



Civil and Administrative Tribunal New South Wales

Medium Neutral Citation:	Trevor John Kelly t/as TJ & Kelly v Smith [2016] NSWCATCD 92
Hearing dates:	28 September 2016
Decision date:	02 December 2016
Jurisdiction:	Consumer and Commercial Division
Before:	J A Ringrose, General Member
Decision:	<ol style="list-style-type: none">1. The respondents are to pay the applicant the sum of \$5,438.43 within one month of the date of these orders.2. Each party is to bear its own costs.
Catchwords:	Home Building – recovery of extras and variations not authorised in writing-quantum meruit
Legislation Cited:	Home Building Act 1989
Cases Cited:	Pavey and Matthews Pty Ltd v Paul [1987] HCA 5 Urban Constructions (NSW) Ltd v Brett and Bronwyn Shearer [2015] NSWCATCD 9 Eden Constructions Pty Ltd v Grigor [2016] NSWCATAP 182 Jason and Michelle Zammit (t/a Zammit Quality Constructions) v Soul Markunsky and Shereen Markunsky [2015] NSWCATCD 21 Lauer v Comer (No. 2) [2016] NSWCATAP 158 Lumbers v Cook [2008] 232 CLR 635
Category:	Principal judgment
Parties:	Trevor John Kelly t/as TJ and MA Kelly (applicant) Helen and Gary Smith (respondents)
Representation:	Mr Biffin, solicitor, appeared for the applicant Ms Wood, solicitor, appeared for the respondent
File Number(s):	HB 16/31153
Publication restriction:	Nil

REASONS FOR DECISION

- 1 By an application filed on 5 July 2016 the applicant claimed a sum of \$16,042.93 being for building works undertaken for the respondent which were commenced on 7 August 2015 and completed on 3 December 2015. The cost of works was claimed to be \$23,692.93 less a sum of \$7,650.00 which had been paid by the respondents. Attached to the application was a quotation for careful works to be carried out for a total sum of \$7,500.00 including PC items of \$500.00 for electrical and plumbing and an allowance for materials of \$500.00.
- 2 By a letter dated 26 July 2016 Mr Biffin, solicitor from R J O'Halloran and Co. noted that he sought leave to appear on behalf of the applicants and at the same time indicated that he would have no objection to the respondent seeking legal representation.
- 3 On 27 July 2016 when the matter came before the Tribunal directions were made for the applicant to file all documents including expert reports witnessed statements and a Scott Schedule by 17 August and the respondents to provide all documents including expert reports, witness statements and a Scott Schedule by 7 September. Material was received by both parties and the matter was listed for hearing through a video conference from Tamworth on 28 September 2016.

APPLICANT'S SUBMISSIONS

- 4 The applicant relied upon his own affidavits sworn 15 August 2016 along with an affidavit of Wayne Wing sworn the same date, an affidavit of Ted Zammit sworn 17 August 2016 and an affidavit of Adrian John Dernee sworn 16 August 2016. The affidavit of Mr Dernee was objected to and was rejected to the extent that it set out a scope of works which was not agreed between the parties.
- 5 Mr Kelly claimed that he had a meeting with the respondents on about 19 June 2015 where he discussed carrying out certain renovations on the applicant's property. He claims that on or about 15 to 17 August he again met with Mr and Mrs Smith and indicated that work they were now seeking was outside his quote and that it would be difficult to cost because he did not know what to expect when he started work. He then annexed what he described as scope of works completed over and above the additional quote.
- 6 Mr Wing gave evidence that he was on site when further items were requested including tiling in the kitchen and repairs to a plaster wall where a heater had been removed. He noted that Mr Kelly was not on the job when these conversations occurred.
- 7 Mr Zammit swore an affidavit referring to discussions from additional work to be undertaken by him as the electrician. That work apparently included installation of pendant lights above the island bench and additional phone and power points. He stated that Ms Smith had agreed to pay for that extra work.
- 8 The applicant did not produce any expert report related to valuation of the extra work

nor did he produce any signed authorisations to carry out such work at a quoted price or at an agreed price for labour and materials.

9 Mr Biffin, on behalf of the applicant, provided a summary of written submissions noting that the works related to renovations carried out by the applicant at the property known as "Dalkeith" at 69 Tilsons Lane, Winton. Mr Biffin sought to rely on the affidavit material along with an expert report of Adrian Dermee sworn 27 September 2016, being the day before the Hearing commenced. That report was rejected on the basis that it had not been served in accordance with the Tribunal directions and on the further basis that no opportunity had been provided for the expert engaged by the respondent to address the report prior to the Hearing. No satisfactory explanation was provided in respect of the delay in obtaining the report and serving it having regard to the directions given by the Tribunal.

10 Mr Biffin submitted that the applicant carried out work in good faith and was entitled to recover on a quantum meruit basis pursuant to s. 94(1A) of the Act. He referred to the observations of Dean J of the High Court in *Pavey and Matthews Pty Ltd v Paul [1987] HCA 5* and to a recent decision of Senior Member Goldstein in *Urban Constructions (NSW) Ltd v Brett and Bronwyn Shearer [2015] NSWCATCD 9* where the member observed:-

"I have to take into account the fact that if the builder is not granted relief under s. 93(1A) of the Act, it is possible that the owners will have the benefit of work carried out and materials supplied by the builder without having to pay for that work.

11 Mr Biffin argued that the respondents had received the benefit of the work and that it was just an equitable that they be remunerated for such work including labour and materials on a quantum meruit basis.

12 Mr Biffin submitted further that the quote dated 24 June 2015 was limited to the works set out therein and that the quote was basic due to the indecisiveness of the respondent regarding further works to be carried out. He claimed that the applicant had advised the respondent that the hourly rate was \$70.00 per hour plus GST and that the quote was varied in discussions between the parties. He claimed that the variations and additional work totalled \$15,321.48 and sought an order for that amount together with interest and costs.

RESPONDENT'S SUBMISSIONS

13 The respondents relied upon an affidavit of Helen Smith sworn 7 September 2016 and an affidavit of Gary Smith sworn 7 September 2016 along with an expert building report of Mr Scott Edwards from Edwards and Froud Building Services Pty Ltd dated 13 September 2016. That report provided costings for the removal of the dining room heater and the making good of the wall and floor frames along with extra tiles to the dining room side of the kitchen. Evidence was given as to the further cost of fitting a sliding door including the construction of the cavity unit at a total cost of \$1,260.00 with the cavity unit cost of \$124.00 plus GST.

14 Ms Wood, on behalf of the respondents submitted that the contract was required to be

in writing and signed by the parties to be bound thereby. She pointed out that the work claim submitted by the applicant exceeded the \$20,000.00 limit imposed by the Act and required a Home Warranty Insurance certificate to be provided and in the event of a failure to provide those documents prevented the builder from relying on the contract to recover his costs. She submitted that the basis of the claim could only be under quantum meruit having regard to the provision of s. 94(1) of the Home Building Act 1989. It was pointed out that the builder bears the onus of establishing that it is just as equitable to recover on a quantum meruit basis and reference was made to the decision of the Tribunal in *Urban Constructions (NSW) Pty Ltd v Shearer [2015] NSWCATCD 9* and the decision of the Supreme Court in *Eddy Lau Constructions Pty Ltd v Transdevelopment Enterprise Pty Ltd [2004] NSWSC 273*.

- 15 Ms Wood argued that a quantum meruit claim was only available to a contractor where a principal has requested or freely accepted services with the opportunity to reject it (*Eden Constructions Pty Ltd v Grigor [2016] NSWCATAP 182*).
- 16 Ms Wood argued that the initial quote to find the scope of works with payment of a total sum of \$7,500.00 including \$500.00 in materials, an estimated \$500.00 for electrical work and an estimated \$500.00 for plumbing work. She submitted that the contract was varied by a verbal agreement and that agreement included the removal of a Warmbrite heater from the dining area with the installation of 11 floor boards requiring an area of wall to fill the gap where the heater was formerly placed. She noted there were an additional 9 tiles in the kitchen area which required labour and materials to be provided.
- 17 Ms Wood pointed out that the expert report provided by the respondents had valued the agreed variations at a sum of \$2,963.33 including a builder's margin and that any recovery by the applicant should be limited to that amount.
- 18 Ms Wood argued that no claim in quantum meruit was open to the applicant in respect of the work which was clearly defined in the original quote. She argued that there was no ambiguity in the wording of the contract and applying plain and ordinary meaning of the words in English. The contract involved all work involved with stripping and preparing the kitchen, preparing walls and floors and installing the kitchen. She argued that there was no other verbal or written expressed or implied to vary the contract. No request either verbal or in writing was made by the respondents to the applicants.
- 19 On the basis of these principals it was submitted that the reasonable value of the quantum meruit claimed for works associated with the agreed variations was \$2,963.33 as outlined in the experts report.

DECISION

- 20 The application lodged by Trevor John Kelly t/a T J and M A Kelly relates to renovations that the applicant carried out for the respondents at the respondents property [***] located at [***] Winton. The applicant is seeking an order that the respondents pay the sum of \$15,321.48 plus interest and costs.
- 21 The applicant submits that in the absence of a written contract he is entitled to recover

the cost of the whole of the works on a quantum meruit basis. The claim relies on the basic quote together with an expanded scope of works which was never referred to the respondents and a calculation of hours and materials for all of the job including extras from which monies paid under the original quote have been deducted. The solicitor for the applicant submits that the respondents had agreed to an hourly rate of \$70.00 plus GST and that following discussions with the respondents the additional quotation was varied and the additional work was undertaken in accordance with the scope of works annexed to the applicant's affidavit.

- 22 The respondents submit firstly that if the value of the contract for residential building work was greater than \$20,000.00 certain requirements provided for under s. 7AAA(2) apply as well as provision for a cooling off period provided for under s. 7BA of the Act and requirements for insurance as set out in s. 92 of the Act. That section provides that a contractor who did the work is not entitled to damages or to enforce any other remedy in respect of the breach of contract committed by any other party and is not entitled to recover money in respect of that work except where the Court finds that it is just inequitable for the contractor, despite the absence of the required contractor insurance to recover money in respect of the work on a quantum meruit basis.
- 23 The contractor clearly bears the onus of persuading the Tribunal that it is just and equitable to recover on a quantum meruit basis (see *Urban Constructions (NSW) Pty Ltd v Shearer [2015] NSWCATCD 9*).
- 24 The Tribunal has considered a number of cases where the entitlement quantum meruit has arisen. In *Jason and Michelle Zammit (t/a Zammit Quality Constructions) v Soul Markunsky and Shereen Markunsky [2015] NSWCATCD 21* it found that it was just inequitable for a builder to recover monies on the basis that the builders failure to taken out insurance was the result of an oversight rather than a wilful or deliberate contravention of the provisions of the Act whereas in *Lauer v Comer (No. 2) [2016] NSWCATAP 158* the Appeal Panel in that case determined that the matter was closer to the upper end of the spectrum from inadvertent to deliberate and in that case the Appeal Panel held that it was not just inequitable for the builder to recover monies on quantum meruit.
- 25 The facts of the present case suggest that the applicant initially prepared, what could be described as, a low quotation attached to a broad scope of works. The final claim, accepting that there were variations authorised by the respondents, was more than three times the original quotation.
- 26 The basic principles arising in quantum meruit were considered by the High Court in *Lumbers v Cook [2008] 232 CLR 635* where the majority of the Court held that:
- “the doing of work or payment of money for or at the request of another, are archetypal cases in which it may be said that a person receives a benefit at the expense of another which the recipient accepts and which it would be unconscionable for the recipient to retain without payment.”
- 27 In *Lauer v Comer (No 2)* (supra) the builder submitted that tax invoices issued by the builder should be accepted as the reasonable value of the work performed. It was

submitted for the home owners that the builder had not provided any evidence to the Tribunal upon which a quantum meruit claim could be determined and that the invoice was not sufficient. Counsel for the home owners submitted that the only evidence as to reasonable value was invoices from unlicensed persons and uninsured persons or entities and based upon those submissions the Appeal Panel held that there was, in truth, no evidence upon which the Tribunal below had been able to assess the value of work performed by the builder and accordingly there was no evidence before which an assessment of the value could be determined.

- 28 In *Eddy Lau Constructions Pty Ltd v Transdevelopment Enterprise Pty Ltd (Supra)* [2004] NSWSC 272 it was held that a quantum meruit was the reasonable cost of work done and expenditure incurred with the assessment of reasonableness being undertaken by reference to the results produced and the evidence of what it would be in the course of ordinary things be necessary to outlay in order to produce those results.
- 29 The respondents submit that the applicant is not entitled to rely on a quantum meruit to establish the whole claim but rather that it is appropriate to assess the value of variations to the contract itself. The respondents rely on the expert's report of Edwards and Fraud Building Services dated 15 September 2015 where the value of the variations is assessed in the sum of \$2,963.33.
- 30 I accept that the evidence provided in that report is the only evidence provided in accordance with the principals in the Eddy Lau case and I accordingly accept that the variations referred in that report have been valued at the sum of \$2,963.33.
- 31 There are two other elements which remain to be considered and they relate to the costs over and above PC allowances for electrical and plumbing works as well as the costs relating to the installation of the cavity door. There is no material provided by the applicant which enables a reliable assessment of additional materials provided above and beyond the values applied in the respondent's expert report.
- 32 The breakdown of costs contained in annexure D to the affidavit of Mr Kelly show an additional allowance of \$149.95 for the cost of a range hood which is over and above the PC allowance. Plumbing allowances in the same schedule include an additional cost of \$928.75 above and beyond the \$500.00 PC allowance and it is in my view appropriate on the evidence to allow those increases as they have not been addressed in the report prepared by Mr Scott Edwards.
- 33 The remaining issue relates to the installation of a cavity door which was clearly a variation. Evidence provided at the hearing suggested that an allowance of \$1,260.00 should be made for labour costs along with the sum of \$136.40 for the cavity units.
- 34 When those sums are added to the variations valued in the report of Mr Edwards, the total sum payable by the respondents to the applicant is a sum of \$5,438.43 and that sum should be paid within one month of the date of these orders.

Each party is to bear their own costs in accordance to the provisions of s. 60(1) of the Act.

J A Ringrose

General Member

Civil and Administrative Tribunal of New South Wales

2 December 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 January 2017