitled and accordingly it is appropriate to reduce the amount claimed to take into account that benefit. In the absence of other costings I am satisfied that it is appropriate to allow a total sum of \$2,000.00 inclusive of GST and any builder's margin for this work. If tiling work is to be undertaken to achieve the appropriate benefit then the tiling should be done at the cost of the applicants and not of the respondent.
- 50 The applicants claim a further sum of \$275.00 noting that the original Basix Certificate for the residence had expired and it was necessary to obtain a new certificate at a cost of \$275.00 inclusive of GST. The rectification costs or other costs payable by the respondent's builder to the owners is a sum of \$2,430.00.
- 51 The remaining element of the applicants claim relates to additional hire costs incurred as a result of the alleged failure by the builder to complete the works in the period prescribed by the contract or even in a reasonable period. The applicants claim expenses for a period of 45 weeks but it is clear, subject to rectification or completion costs totalling \$2,430.00, the works were completed and an occupation certificate was issued by 15 January 2015. The applicants did not go into occupation of the property until 1 October 2015 as a result of legal disputes between them which resulted in the respondent withholding keys and relevant certificates until after the present proceedings had been commenced.
- 52 It would appear that both parties have contributed to the delays over a period of time but it is noted that on 9 April 2015 the applicants offered to resolve the matter by the payment of a sum of \$12,736.20. That offer was rejected on 4 May 2015 and the builder repeated a claim for \$22,591.00 with a request that monies not in dispute in a total sum of \$7,773.24 be paid immediately. By 15 May 2015 an offer was made to resolve the dispute with a payment of a total sum of \$15,000.00 to be made to the builder and upon payment of that sum by bank cheque the keys would be handed over. Issues of defective work were then raised by the solicitors for the applicant and the deed of release proposed by the respondents sought to release the builder from all claims including claims in respect of any warranty under the Act. The release was not regarded as acceptable by the applicant's solicitors and the dispute continued with the keys not being handed over until 1 October 2015.

- 53 Having considered the material and the communications between the legal advisors for the parties I am satisfied that it is appropriate to order the respondent to pay the cost of additional rental for the site office, toilet, shower block and shipping container in which the applicants were residing from mid May 2015 to 1 October 2015 representing a total of 20 weeks. I am satisfied that the ongoing rental cost was a sum of \$338.03 per week and the resultant cost of additional rent over a period of 20 weeks is a sum of \$6,760.60.
- 54 The total compensation payable by the respondents to the applicants is a sum of \$9,190.60 and when this sum is deducted from the monies owing by the applicants to the respondent a balance of \$6,699.07 remains payable by the applicants to the respondents. It is observed that had the parties considered their position a little more closely when the offers were near to \$12,015.00 the applicants could have occupied the premises from May 2015 and the respondents would not have been obliged to pay the rental costs which I have now ordered.
- 55 As the parties were each self-represented and the resultant claim does not exceed the sum of \$30,000.00 I order that each party should pay their own costs of the proceedings.

J A Ringrose

General Member

Civil and Administrative Tribunal of New South Wales

15 September 2016

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.

Registrar

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Decision last updated: 18 November 2016