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TRIMIS & ANOR V MINA [1999] NSWCA 140

Supreme Court of New South Wales Court of Appeal – 2 May 1999

FACTS

Mr. and Mrs Trimis ('Trimis') owned land at Bankstown which they wished to develop. Plans for cluster houses were approved and Mr. Mina ('Mina'), the builder, quoted for the remaining work. The parties executed a Contract.

It became apparent over time that there had been some departures from the plans, in particular, the upstairs bedroom was smaller than shown. As a result, relations soured, and a dispute arose as to payment for the work done. Trimis then excluded Mina from the site and took the keys to the building, leaving Mina's materials, plans and equipment on the site and effectively repudiating the Contract.

Mina claimed that during the contract, Trimis had orally agreed to variations but Trimis claimed that the agreements had been made on the basis that there would be no additional costs. Mina sued for variations to the contract.

Trimis submitted that it was not open to Mina to sue off or outside the contract in restitution with respect to the variations not evidenced in writing. Alternatively, Trimis submitted that there should have been no award for the variations because the fact that Trimis was aware of the work being carried out was not sufficient to sustain the restitutionary claim. What was lacking, Trimis contended, was a finding that the owners had agreed to pay extra for the work.

ISSUE

Whether Mina was entitled to the variations on quantum meruit or restitutionary basis.

FINDING

The Court found that Trimis had not agreed to pay extra for the variations, that the variations were not costlier to Mina thancontractual performance, and that Trimis had not received a benefit additional in value to that contracted for.

Further, the principles stemming from Liebe v Molloy, had not been satisfied, namely that (i) that the Trimis had actual knowledge of the extra works as they were being done, (ii) knew that they were outside the contract and (iii) knew that Mina expected to be paid for them as extras, then a contract to pay for them could properly be implied.

Accordingly, the Court found that Mina had not established an express or implied contract, nor a quantum meruit or restitutionary basis to pay for the variations.

QUOTE

Mason P held at paragraph 56:

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...a contract for work may not preclude a claim for additional work, under an implied contract or on a restitutio nary basis, where the additional work is done "outside the contract" and in circumstances where the law would recognize a contract to pay for it or impose a restitutio nary obligation to similar effect. But merely because the work differs from that contracted for will not suffice, even if delivered to the plaintiff or performed upon the plaintiff's land... Exactly what extra must be demonstrated before a restitutio nary claim will lie is a matter of some controversy.

Different positions are adopted depending on how essential one regards the need for the defendant's "benefit" to be established as an element in a restitutio nary cause of action."

IMPACT

This case confirms the proposition that where a principal has actual knowledge of the additional or extra works, knows that they are outside the contract and knows that the builder is expecting to be paid for the works as extras to the contract, then a builder may be entitled to claim on a quantum meruit or restitutionary basis.

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