DECISION : G J Durie : Senior Member : Consumer Trader & Tenancy Tribunal : Home Building Division. 23rd June 2005

APPLICATION

1. This matter came before me at Newcastle on 22 March 2005. At the commencement of the hearing, the Builder was represented by Mr C Doyle, a solicitor. Mr Doyle was unable tor remain for the substantive part of the hearing, and after he left, both parties were unrepresented.

2. The applications had been the subject of extensive case management by another Member. Unfortunately, that member had taken another appointment wad was unable to conduct the hearing on 22 March. Before I turn to the consideration of the evidence and the consequences of various findings of fact, it is appropriate to make some general comments.

3. The first is that the file shows a history by the Builder of non-compliance with Tribunal directions. I am unable to say whether the fault is that of the Builder or of his solicitor, but the fact remains that the history is there. In fact it continued after the hearing, with the Builder's failure to provide his written submissions in accordance with the timetable I had set. In ***Duncan v Cliftonville Estates Pty Ltd [2001] NSWSC 968 (Young CJ in Eq, 17 October 2001)*** His Honour said that directions were made by the Court and were to be complied with. He adverted to the consequences of failure. In this case, there was no injustice to the Owners in receipt of the documents, and a potential injustice to the Builder had the documents not been received. That may not be the case in other matters, and a party who does not comply with directions takes a real risk. I refer also to ***Stojanovski v Parevski*** [2004] NSWSC 1144 (Malpass M, 10 December 2004), where the Master refers to those consequences.

4. On the other hand, the Owners appear to have spent much energy, which could perhaps have been better directed towards the substantive questions in dispute, in attacking the failure to comply with directions. For example, directions were given on 9 February this year for the parties to file and serve evidence; the Owners submitted a lengthy statutory declaration, which failed to address the matters put into evidence by the Builder. Whilst there had been another failure by the Builder to have filed evidence in time, the real question before me was the extent to which the Owners were prejudiced by that failure. I refer to the several reasons given by the High Court in ***State of Queensland & Anor v JL Holdings Pty Ltd*** (1997)189 CLR 146, where great emphasis was laid upon the duty to afford fairness to both parties in the preparation and presentation of the case. The judgments refer to the balancing exercise between compliance with directions and case management on one side, and prejudice to parties on the other. In this case, there had been ample time between the late filing of documents by the Builder and the hearing before me to ensure that there was no prejudice to the Owners; they were aware of the case the Builder was asking the Tribunal to determine, and the basis for that case. They were well able to obtain and present evidence to rebut that case in the intervening period.

5. Mr Doyle had sought an adjournment of the hearing. He said that he had had a long standing engagement for the day, and was not dressed as one would expect him to be for a hearing. He had done all the appearances beforehand, and said there was no-one in his firm able to appear. He had not made any approach to see if any counsel were available to take a brief. In considering this application I had regard to the cases set out above, and also to the decision of the High Court in ***Sali v SPC*** 116 ALR 625 at 636. In the absence of any evidence as to search to ascertain the availability of counsel to appear, I declined the application.

6. Finally, I note that I endeavoured to bring the parties to a conciliated resolution of the dispute, and in the course of that was made aware of offers and counter-offers. I was made aware that it was really only the form which the settlement was to take which had prevented a resolution. It is not for me to judge the quality of the advice which prevented a settlement on sensible lines. I did advise the parties that I was not in any way bound by the information which had been given to me. I would be deciding the case on the evidence before me, and would disregard the advice as to settlement discussions.

BUILDER'S EVIDENCE

7. I considered that it was better to hear first from the Builder at the hearing. Mr Pearce gave sworn evidence, starting with his adoption of his statutory declaration of 17 January 2005. He was questioned on his evidence by the Owners.

8. He said in relation to paragraph 3 of the declaration that he had been prepared to forgo some matters on the basis of an overall resolution of the dispute. He retained his right to press items L, N and O as settlement had not been reached. He could recall seeing the statutory declarations from the Bells, but could not now recall the precise date. His declaration had been drafted by Mr Doyle from information he had provided, and he had made the declaration satisfied that it was correct. I interpolate that this is a standard procedure, and that as Mr Pearce was satisfied that the whole statement was true, I draw no adverse inference from the method adopted.

9. Mr Pearce said that he had placed the order for windows once the contract had been signed, although at this stage he could not recall the exact date. He knew that there would be a lag of 6 weeks after ordering before delivery, and that he would need the windows about 8 to 10 weeks into the job.

10. In relation to paragraph 6, he agreed that the cost of steel should have been deducted, but was not sure of the exact amount. He was unable to point to the where the cost had been eliminated.

11. As to paragraph 7, he agreed that if the amount had been included in the contract price, there should be a corresponding deduction, but as it had been taken out of the contract sum, it was still owing.

12. He was not sure exactly when he had made the claim for the variation in paragraph 9. There had been a telephone conversation concerning the finish to the driveway, and what was supplied was what had been agreed upon in that conversation. The cost of what had originally been contracted to be supplied and what was later agreed upon was about the same.

13. Mr Pearce said that he had only claimed as variations to the electrical works extra costs. There was no overlap. He agreed that there needed to be a deduction for 2 telephone points not supplied. I have no evidence as to this cost, but it must be minimal.

14. He was questioned about his use of Hudson Timber and Hardware as a supplier on the basis that other suppliers may have been cheaper. He said that overall, he obtained better prices through his supplier, and he relied upon it.

15. He gave evidence about the costs of moving hinges to the laundry doors. His evidence was that it took the time he had claimed to move them.

16. He asserted that the Owners would have known the extra costs involved, as they were developers, who had carried out similar projects in the past.

17. He relied upon the statutory declaration and its annexures for his claim for variations.

OWNERS' EVIDENCE

18. The Owners relied upon the material they had forwarded to the Tribunal. I refer in particular to the Statutory Declaration of Mr Bell made on 9 December 2004. The issue they raise is of the termination of the contract. They say that as a result of the termination, they are entitled to the costs of completion by others. In that declaration, Mr Bell makes reference to a bundle of documents forwarded to the Tribunal in February 2004, and I have taken those into account also.

19. There are clear questions raised in that evidence about the diligence of the Builder. There were discussions when progress claims were made, and the contract schedule was varied; as with the Builder's variations, there was nothing in writing signed by both parties. A dispute arose whether or not PC items could be so adjusted as there was no agreement that they formed part of the tender sum. The Builder served a Notice of Dispute on 24 February 2003, and in return the Owners served a Notice of Breach on 14 March, while the original dispute remained unresolved. There seem to have been real difficulties in the parties meeting to resolve their disputes sensibly. On 29 March, the Owners served a Notice of Termination and entered into possession.

20. After that, there were some further negotiations. Mr Bell gives what purports to be evidence as to the legal advice he, and perhaps Mr Pearce, were given. This is not a case where the giving and receiving of advice are matters in issue, and I disregard the evidence. An agreement was drafted by Mr Bell, but was not executed. Despite this, Mr Pearce returned to the site and carried out some additional works. The basis of his so doing is far from clear. Mr Bell sets out his understanding of the basis on p5 (at about point 2) of his declaration, but that is far from clear to me. Not surprisingly, more disputes arose.

21. On Mr Pearce's behalf, his present solicitors issued a series of claims under the provisions of the *Building and Construction Industry Security of Payment Act 1999*. One of those claims resulted in an adjudication and as a part of that a finding that a finding that the contract was terminated on or about 29 March 2003.

FINDINGS

22. The contract between the parties provided a simple method for variation. The adoption of that method would have largely eliminated many of the disputes between these parties, and it would have ensured compliance with the provisions of the *Home Building Act* ("the Act") s.7. The late provision by the Builder of a series of variation notices does not get him around the requirements of the contract. They are clearly not variations in accordance within the contract, as they are not signed by the Owners. That is not the end of the matter, however. A failure by the parties to follow the contract procedures will not mean that the Builder is not entitled to remuneration for agreed variations. In this case, the failure was one by both parties. It would be unjust to deny the Builder a fair and reasonable price for work he did at the Applicants' request. In deciding what is fair and reasonable, I am able to have regard to the contract between the parties as setting out fair and reasonable rates, and also to their oral variations to that contract – see ***Renard Constructions Pty Limited v The Minister*** (1992) 26 NSWLR 234 per Meagher JA at 276E ff.

23. Mr Pearce was cross-examined extensively, but in my opinion, there was nothing which emerged in the course of that which should lead me to consider his evidence with caution; to the contrary, I considered that he was endeavouring to recall events to the best he was able. He may not have been able to recall precise dates, but that does not cause me to doubt his reliability. In fact, his honestly stating this inability, but then placing an inexact time by reference to other events struck me as supporting his credibility overall. Further, in the course of his cross-examination, the Builder made several admissions against his interest. These related to admissions that there should be some deductions against the cost of variations for the cost of the work originally contracted to be performed. The fact that the Builder made these admissions goes to enhance his credibility also.

24. Overall, I accept Mr Pearce's account of the various conversations with the Owners going to variations. Firstly, there are the matters referred to above. Next, and most importantly, I am satisfied that the Owners knew of the variations whilst they were being implemented. If they did not accept them, that was the time to raise objections.

The Owners did not raise any. Finally, one must ask why the Builder would carry out the variations were they not at the request of the Owners. The commonsense answer is that he carried them out because Mr Bell asked him to.

25. Accordingly, I find that the variations were at the request of the Owners and that subject to some minor matters which require adjustment, the Builder is entitled to be paid for them. As the variations were not in writing, the Builder must rely upon a quantum meruit, and is entitled to do so – see ***Pavey & Matthews Pty Limited v Paul*** (1987) 162 CLR 221. The variations claimed are consistent with the rates charged for works under the contract, and I consider that, subject to the minor matters below, the Builder is entitled to the sums claimed. While the Builder was cross-examined as to possible purchases at a lower price from another supplier, there was no real evidence that items purchased for this job could have been obtained from another supplier more cheaply; further, there is the evidence from Mr Pearce that overall he got best prices from his supplier. I do not know what prices Mr Pearce could have obtained were he to have split his purchases between suppliers; they may well have increased overall. I find that the use by Mr Pearce of his supplier was reasonable and that the prices he obtained were in the context also reasonable.

26. I now turn to the question of the termination of the contract. The Builder's submissions refer to the lack of grounds which the Owners had to terminate, and to their being themselves in default. There may well be some substance in those arguments, but the facts before me lead to another conclusion in this case.

27. There has been a series of cases in the Supreme Court and the Court of Appeal concerning adjudications under the provisions of the *Building and Construction Industry Security of Payment Act 1999*. It may well be that by virtue of the provisions of s.7 (2) (b) of that Act, the determination was outside the jurisdiction of the adjudicator. For the purposes of this decision, I do not need to discuss those cases in any detail, but my understanding of their effect in relation to this case is that this Tribunal has no power to oversee an adjudication, let alone set one aside. Until it is set aside, I consider that I must regard it as valid.

28. The adjudicator does not specify precisely how the contract was terminated. The only event occurring on or about 29 March which could give rise to a termination of the contract is the Owners' Notice of that date. Accordingly, I proceed upon the basis that the termination by the Owners' Notice of Breach of 29 March 2003 was valid. The consequence of that is that the provisions of Clause 36 of the Contract come into play. While the Builder did do further work after that date, the basis for his so doing is far from clear. The evidence from the Owners is that the Builder returned almost on a casual basis to attend to outstanding matters. There was no contradictory evidence from the Builder. On that basis I accept the Owners' evidence and find that the work done after 29 March 2003 was not done under the original contract. Again, I consider that ***Renard*** permits me to have regard to the contract agreement in determining just what was a reasonable charge between these parties, even after the formal contract has come to an end. Any amount which may be due to the Builder is taken into account in the calculations set out below.

29. The Builder served a series of notices claiming extensions of time. Claims for extensions are dealt with in Clause 9 of the Contract. The Builder is entitled to a reasonable extension of time; to claim an extension, the Builder is to give a written claim within 10 working days after becoming aware of both the cause of the delay and its extent. The claims before me are all dated in March 2003, and thus after the disputes first arose. There is no evidence before me as to when the Builder became aware of the 2 matters referred to in Clause 9.2. In my opinion, the burden of adducing that evidence lies fairly and squarely upon the Builder, regardless of the overall burden of proof in a case; at least the second of the matters is one peculiarly within his knowledge. The purpose of the Clause is clear – it is to have claims made shortly after the event giving rise to them, so that any disputes can be resolved quickly when knowledge of the matters said to give rise to the claim are fresh in the minds of the parties. That is why Clause 9.3 extends time unless the Owner within a limited period disputes the claim. Accordingly, I find that the Builder did not validly claim extensions of time, and that the original times fixed under the contract apply. From this it flows that the Owners are entitled to damages for delay in completion.

30. I set out in table form the amounts I allow in favour of the Builder on his claim for variations. I accept the Builder's evidence that certain of the items were not pressed in earlier discussions purely as a negotiating matter. I otherwise accept his evidence in relation to the variations. There were assertions by the Owners that the sums were excessive, but those assertions were either denied by Mr Pearce in his cross-examination when they were put to him or they were not backed by any evidence from a quantity surveyor, or other person qualified to give such evidence. In determining what is the fair amount to allow to the Builder, I have applied the principle referred to above in ***Renard***, and had close regard to what the contract would have allowed. I also consider it reasonable for the Builder to have continued with his supplier, rather than to shop around on each and every item. After all, a builder is not proceeding on a one-off basis; a builder needs to establish a relationship with a supplier to ensure availability of materials and credit facilities over a period of operation.

Item	**Allowance**
Sliding door unit	4,911.72
Carport posts	3,262.80
Soffit lining	2,692.80
Handrail variations	2,084.71
Pergola alterations	486.32

Glass blocks	556.80
Electrical extras	4,700.00
Pest work	2,026.97
Moulding profile change	2,432.42
Changed entry doors	3,743.56
Laundry doors	231.00
Carport roof	415.80
Lower ceilings	545.08
Stormwater alterations	2.059.20
Total	**$30,149.18**

I have deducted approximately $50.00m from the claim for the electrical work because of the concession made by Mr Pearce in cross-examination that 2 telephone points were not installed. Although the Owners gained some other ground in relation to possible duplication in other areas, there was a real lack of evidence upon which I could make a decision that there was in fact both duplication and the amount of that duplication.

31. The effect of these findings is that there will be a finding in favour of the Builder on his claim for debt. To the amount of the outstanding progress payments is to be added the amount allowed for variations; from that is to be deducted the sum for PC items. That deduction flows from a prior decision of the Tribunal that the contract sum included PC items. As these matters were not covered in the evidence, it is appropriate that the parties be given the opportunity to reach agreement on the proper deductions to be made.

32. The Contract has provision for liquidated damages in Clause 30. The amount stated in Item 13 of Schedule 1 is $110.00 per working day. I have found that the Builder is not entitled to the extensions of time claimed, as the provisions of the contract were not complied with. There is nothing before me to suggest that the contract provision is a penalty and not a genuine pre-estimate of the losses of the Owners should the contract time be exceeded.

33. The evidence from Mr Bell (in his Statutory Declaration of 9 December 2004) is that the date for completion was 14 January 2003. In reaching that date, he says that he had regard to the provisions if Item 12 of Schedule 1, to which he added 3 rain days and 4 public holidays. Later in that declaration, he sys that practical completion was achieved on 17 June 2003. He goes on to calculate that there was an overrun of 107 working days. Once I reject the submission of the Builder that time was validly extended by the late claims, there is no evidence from him to dispute the calculations made by the Owners. There will therefore be an allowance in favour of the Owners for $11,770.00 for damages for late completion.

34. In the same Statutory Declaration, Mr Bell gives evidence that the amount owing to Mr Pearce by reference to Clause 36 of the Contract is $2,647.52. He refers to documents 37 and 38 in the Owners' bundle as support for this claim. In his Statutory Declaration, Mr Pearce gives evidence that the sum of $1,737.26 paid to Port Stephens Aluminium has already been allowed to the Owners in the overall calculations in his Amended Cross Claim. My own mathematical calculations show that to be the case. It is for that reason that I included it in the variation calculations above. It would double dip in favour of the Builder were I to allow this in addition to the Owners' figure. There is no other evidence from the Builder which goes to this issue.

ORDERS

35. The effect of these findings is that the Owners owe the Builder $41,401.24 for variations and other payments. The Builder owes the Owners $11,770.00 for delay. There must be allowance for the amount owing under Clause 36 of the Contract; there must also be allowance for the PC items in accordance with the earlier decision of the Tribunal. As these matters were not the subject of evidence or argument before me, it would be improper for me to consider them in these reasons. There should also be an interest calculation to the final figure by virtue of Clause 16 of the Contract, to be calculated in accordance with Item 10 of Schedule 1. I leave these outstanding calculations to the parties. Should they be unable to agree, they have leave to seek a further short hearing for resolution of these issues.

ORDERS : The Tribunal, in relation to the matters heard and argued before it on 22 March 2005:

1. On HB 03/52669 finds that the Respondent owes the Applicants $11,770.00;
2. On HB04/09980 finds that the Respondents owe the Applicant $30,149.18; and therefore;
3. Directs that the parties now agree the final amounts owing from one party to the other to give effect to these reasons in relation to interest and the sums owing both pursuant to Clause 36 of the Contract, and flowing from the previous reasons of the Tribunal in relation to the inclusion of PC items in the contract sum, together with any sum owing for unpaid progress claims;
4. The Tribunal further gives the parties leave to seek a further hearing date in the event that they are unable to agree upon the overall sum to give effect to these reasons;