Nikolic (Damien & Giorgio) v Oladaily P/L ; Tri Vo ; Hahn Vo [2007] Adj.L.R. 09/21

Court of Appeal, Supreme Court New South Wales before Mason P; Campbell JA; Handley AJA. 21st September 2007

JUDGMENT : MASON P:

1 The appellants claim the cost of supplying design and building services to the first respondent ("the company") a company managed by Mr and Mrs Vo, the second and third respondents.

2 In June 1999 Mr and Mrs Vo retained the appellants to undertake work at the Crystal Palace, a function centre owned by the company at Canley Heights.

3 The work was done to the satisfaction of the respondents. In other words, there was no dispute at trial that the works contracted for were supplied, nor about their quality.

4 The only dispute relates to price. The respondents say that they paid what was due.

5 The trial judge, Gibb DCJ, found for the respondents. Her Honour found that there was a partly written, partly oral agreement to the effect of a fixed-price contract to do the work for $690,000 less the reasonable cost of particular items that were excluded in negotiations before the deal was struck on 7 June 1999. That cost was later quantified by the appellants to the satisfaction of the respondents. There were also some undisputed post-contractual "variations" that have been paid for, apparently to the tune of $78,000 (CA Tr p80).

6 It is common ground that, with the possible exception of the cost of the design work apparently done by employees of the appellants, the work done and materials supplied came from persons or entities other than the appellants. The appellants did not establish that they became liable to pay these third parties for the work and materials (Red 58-9, 60L). As will appear, this is one of the fatal gaps in their alternative restitutionary claim.

7 It is also common ground that the value of the work and materials provided to the company was in the vicinity of $1m, a sum considerably higher than the respondents' $690,000 "budget" notified to the appellants that became (according to the respondents, but not the appellants) the basis of a fixed price contract.

8 The appellants claim the higher sum, or as much of it as they can prove, on three alternative juridical bases:

1. as an implied term of an express contract that the appellants would do *"the work"* and charge reasonably for it;
2. under a restitutionary cause of action; or
3. as damages stemming from breaches of s42 of the **Trade Practices Act 1974 (Cth)** (alternatively the principles of estoppel) in relation to representations made by Mr Vo while the work was being supplied.

The claim in contract

9 The contractual case was pleaded by the appellants in the following terms:

*3. On or about 3rd June, 1999 pursuant to an agreement with the Defendants, the Plaintiffs agreed to undertake and complete certain works relating to the construction of a function and wedding reception centre on behalf of the Defendants at the Crystal Palace (**"the Agreement"**).*

3A. It was a term of the Agreement that the Defendants would pay a reasonable sum for any building works, including demolition work, design services, labour and materials, provided by the Plaintiffs at the Crystal Palace.

4A. Pursuant to the Agreement, between on or about 3rd June, 1999 and on or about 22nd October, 1999 the Plaintiffs provided to the Defendants various building works, including demolition work, design services, labour and materials, in refurbishing and renovating the Crystal Palace.

4B. A reasonable sum for the various building works, including demolition work, design services, labour and material provided by the Plaintiffs is ~~$963,149.55.~~ $944.362.24.

10 The respondents' pleaded response was:

8. In answer to paragraph 3 of the Further Amended Ordinary Statement of Claim the defendants say:

(a) The defendants admit the allegations made in paragraph 3 of the Further Amended Ordinary Statement of Claim but deny the agreement was on the terms alleged by the Plaintiffs.

(b) The defendants say the agreement was partly oral and partly in writing. The writing consisted of: 25 May 1999 concept plan, sketch perspectives and a quotation for $690,000 given by Damien Nikolic to the first defendant on the letterhead of a firm called CDG Construction Design Group. The oral was discussions between the Vo's and Damien Nikolic as set out in inter alia in Ex 13 para 15. This amount was reduced by items of building work not required by the first defendant ($134,000) or items of building work undertaken by the first defendant or its contractors.

(c) The defendants say there were variations to that agreement Variations as detailed statement evidence of Tri Minh at a cost of $25,865 and variation of construction of a kitchen wall at a cost of $15,000.

Paragraphs 3A, 4A and 4B of the statement of claim were denied.

11 Most of the judge's findings proceeded from documentary evidence or evidence that was common ground. There were some exceptions, the most significant being the rejection of the evidence of Ms Habibeh to the effect that she gave a warning on 9 June that was, so it was contended, sufficient to put the respondents on notice that the price would depend on actual cost and that the actual cost was likely to be in the vicinity of $1million. Her Honour did not accept this evidence and gave acceptable reasons for rejecting it (Red 74-5).

12 The judge also made findings accepting the evidence of Mr and Mrs Vo as to important conversations on 7 and 9 June. These were based in part upon preference of the oral testimony of one group of witnesses over another. Her Honour's careful reasons embody many explanations of her credibility findings, including reference to documentary matters destructive of the appellants' case (see Red 32C-K, 34-35 (referring to the invoices), 36M, 48G, 61C, 61T (referring to an implausible attempt to explain away the Quotation), 63C, 68Q, 69H, 75D-M, 76S).

13 The judge also resolved in the respondents' favour a hard-fought issue about whether the design as it stood no later than 10 June entailed the demolition of certain walls (see Red 48D-H).

14 The challenges to these credibility-based findings cannot succeed given the advantages enjoyed by the trial judge compared to this Court.

15 The critical events occurred in June 1999; the dispute erupted at the end of 1999; proceedings were commenced in 2001; and the trial took place in May 2006. There was inevitably a slide in the capacity of witnesses to recall the details of their largely oral communications for example, discussions spanning several hours have been captured in a couple of pages of an affidavit. Additionally, English is not the first language of the three main actors, Mr Nikolich and Mr and Mrs Vo (Red 31-2). These circumstances explain why it would be fallacious to conclude that what was recalled represents the totality of the discussions about the scope of the work to be done. They also explain the need for caution in an appeal court rejecting the detailed findings of the judge.

16 Determining whether the communications and conduct evidenced a contract and, if so, what were its terms is a matter to be determined according to the objectivity principle discussed in ***Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*** (2004) 219 CLR 165 at 179[40].

17 The parties were agreed that the court could examine dealings occurring after 3rd June 1999 to the extent that this might cast useful light upon the issues already identified (see ***Mears v Safecar Security Ltd*** [1983] QB 54 at 77; ***Sussan Corporation (Aust) Pty Ltd v A P Kenyon Pty Ltd*** (1997) 8 BPR [15,411] at p15,413; Cross R, Heydon J D, Byrne D M, **Cross on Evidence**, 4th Australian ed, Sydney Butterworths, 1991- at [39290]). It is plain that, at trial, the parties fully explored the events surrounding the dealings that took place throughout June 1999 and they did so in a context where the respondents' exclusive and the appellants' primary position was that the parties had reached an express agreement in early June.

18 Her Honour noted that the present case bore similarities with ***Film Bars Pty Ltd v Pacific Film Laboratories Pty Ltd*** (1979) 1 BPR 9251 in that (Red 35C):

"The plaintiffs, who deny the existence of a contract for a fixed price, asserted just that fact on numerous occasions, including in correspondence to the defendants.

Indeed, until 31 January 2000, all correspondence in evidence emanating from the plaintiffs referred in various ways to a contract with a fixed price and relevant variation."

19 As will emerge, the judge found that the parties reached a concluded agreement on 7 June 1999, a few days later than the date pleaded. Her Honour found that it was a fixed price contract with certain qualifications. She therefore rejected the appellants' case that it was a "do and charge" contract.

20 There was no evidence that anything was said about the contract being a "do and charge" or a "reasonable charge" agreement. Accordingly, there could be no finding of an express term to that effect. The appellants nevertheless submit that a term to this effect should be implied.

21 Mr and Mrs Vo decided in about April 1999 to open a wedding reception centre at the premises belonging to their company. The existing centre needed to be upgraded and decorated to include new ceiling, layout, flooring, toilet fittings, lights, carpet, foyer and kitchen. No structural work was contemplated, but the respondents wanted to be able to divide the reception centre so that two functions could be held concurrently. The respondents' initial budget was $500,000.

22 The appellants were recommended by a builder, Mr Carioti.

23 The parties first met on about 20 May 1999. Mr Damien Nikolic and his designers Ms Habibeh and Mr Mangila were present. So too were Mr and Mrs Vo and Mr Carioti. The meeting lasted about two hours and there was extensive discussion about the details of the work (see Blue 26-30). The respondents provided a copy of a plan prepared in 1988 by Mr Bello that was useful in disclosing some dimensions.

24 Neither side gave much evidence as to the details of what was discussed at the first meeting. However, between 20 and 25 May, Ms Habibeh and Mr Mangila prepared what came to be known as "the 25 May floor plan" (Drawing No 1858-01, Blue 393). Ms Habibeh described it as a "concept plan". This Plan provided only limited detail, well short of that required to undertake any works (Red 52Q). The appellants costed the work contemplated by this Plan (unamended) at approximately $1million.

25 At some stage Mr and Mrs Vo indicated that the job had to be finished by 4 September because a reception had been booked for that date.

26 The 25 May floor plan and an "Asian perspective" sketch prepared by the designers were presented to Mr and Mrs Vo by Mr Damien Nikolic on 1 June 1999. The respondents indicated general approval of the floor plan while rejecting the proposed "Asian perspective". Cost was discussed. The Vos told Mr Nikolich that $1million was too much and that they had a budget of $690,000 including the design work.

27 Mr Nikolic returned to his office and instructed his designers that the concept would have to be redesigned because *"They have a budget of $690,000. Leave as much intact as possible."*

28 The "concept" was redesigned by Ms Habibeh from an "Asian" to a "European" perspective.

29 On or about 3 June Mr Nikolic presented the Vos with a new "European" sketch and a three page document which shall be referred to as the Quotation (Blue 43-45).

30 The Vos were happy with the "European" perspective.

31 The first page of the Quotation, headed **Allowances in price**, lists 34 items of work by brief description (eg "new screen walls", "alter main entry to design", "planter boxes", "plumbing works"). No prices are assigned. Some (possibly all) of these items would have been the subject of earlier discussion, but the evidence casts little light on the specificity of that discussion.

32 Page 2 of the Quotation lists seven items of **Works by others**. This addresses major items (such as "kitchen equipment", "demolition work") to be excluded from the original concept that the appellants and their designers had earlier costed at approximately $1million. The document states on page 2: *"Total Job Cost $690,000.00"*

33 Page 3 contains various terms and conditions referable to *"our quotation"*, addressing aspects of the contract that (subject only to a legal question of certainty as to the work to be done) would have been formed upon its acceptance. The first term states that *"[s]hould our quotation meet with your approval please sign where indicated and with a 30% deposit return to the above address"*.

34 The appellants submit that, even if the Quotation had been signed on the spot, on its fair construction it was a do and charge contract, not a fixed sum contract. I cannot agree. The Quotation may have been vague as to definition of the work it covered, but its stipulations as to intention to contract (were it accepted) and as to price were perfectly clear.

35 Indeed, the conditions of the Quotation relating to acceptance and deposit support the ultimate conclusion that the parties conducted themselves on the basis that the work proposed to be done was sufficiently identified for each to commit to a fixed price agreement, subject to an adjustment with regard to the handful of items deleted by agreement (see below).

36 As will appear, the Quotation was not accepted according to its terms. But the document remained a focus for the discussions over the next few days. Nothing said in that time amounted to a departure from the basic idea of a fixed price contract represented by the form and conditions of the Quotation.

37 Her Honour found that the appellants were ready willing and able to enter into a contract with the respondents on the basis of the offer proffered in the Quotation (Red 63Q). She also found that the respondents made a counter offer that was accepted on 7 June 1999 at the time they paid a deposit of $60,000.

38 On 3 June 1999 Mr and Mrs Vo returned the Quotation to Mr Nikolic, having struck out five of the items shown on the first page (see Blue 43). The crossings out represented items that Mrs Vo did not want or which the respondents intended to do themselves (Blue 26N). The first page of Mrs Vo's copy of the Quotation also contains various questions intended to be asked of Mr Nikolic.

39 The matters struck out were discrete in nature and (along with other items) were costed by the appellants on about 6 June 1999 as follows:

New bar to rear entry	$18,000
Repair existing bar and update	$17,000
35 x 1500 diameter MDF tables and clear sealed	$13,000
600 selected chairs in colour to match carpet	$99,000
Alter and split air conditioning (if possible split) (provided existing is operational)	$50,000

This was an internal costing that was not shown to the respondents until much later.

40 There was a meeting attended by the Vos and Mr Nikolic in which the proposed amendments were negotiated in detail (see Blue 26-29) and recorded by Ms Habibeh making notes to a copy of the 25 May floor plan (Blue 92, 393).

41 As the parties moved towards contractual commitment on those lines there were elements of trust each way. The primary judge held that the appellants were experienced in both design and construction, thereby likely to adopt a robust approach to contracting and costing (Red 63). Her Honour also found (Red 69) that Mr and Mrs Vo accepted on trust Mr Damien Nikolic's costings and (as regards the matters excluded from the original 34 items) a contract price set on a formula with a variable (the price of the deductions) known only to the appellants. The judge observed: *"The defendants make no complaint about that. In these proceedings, they stand behind that decision and accept the plaintiffs' costings on their face."*

42 These findings based upon her Honour's observation of the parties in the witness box are relevant to the probabilities that the parties would have contracted as they were found to have done, both as regards their

several subjective intents and as regards the impression that their conduct during the negotiation stage is likely to have engendered in the other party.

43 Ms Habibeh was instructed to make a long list of adjustments to meet the budget estimate of $690,000 (Blue 385-7). The details are summarised at Red 65-6. During this period Mr Mangila also made a free hand sketch (Blue 396, Red 55Q).

44 The fact that certain items of work nominated in the Quotation were removed by agreement prior to the payment of the deposit is attested to by: Mr Vo's evidence (accepted by the judge); the annotations on the Quotation; Ms Habibeh's annotations on the 25 May floor plan; the evidence of Ms Habibeh and Mr Mangila about the instructions they received from Mr Nikolic on about 3 June 1999 for particular deletions to the previously discussed works; and the substantial correspondence between the agreed deletions and the credits later allowed by the appellants (see Red 67N-T).

45 On about 4 June, Mr and Mrs Vo went to the Marconi Club where, at the request of Mr Nikolic, they inspected the quality of the finish of a comparable job. Mr Nikolic had told them: *"Trust me. I am putting my reputation to this project and it will be an example of the quality for my business, something to be proud about. You should go to the Marconi Club where I finished renovations for the club.*"

46 This evidence was used to support a submission that there was a term in the contract regarding the quality of finishes. The effect of such a term was that they would be comparable to those at the Marconi Club.

47 The appellants now submit that the "Marconi Term" was so vague as to be meaningless (Orange 27-8). I do not agree, especially because the term (if such it was) related to no more than the general quality of finishes. This submission also has a self-defeating aspect in that an agreement void for uncertainty would expose the appellants to the perils of a restitutionary claim that are discussed below. I say "if such it was" in recognition of the appellants' submission that neither party is said to have put their case before the trial judge on the basis that the "Marconi Term" was a term of any agreement. If it was a term, I see no problem from an incompleteness or uncertainty point of view. If it was not, the terms that remained were sufficient to constitute an enforceable contract for reasons that I explain below.

48 On 6 June 1999 employees of the appellants created a document that costed, item by item, the 34 items of work shown on page 1 of the Quotation. These assigned a value to each item (eg "5. New screen walls $14,000.00"). There was a 35th item ("Design fees $30,000") which, when added to the 34, brought the total cost to $690,000. This was an internal working document of the appellants which was first shown to the respondents in typewritten form as an attachment to the second version of the appellants' invoice/statement dated 17 November 1999 delivered after the job was finished (see below).

49 This 6 June 1999 document formed no part of the pre-contractual communications between the parties. It is, however, significant because it shows that as early as 6 June 1999 the appellants understood enough about the work which was the subject matter of the Quotation to be able to cost it, item by item. In addition, it supports the probabilities that the appellants may have conveyed to Mr and Mrs Vo in some manner now forgotten their sense of confidence that the deleted items from the Quotation had a reasonable cost capable of ready ascertainment by a trusted contracting party. In my view, this undercuts the appellants' argument that their own understanding of the contract works was so incomplete by 7 June 1999 as to make it improbable that they would have entered into a fixed price contract by that stage. I also observe that the Quotation included items for "*new … walls*", one of the matters that the appellants now say were only clarified later in June.

50 Judge Gibb found that the parties collectively attended to the fleshing out of the content of the contractual works around this time (Red 63T). She also found that the content of the works was settled by the parties by reference to the amended list in the Quotation with the Marconi Club work being accepted as the standard for form and quality (Red 70-1). In my view, these conclusions were correct having regard to the 6 June document and the evidence that the parties considered themselves in a position to conclude the deal by 7 June (possibly 9 June, in the alternative) in the following circumstances.

51 On 7 June 1999 the respondents paid a deposit of $60,000, half by cheque and half in cash. The cash payment is acknowledged by a receipt signed by Mr Damien Nikolic. The judge found that this occurred after what she described as the defendants' counter offer raised in the course of discussion had been accepted by the plaintiffs (Red 71M). This finding involved acceptance of Mr Vo's evidence that there was the following conversation:

Damien Nikolic said: 'The cost includes the design work and management fee. I am saving you money. If you want me to do the job you must give me a deposit of $60,000. To do the job quickly I need cash payments'.

I said: "I want you to do the job at a cost of $690,000 less deductions for those items of work that are not included."

Damien Nikolic said: "I agree. I will start on the plans and drawings straightaway."

52 The primary judge held that "*the contract was settled by 7 June*" (Red 73). Specifically, she found (Red 71): !*I do find that Mr Damien Nikolic's three-page document had some contractual force. I find that it was a contractual quotation which, amended by the deletion of certain items, took the form of a counteroffer by the defendants, which was accepted by the plaintiffs, in the context of some oral agreements as to price. The oral agreement as to price included an agreement upon the contract price by way of a formula, relevantly "$690,000 less a variable (the price of the deductions)," which was a variable known only to the plaintiffs. There was a further oral component by way of agreement that there would be agreement as to variations.*"

53 There were nevertheless "*numerous details to be settled*" (Red 73). And, as often occurs, the clients closely monitored the work as it progressed, sometimes requesting changes of such materiality that there were admitted variations to the original contract.

54 Ms Habibeh undertook site measurement and inspection, spending seven hours on the project on 7 June 1999. She produced a drawing of the existing structure on 8 June 1999 (Blue 747, Red 55). As the judge observed (Red 73), this was not something that occurred casually. Indeed, Ms Habibeh had agreed in cross-examination that she went back to the site to measure it in a detailed way "*after they agreed*".

55 The appellants sub-contracted the construction work (on a do and charge basis) to Mr Spiteri through his company. He was initially engaged on 8 June (Red 77).

56 A lengthy meeting took place on 9 June attended by Mr and Mrs Vo, Mr Vo's sister and the appellants' two designers. During this meeting the Vos selected the carpet, tiles and marble effect paint from samples shown by Ms Habibeh. The judge held that it was on this occasion that Ms Habibeh made extensive notes on the 25 May floor plan, concluding that they "*relevantly fleshed out some details*" and "*relevantly confirm[ed] with some precision that which Mr Vo recalls discussing with Ms Habibeh*" (Red 74). Her Honour rejected evidence from Ms Habibeh that she flagged on that occasion that the matters under discussion were going to take the cost up to a million dollars (Red 74-5).

57 Senior counsel for the appellants would prefer to view this event as evidence that the definition of the contract work was so uncertain and/or fluid on 7 June to indicate that the parties cannot be taken to have reached a contract on 7 June, indeed even on 9 June. He nevertheless frankly conceded the possibility of a finding that the contract was formed on the later date while maintaining his submission that the price component was a "*do and charge*" basis. A third possibility is that a contract was formed on the earlier date and varied two days later.

58 None of these scenarios assist the appellants if (as the judge held) nothing was said on or before 9 June to flag the anticipated cost overrun. Each scenario involves a contract being concluded (as pleaded, apart from the date) with the striking of the bargain being evidenced by payment of a substantial deposit, by the appellants' designers promptly completing design work, execution of the demolition contract on 10 June, performance of that demolition contract by 1 July and thereafter (between 1 July and 4 September 1999) the performance of the works by the builders associated with the appellants. As will appear, the accounts submitted by the appellants in November 1999 also embody significant admissions to similar effect.

59 Ms Habibeh had no authority to make a contract on behalf of the appellants (see also Blue 389H). I see nothing improbable in Mr Nikolic allowing her to discuss design in detail two days after the fixed price contract was reached. Having regard to the way in which the parties joined issue, it was the appellants who needed to advance evidence showing that this conduct was inconsistent with an existing commitment to do the generally outlined work for a fixed price (less the reasonable cost of items deleted from the Quotation).

60 The appellants' case at trial and in this Court seldom rose beyond asserting that the contract said to have been formed was nevertheless so vague regarding scope of works as to lead to an implied term that the company would pay the reasonable cost of work on a do and charge basis.

61 On 10 June the parties signed a separate quotation document providing for demolition work to be done for $16,000. This relevantly stated (emphasis added):

> Demolition work **as required by the design**
>
> *Please Note: If this is accepted please sign and fax to me urgently* ***so that we can commence works on the 9 June 1999***.

Demolition work commenced on 10 June on the instruction of Mr Damien Nikolic (Blue 95, 166; Red 76).

62 The terms I have emphasised further undermine the appellants' submission that too little was known about the building work to make it probable that the parties would have entered into a fixed price contract by 9 June at the latest. The demolition work was completed by 1 July 1999 and paid for in full.

63 Mr Vo gave evidence that when Ms Habibeh presented a plan on about 23 June she said that it had been drawn by her in accordance with the discussions on the 25 May floor plan (Blue 95).

64 "Final plans" were produced on 28 June in time for construction work to commence on 1 July. Ms Habibeh described them as a "*more refined version*" of an earlier plan dated 23 June (Red 78), but no specific evidence was led by the appellants to flesh out the case that they now press, namely that significant developments in the design occurred between 7 and 28 June.

65 During the construction phase some further plans were prepared. The judge held that any changes in them were matters of detail, involving refinement of finish and not structural changes (Red 78. See also the detailed findings at Red 79-80, 83-86). Her Honour found that (Red 80): "*Although there were many discussions between the Vos and the designers, there were relevantly few changes – as distinct from developments and increasing levels of detail shown on the plans. And, with the exception of the revised kitchen design, which was provided to the plaintiffs rather than by them, changes after 28 June, relevantly before the start of the construction work, are not embodied in any revised or altered plans or changes in design.*"

66 The appellants submit that these findings about the limited scope of variations after 28 June 1999 miss the essential point. If, as found, the contract was formed earlier, on 7 or 9 June 1999, it needs to be shown that the work to be performed had reached sufficient contractual definition by that earlier date.

67 In my view, this submission misunderstands the thrust of the reasoning at this part of the judgment (Red 82-88). Her Honour was addressing the claims for "variations" in the appellants' invoices of November 1999. She was seeking to show why some of those items covered work falling within the scope of the fixed price contract struck on 7 June 1999. By demonstrating this, she tended to undermine the appellants' costings generally, thereby casting further doubt on the appellants' case on the central issue of whether a fixed price contract was ever struck.

68 There was considerable conflict in the evidence about the precise sum paid by the respondents during 1999. Neither side was an accurate bookkeeper. Well over half a million dollars was paid. Some was in cash, some by cheque, some in kind (see Red 81-2). The respondents' case, that they paid what was due (including agreed variations), was accepted. The appeal proceeded on the basis that this Court need not be troubled with the detailed mathematics.

69 The work was completed on 4 September 1999 approximately four hours prior to the first wedding function that took place there.

70 On 1 November 1999 Mr Damien Nikolich handed Mr Vo a five page "FINAL STATEMENT/INVOICE". The document is addressed to the company. Relevantly it reads (emphasis added):

ESTIMATED COST (**as per agreement)**		$690,000.00
Less following allowances:		
(1) Air conditioning splitting up	$ 50,000.00	
(2) New bar to rear entry	$ 18,000.00	
(3) Planter boxes	$ 4,679.00	
(4) Tables round 1500 x 35 off	$ 13,000.00	
(5) Tables 1200 x 760.67 off	$ 12,060.00	
(6) Chairs	$ 28,000.00	
(7) Rehash of existing bar	$ 9,000.00	
TOTAL CREDITS		$134,739.00
BALANCE		$555,261.00
LESS AMOUNT PAID		$414,200.00
BALANCE OUTSTANDING		$141,061.00

Plus the following variations (see attached sheets for list)

TOTAL VARIATIONS $199,899.00
BALANCE $340,970.00
Supervision Fee 12% $ 90,620.00

71 Pages 2-5 list numerous variations under the headings GENERAL VARIATIONS, CHAIRS, PAINTING, PLUMBING, ELECTRICAL, GYPROCKER, FIRE DOORS, NEON, CERAMICS, CARPET and SPECIALISED PAINTING.

72 Mr Vo's response was: "*Wow, what happened, I only owe you about $20,000 more. Under the law I should keep 5% for one year but you did good work and on time so I paid you everything.*"

Mr Nikolic replied: "*Go through it, look at all the invoices. We can do something about the supervision fee. I will reduce it down to $40,620.*"

73 Mr Nikolic then altered the document by deleting $90,620 for the supervision fee and inserting $40,620 which he then initialled. He then amended the balance to $374,000. Mr Vo asked him to leave the document with him so that he could look at it.

74 Without any intervening communications from the respondents, it seems, a fresh INVOICE/STATEMENT was issued on 17 November 1999. Relevantly it stated (emphasis added):

Estimated Cost (**as per our agreement**) dated 6th June, 1999 $690,000.00
Less the following credits, attachment (iii)
Including amounts paid by client direct to
Contractors (items 1,2,3,4,5,6,7,8,9,10,11,12,
13,14,15,16,20,21,22,23,24,25,26,29,30,32,33) $408,533.00
Balance $281,467.00
Plus the following debits, attachment (iii)
(items 7,9,11,14, 17,18,19,27,28,31,34) $241,231.00
BALANCE $522,698.00

Plus the following variations **not allowed for in original pricing …**

75 Then followed lists of variations, a claim for a *"builders margin on job cost 14%"*, acknowledgement of payments received to date and a claim for *"total now due"* of $440,609.78. Judge Gibb held that many of the "variations" were simply overrun costs (Red 83).

76 One of the attachments to this second invoice was a typewritten version of the internal costings document dated 6 June 1999.

77 Judge Gibb extracted portions of the first two invoices. She noted that there was dispute about detail, relevantly in the quantification of the moneys paid, as well as the value of the works/variations. Nevertheless, the invoices were found to be entirely consistent with the respondents' assertion that there was relevantly a fixed price contract, under which works were removed from a list on which a price was quantified (with credit given) and to which other works were added, either in substitution or by way of variation (Red 35Q). The judge was unimpressed by Mr Nikolic's endeavour to explain away the two earlier invoices. In my view she was well entitled to be. I agree that the first two invoices tend to corroborate the respondents' case as regards what was said and what was not said during the critical conversations on 7 and 9 June 1999.

78 There was a third invoice issued on 31 January 2000. Its format was consistent with the case as pleaded by the appellants and it included items for a "*builders margin*" and a "*project management fee*". As the trial judge observed, there was no discussion about these components at any stage before the issue of this invoice. Furthermore, the admissions inherent in the first two invoices could not be swept away by a belated correction in the form of a third invoice.

79 Thereafter the dispute moved to the litigation phase.

80 The trial judge recorded the plaintiffs' submission as being (Red 33):

(a) the agreement was that the defendants would pay them a reasonable sum to perform the building work, the scope of which was to be settled as the design evolved concurrently with the performance of the works; and

(b) the reasonable sum is to be derived by taking the cost to the plaintiffs of performing the work, and adding to that cost reasonable percentages to reflect the plaintiffs' overheads, project management fee and entitlement to profit.

81 In this Court, the submission was to similar effect. As senior counsel for the appellants put it (CA Tr p2): *"In other words, it's a contract to do work along these lines: the budget or estimate is $690,000, but as things unfold throughout the job the parties will agree as to what precisely will be done and it will be charged on a do and charge basis."*

82 These submissions accept that there was no express term along the lines of "*do and charge*". Indeed, there was no evidence to that effect. Neither was there any discussion about a supervision fee, something one might expect to find in a do and charge contract. In my opinion, this is more than a gap in the evidence. The silence is deafening when one turns to the probabilities in a choice between the contract as found by the trial judge and that contended for by the appellants.

83 The appellants were contending that it was both open and probable that the contract formed on or around 7 June 1999 contained an **implied** do and charge term. But the express terms of the Quotation left no room for such a case if, as held, that document (albeit modified by the deletion of some items of work nominated on page one) continued to form part of the communications that in their totality led to the formation of the contract.

84 The appellants submit that a term that work and materials would be provided on a "do and charge" basis is to be implied to give business efficacy to what, ex hypothesi, was a concluded agreement. It is at this point that they climbed onto a tightrope. In the one breath, they point to the relative paucity of direct evidence as to precise definition of the contract works, while at the same time arguing that this did not betoken that the concluded agreement was so uncertain or incomplete as to be unenforceable in a court of law. The latter alternative would have thrown them into the jaws of the hopeless restitution claim (see below).

85 The very fact that the parties signed the separate demolition contract on 9 June and that the demolition and construction work proceeded without interruption between 10 June and its satisfactory completion on about 4 September 1999 suggests that the parties recognised that a construction contract had been formed. The pleadings revealed that this was common ground, albeit that the parties litigated about the term as to price and the date of contracting was found to have been a few days later than that pleaded.

86 According to Carter J W, **Carter on Contract**, Australia Butterworths, 2002 at §04-010 (citations omitted): *"In **Meehan v Jones** [(1982) 149 CLR 571 at 589] Mason J expressed the general approach of the courts to issues of uncertainty and incompleteness in terms of the 'traditional doctrine that courts should be astute to adopt a construction which will preserve the validity of the contract'. Accordingly, when faced with a conflict between the desire, on the one hand, to avoid making such efforts to enforce an uncertain or incomplete agreement that what is enforced is something that the parties did not in fact agree to and, on the other hand, to uphold reasonable expectations of parties who believed they had a contract and to avoid the reproach of being the destroyer of bargains, the courts give primacy to the need to uphold agreements. This is particularly true of executed agreements and commercial arrangements."*

87 The appellants did not contend that the contract was void for uncertainty by reference to its failure to define the contract works with sufficient precision. Legally, such a contention would have been self-defeating because it would have destroyed the contract relied upon of its legal efficacy and, worse still, have thrown the appellants

into the fire of a restitutionary claim in a case where there was simply no evidence to show that they had performed the work or incurred the expenditure referable to the work provided by others.

88 Senior counsel for the appellants confirmed during argument (CA Tr p4) that:

- there was no appeal against the conclusion that the contract was not uncertain because of vagueness; and
- even a do and charge contract needs to have sufficient certainty about what the work is that is to be done and charged for.

89 Absent express discussion about a "*do and charge*" basis, it is the appellants who are driven to argue in favour of an implication to that effect. Their main argument proceeds from Duncan W I N, **Hudson's Building and Engineering Contracts**, 11th ed, London, Sweet & Maxwell, 1995 at [3.045] which states that a "*cost plus*", "*do and change*" or "*reasonable sum contract*" is more commonly used (rather than a fixed price contract) where: "*the extent and nature of the work is not known with sufficient precision at the time of contracting to enable prices to be obtained.*"

90 The basic problem with this part of the appellants' case is that they have little more than assertion to show that the extent and nature of the work was not known with **sufficient** precision as at early June 1999. There was no evidence that they had insufficient information about the works to make the offer embodied in the Quotation. Their conduct belies this assertion. In the final analysis, it is the parties to a contract, not the court, who decide what terms are essential before an agreement may be concluded (***Ormwave Pty Ltd v Smith*** [2007] NSWCA 210 at [86]-[88]).

91 As counsel for the respondents pointed out in submissions, virtually no evidence was led by the appellants to show the materiality or cost impact of any matters discussed between 9 June and 28 June when the "final plans" were produced by the appellants.

92 It was undoubtedly the case that the detail of the work to be performed acquired greater precision after 7 June. There were further plans, including some drawn after 28 June. There were further meetings with the Vos at which what may neutrally be termed the refinements were discussed and agreed upon. Some of these entailed variations for which the respondents agreed to pay extra. As to the residue, their legal character depends in the final analysis upon whether a contract had been formed on about 7 June (as found) and/or upon the extent to which the relevant "refinement" amounted to a substantial departure from that which had been formulated or agreed upon in early June.

93 The submission that the trial judge failed to have regard to the improbability that the appellants would have entered into a fixed price contract in early June 1999 is also essentially circular. There is an absence of hard evidence to show that so little had been discussed as to preclude the appellants, as experienced designers, from making a fixed price commitment to secure a deal that the trusting respondents were anxious to close.

94 The trial judge was correct to seek out the term as to price by reference (primarily) to the express communications between the parties. It is clear, indeed undisputed, that Mr and Mrs Vo stipulated a "budget" of $690,000. This was the sum stipulated in the Quotation as the "Total Job Cost". The parties subsequently, but prior to payment of the deposit, agreed to the deletion of particular items on page 1 of that Quotation.

95 This situation did not lock the appellants into a straitjacket. It was open to them to indicate that a particular item of work was outside the work covered by the fixed price contract. In fact, this occurred as regards the parties' agreement that the respondents would themselves attend to the work in the kitchen as well as what became true "variations" which were paid for by the company. These items were flagged in particular discussions. Outside these matters the parties should be taken to have proceeded on the basis of trusting each other to be reasonable in matters of detail such as finishes, carpet, colour etc. The job did not involve structural alterations.

96 In my view, the respondents have made good their defence of the findings about the fixed sum contract.

The restitutionary claim

97 As regards the claim in restitution, there is no evidence that the appellants paid for the work done or materials provided for which they are suing the company. Such evidence as there is points to the work having been performed by third parties and paid for by a company associated with the appellants, but not the appellants themselves. No evidence was led to show that these third parties ever looked to the appellants for recompense.

98 I have not overlooked the design work done in the early stages by the appellants' employees, Ms Habibeh and Mr Mangila. But no attempt was made to establish the cost of this work to the appellants. In any event, that cost would have been recouped from the respondents out of the substantial monies paid by the respondents before the dispute erupted.

99 The appellants' alternative restitutionary claim was self-defeating because practically all the expense incurred in performing the work supplied to the company was incurred by an entity other than the appellants. Furthermore, the payments made by the respondents (totalling more than half a million dollars) were never treated by the appellants as received by them, according to their taxation returns (Red 59).

100 This point was taken at trial, but no application was made for the appellants' company to be joined as a plaintiff. (It is not known whether the problem was due to evidentiary or **Limitation Act 1969** concerns, or whether it was too late in the trial for course to be changed. The significant fact is that it was not.) An application to amend the pleadings was made and rejected during the hearing of the appeal.

101 A second difficulty with the restitutionary claim stems from the principle that a claim of this nature cannot be made where a valid contract covers the field. The statement of claim recognised this principle from the outset (Red 4T). This subsidiarity doctrine means that the contractual allocation of risk cannot be subverted by alleging a cause of action stemming from unjust enrichment covering the same conduct (see generally ***Roxborough v Rothmans of Pall Mall Australia Ltd*** (2001) 208 CLR 516 at 545[75], 577[166]; ***Coshott v Lenin*** [2007] NSWCA 153). As to its application in the context of a building contract, see ***Horton v Jones (No 2)*** (1939) 39 SR(NSW) 305 at 319; ***Trimis v Mina*** (1999) 16 BCL 288; [1999] NSWCA 140.)

102 Senior counsel for the appellants accepted that restitution would only lie if it were found that there had never been any contract, either because the parties never intended to contract or because the content of their intended agreement was so uncertain as to be void. Since a contract has been found to exist, the restitutionary claim fails on this second basis as well.

The trade practices and estoppel claims

103 The nub of the trade practices claim was that the respondents had engaged in misleading or deceptive conduct in representing that they would pay for work performed and in not honouring such representations.

104 The appellants pointed to a series of discussions, most of them post-contractual, in which the respondents were said to have given instructions to perform some segment of the work (see judgment at Red 91-2). These instructions were said to entail express or implied representations as to payment.

105 The primary judge did not find it necessary to decide whether or not the conversations had taken place as alleged by the appellants. Taken at its highest, the evidence failed to show any basis on the facts for a claim outside contract. Some of the conversations relate to what were found to be genuine post-contractual variations for which additional payment was found to have been made. As to the rest, the discussions took place in the context of what had been found to have been a fixed price contract.

106 The trial judge correctly rejected the claim for misrepresentation on the basis that that which was promised (payment) was made in full by the respondents upon the basis agreed between the parties (Red 92).

107 An alternative claim based upon "*estoppel*" was also correctly rejected. There was no evidence of a discussion about payment on a "*reasonable sum*" basis, as pleaded. And, as with the misrepresentation claim, the respondents' promises of payment were honoured having regard to their contractual obligations.

108 The appeal should be dismissed with costs.

109 **CAMPBELL JA:** I agree with Mason P.

110 **HANDLEY AJA:** I agree with Mason P.

Appellants: C R C Newlinds SC/ P A Horvath instructed by John J Puleo & Company (Castle Hill)
Respondents: M Southwick instructed by Murphy's Lawyers Civil (Surry Hills)