



CONSTRUCTION LAW UPDATE NO. 702

No contract – no payment?

Introduction

In January 2007 the Full Court of the Supreme Court of South Australia handed down a decision in relation to payment for building work performed in the absence of a building contract: *W Cook Builders Pty Ltd (In liq) v Lumbers & Ors* (30 January 2007, unreported).

The land owners, Matthew Lumbers and Warwick Lumbers, agreed with W Cook & Sons Pty Ltd to build a house of unusual and complex design. W Cook & Sons was specifically selected by Warwick Lumbers due to its reputation and competence, and the business relationship between Lumbers and a senior executive of the Cook group of companies. No written contract was signed. Without telling the Lumbers, W Cook & Sons arranged to have the work performed by a subsidiary company, W Cook Builders Pty Ltd ("**the Builder**") for internal administrative reasons. The Builder did not hold a building licence. Both the Builder and W Cook & Sons shared common staff and a common bank account. The arrangements with the Lumbers were informal due to the high degree of trust Warwick Lumbers placed in W Cook & Sons and its management; when the Builder required payment its senior executive would make a verbal request and the funds were transferred by Lumbers. No written invoices were issued.

The Lumbers made total payments of about \$420,000. After the Builder went into liquidation, the liquidator found that the Lumbers had not been asked by the Builder to pay the full cost of the house; an amount of \$261,715 remained unpaid. The Builder, through the liquidator, sued the Lumbers for the balance of the construction costs. At the trial, Warwick Lumbers said he would never have approved the assignment of the building contract from his selected builder, W Cook & Sons, to the Builder as he had selected W Cook & Son because of their longstanding reputation.

Quantum meruit claim

A *quantum meruit* claim is a claim to be paid fair value for the work undertaken where no contractual right to payment exists. As there was no contract

between the Lumbers and the Builder, the Builder argued that it should be paid for its work on a *quantum meruit* basis. The Builder said that it would be unconscionable for the Lumbers to receive and retain the benefit of having a home built without paying for it. The Builder said that the Lumbers had been unjustly enriched at the Builder's expense and the Builder was, therefore, entitled to recover in *quantum meruit* for the goods and services that were supplied at the Builder's expense.

The impact of the Builder being unlicensed

The Lumbers said that the Builder was not entitled to any payment at all for the works because section 39 of the *Builders Licensing Act 1986* (SA) precludes the entitlement of an unlicensed person to any payment for building work unless the person's failure to be licensed resulted from inadvertence.

There was evidence that the failure to hold a licence was not inadvertent. The Supreme Court held that section 39 of the *Builders Licensing Act* only disallows a claim to a contractual sum on the part of an unlicensed builder. That is, an unlicensed builder cannot sue for any contract sum. However, it does not preclude a claim by a builder on a *quantum meruit* basis for work that has been completed in the absence of a contract.

Court's views on *Quantum Meruit*

The Court made some observations about *quantum meruit* and unjust enrichment claims:

- *Quantum meruit* and unjust enrichment claims may only be brought by a builder where, for whatever reason, there is no valid contract in place – where there is a contract in place, it is the terms of the contract which will govern what monies the builder is entitled to and a *quantum meruit* claim will not be permitted.

The Court said that there are 3 key elements to be proved before an unjust enrichment claim can succeed in relation to a construction contract:

- the home owner must receive a benefit. Historically, it has been said that the benefit must be requested by the owner, or at least that the owner acquiesced in the works being performed in circumstances where a reasonable person would have realised that the builder expected to be paid. In this instance, Lumbers said that he had not asked the Builder to do the work and would not have accepted the house if it had known that the Builder was performing the work. Lumbers had asked W Cook & Sons to do the work. The Court said this was not an obstacle to a *quantum meruit* claim where an owner receives an "incontrovertible" benefit; that is, a benefit that no reasonable person could deny. The Court said that the Lumbers had received such a benefit by having the house built by the Builder;
- the benefit must be received at the builder's expense;
- it must be shown that it would be unjust if the builder were not remunerated – that is, the builder must establish that it would be unconscionable for the owner to retain the benefit.

The Court's Findings

The Court held that the Lumbers were obliged to make payment to the Builder on the principles of *quantum meruit* and unjust enrichment. The Builder incurred actual expenses from which the Lumbers benefited. The services provided were with the knowledge of the Lumbers and they benefited at the expense of the Builder. The Lumbers agreed to the work being carried out and by moving in to the house accepted the benefit. The Lumbers knew that the services were not being provided gratuitously.

The fact that Warwick Lumbers said he would not have accepted the benefit if he had known it was to be the Builder doing the work was found by the Court to be irrelevant. There was no suggestion that there was any difference in the quality of the construction of the house as a consequence of it having been built by the Builder rather than by W Cook & Sons. The failure on the part of the Builder to have the necessary insurance did not have any adverse effect on the Lumbers.

Conclusion

Clearly, it is preferable to have a binding written contract in place for a building or engineering project. If such a contract is in place, it alone will govern the terms upon which the builder or contractor is entitled to be paid.

However, occasionally for various reasons there may be a failure to have a binding contract in place. In such circumstances, a builder or contractor may be able to recover from the owner under the principles of unjust enrichment and *quantum meruit*. Claims in *quantum meruit* are not straightforward. The builder will need to prove that the works took place on the instruction of the owner, or with the owner's knowledge and consent, or that the benefit received by the owner was incontrovertible and in circumstances where the owner would have realised the builder intended to receive payment. If the owner can show that it was reasonable for them to believe that the builder was providing the services gratuitously, the builder will not be able to recover.

In addition, even if a builder is able to recover on a *quantum meruit* basis, it will only recover what is a "fair" value for the works – which may be considerably less than a contracted and agreed price.

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