

CITATION: *Cameron Owen Linnell t/a Easy Glass Services and Mary Linnell v Raymond Sweeten* [2006] NTMC 062

PARTIES: CAMERON OWEN LINNELL t/a EASY  
GLASS SERVICES

AND

MARY LINNELL

v

RAYMOND SWEETEN

TITLE OF COURT: LOCAL COURT (NT)

JURISDICTION: Small Claims

FILE NO(s): 20513698

DELIVERED ON: 5 September 2006

DELIVERED AT: DARWIN

HEARING DATE(s): 13 March 2006

DECISION OF: D LOADMAN, SM

**CATCHWORDS:**

ONUS OF PROOF ON PLAINTIFF – FAILURE TO DISCHARGE ONUS

*REPRESENTATION:*

*Counsel:*

Plaintiff: Self represented  
Defendant: J Lewis

*Solicitors:*

Plaintiff: Nil  
Defendant: Nil

Judgment category classification: B  
Judgment ID number: [2006] NTMC 062  
Number of paragraphs: 30

IN THE LOCAL COURT  
AT DARWIN IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. 20513698

BETWEEN:

**CAMERON OWEN LINNELL & MARY  
LINNELL**  
Plaintiffs

AND:

**RAYMOND SWEETEN**  
Defendant

DECISION

(Delivered 5 September 2006)

Mr David LOADMAN SM:

**PRELIMINARY**

1. In this action the statement of claim sets out a claim in the following terms

“The PLAINTIFF’S CLAIMS that you owe the Plaintiff the amount of \$4,599.30 a result of the plaintiff and the defendant entering into oral contracts, the particulars of which are set out below, and seeks \$4,599.30.

**PARTICULARS**

- 1 On or about the 1<sup>st</sup> October 2003, at the request of the defendant, the Plaintiff supplied to the defendant, 5 of INVISI-GARD stainless steel security doors, the cost of these goods being \$4,400.00, particulars of which the defendant has had by way of invoice number 101063, a copy of which has been attached.

2 The defendant has failed or refused to pay by the due date.

3 The Plaintiff claims: Pursuant to paragraph 1. \$4,400.00

TOTAL DEBT \$4,400.00

Filing Fee 65.00

Service Fee 124.30

(Incl 10% GST)

Business Search 10.00

**Total \$4,599.30**

2. To the above statement of claim Sweeten's defence recites an intention to defend the claim on the grounds "that I am not indebted to the plaintiff either as alleged or at all".

3. By order of 26 July 2005, order (1) made on that day by the judicial registrar was in the following terms in matter 20511526 :-

"1. That this proceeding be heard together with proceeding file number: 20513698".

On the 23<sup>rd</sup> day of August 2005 an order was made, the relevant terms of the order being as follows:-

"2. The plaintiffs to file and serve within 21 days any expert's report as to the work that needs to be done (for the cost) to make the doors compliant with pool safety laws.

3. The defendant to file and serve any expert's report as to the matters referred to in order 2 within 6 weeks or 21 days of service of the plaintiffs expert report, whichever happens later".

4. The plaintiff failed to file any expert's report as directed by the court. Acceding to the wishes of the parties the court nevertheless entered into the ventilation of the dispute between them, but with the benefit of hindsight were the matter to commence again the court would not have proceeded to have the matter ventilated prior to the plaintiff filing the report requested. Of course there is also a construction which would have required the Defendant to file the report within six weeks regardless of the Plaintiff's failure although in any logical sense it is difficult to conceive how that could have been done because the very purpose of the Defendant's obligation was to respond to the report to be filed by the Plaintiff. In the event that is water under the bridge.
5. In broad compass both claims involve five doors, providing separation of a living area from an elevated plunge pool located at 3 Bradhurst Court. Again in broad terms it is alleged that those five doors have never worked in the manner which they were designed to work.
6. Although some procedural complexity is occasioned by the action of Eve Ackermann who discontinued her discrete proceeding in file number 20511526 by notice of 24 July 2006, because of the fact that there was a Court order that both parties be heard together, this Court will simply proceed on the basis that the only claim in respect of which a decision is required is the claim as presently recited in this decision.
7. During the progress of the building Sweeten allegedly contracted on behalf of Ackermann with Mr and Mrs Linnell who are glaziers and who run a business called 'Easy Glass'. The contract was to install firstly some windows which are not the subject of any dispute. That was satisfactorily completed and paid for. The second contract was to install four doors, then expanded to five, such doors being known as swimming pool safe doors. The issue as to whether Sweeten contracted on behalf of Ackermann is now a dead issue by virtue of her discontinuing the action.

8. At T12 Eve Ackermann gave evidence that she had an oral contract with Raymond Sweeten to build the house at 3 Bradhurst Court. She assisted him and consulted with him in the preparation of the plans which entailed amongst other things the construction of a swimming pool on the verandah of the two storey residence. Using the pronoun “we” at T13 she gave evidence that she and Raymond Sweeten looked around for the required product and settled on Easy Glass Pty Ltd from whom a quote was obtained, T14.
9. That quotation exhibit P3 is addressed to Sweeten Construction to the attention of Raymond Sweeten. It does not mention Eve Ackermann at all. At T14 Eve Ackermann gave evidence that the quote that was initially for four doors at a total of \$3,520 was to increase for five doors to an amount of \$4,000. The Court immediately remarks that the endorsement of five doors totalling \$4,000 was the subject of a handwritten endorsement by Raymond Sweeten which also records “paid \$4,000” and as was subsequently given in evidence there are the initials of Raymond Sweeten. It is to be observed that this is a most unlikely negotiated result; it doesn’t bear the signature of either of the Linnells’ and omits any calculation of GST. In the Court’s perception the endorsement and the allegation of payment of \$4,000 is simply not credible to evidence of variation of the contract in any event is separated logically in time and as will become apparent subsequently, in any event, could not have been a contemporaneous endorsement because the payment alleged of \$4,000 did not occur even on Sweetens’ evidence until much later in the situation.
10. T16 records that it was Raymond Sweeten that asked the contractors for the supply of the doors and whatever occurred between him and either one of the Linnells was not something that occurred in the presence of Ackermann.
11. Ackermann said that Raymond Sweeten had authority to speak about the doors on her behalf and that was the position “right throughout this relevant

period”. That of course begs the question as to whether he ever revealed to the Linnells he was acting as the agent of Ackermann whatever the arrangement may have been between Ackermann and Sweeten discreetly.

12. Turning to the evidence of Raymond Sweeten at T28 he stated that Ackermann had asked him to build her a house being the house in question and at T29 that supervision of all the building work was his task as was the undertaking of the job in question. There was no examination of the critical issue as to the alleged agency at all. Raymond Sweeten’s evidence was that he accepted the contract orally.
13. At T30 Sweeten indicated that for a separate piece of work relating to installation of windows “I was given a quote” “And then I accepted that quote”. The quotation is in evidence over the objection of Mary Linnell and records the amount due was paid by cheque on the 28 August 2003. It is addressed to Sweeten Construction and dated the 27 August 2003 and was accompanied by a letter of the 17 July 2003 or perhaps it preceded the quote it not being clear which is the case.
14. At T48 Cameron Linnell stated “...Mr Sweeten asked us if we could do the stainless steel pool doors...I offered him a quote. Measured them up and offered him a quote...it was four doors at the start, but then there was a double door which made it five...Mr Sweeten give us the go ahead on it”.
15. At T55 it was correctly pointed out by Mr Lewis that Cameron Linnell had said he was unable to “recall” any payment being made to him by Sweeten. However from transcript 56 there was no invoice until 2005 and Mary Linnell was apparently not in hospital having a baby at the time on the admitted occasion of the visit to Raymond Sweeten by Cameron Linnell.
16. Mary Linnell (T64) denied ever receiving payment and at T66 stated that it was only at the pre-hearing conference that there was an awareness by her of an allegation that \$4,000 had been paid by Sweeten to Cameron, but at T67

it was conceded that the statement of claim from Ackermann would have been the first occasion where the allegation was made.

17. Turning to the issues discreetly relating to matter 20513698 of Linnell v Sweeten the defence to the claim of \$4,599.30 is that he is not indebted to the Plaintiff as alleged or at all.
18. At T2 it becomes apparent that his actual defence is that he paid what was owing in full. That is he doesn't deny there was an indebtedness by him, but that he paid it in full. That this Court treats as an acknowledgement that he contracted as principal. At T10 he acknowledges that he had been a builder at the time of the relevant matters for 40 years.
19. At T34 and in relation to exhibit P3 he acknowledged that this was the quote that he accepted and at T36 in testified that at the Vic Arcade on the occasion of the visit by Cameron Linnell after announcing his wife had had a baby “..with that I went into the safe, I got \$4,000 out. I counted it before I came into the shop and then I just gave it to him. I didn't count it in front of him.” Bearing in mind he had been a builder for 40 years and bearing in mind he would have to prove out goings to be deducted from gross revenue for the purposes of reducing his tax liability, it would have been extraordinary that he did not secure provision of a receipt or a written acknowledgement of payment.
20. What is however more significant, is that he makes an endorsement on P3 in his own handwriting to the effect that the cost of five doors at \$800 equals \$4,000 and further “paid \$4,000”. That fits much too conveniently and incredibly with corroboration of his version of what occurred as far as this Court is concerned.
21. At transcript 44 he says he had no idea where the name Sweeten Construction came from, but as has already been pointed out it was a name about which no complaint was made before and the name in which previous

contractual arrangements had been made and indeed for the work in relation to which payment had occurred.

22. At T46 it emerges the pool inspector's report only found a single door to be defective.
23. What is, in this Court's perception, most telling as a single piece of evidence is the assertion at T47 (referring to the advent of the child being born to Mary Linnell and the difficulty this occasioned by her not being able to attend to invoice despatch) "so I left it at that, already doing business with you I thought yeah, there's no problem I paid him, it's on camera and that was it".
24. There can be no doubt that what he was referring to was some form of security camera and he alleged it had recorded the event in question. Despite the assertion, no footage was ever tendered by Mr Sweeten in evidence in support of his contention and it is extraordinary to suggest that if such evidence existed it would not have been produced. The consequence is that this Court finds that answer comprised, a matter which was recent invention or fabrication.
25. It is this Court's finding that all of the evidence points to the fact that Raymond Sweeten contracted with Mary and Cameron Linnell as principal and not as agent for Ackermann. In so far as there may have been room to argue that there was a contract on behalf of an undisclosed principal there would need to have been a ratification of the contract by Ms Ackermann subsequent to the initial arrangements concluded by Mr Raymond Sweeten. That never occurred. She has in any event withdrawn her claim as previously recited.
26. There was a previous contract between Mr Sweeten and Cameron and Mary Linnell that was negotiated, completed and paid for without any disclosure of agency in respect of the same building project.



27. There is an ability in the Court as has previously been remarked to take judicial notice of the fact that in contracts of this kind it would be most unusual for an owner who had contracted with a building contractor to be negotiating directly with the subcontractors engaged by the builder.
28. In this matter the Court rejects the fact that there was ever express price negotiation after the fifth door was found necessary culminating in an agreed price of \$4,000. The Court finds that what was inferred that was payment was to be made on the same basis and for the same price as had been previously been negotiated by Mr Sweeten with Cameron and Mary Linnell.
29. The fact that there is the unexplained or irrational alteration coupled with a unilateral step taken by Mr Sweeten of a self serving nature to record \$4,000 having been paid reflects on his credibility. The amount in question clearly would not have been 4,000 on any basis on the evidence lead before the Court.
30. The allegation that the handing over of the \$4,000 was recorded on camera has already been the subject of earlier remarks. In all the circumstances in relation to this claim it is the Court's finding that Mr Sweeten is indebted to the Plaintiffs in the sum of \$4,400. Although costs are not capable of being ordered by this honourable Court such costs can only be logically interpreted to mean profit costs or professional fees. In the circumstances the Court will allow the filing fee, the service fee and the business search fee that is a total amount of \$4,599.30 and there will be judgment against Raymond Sweeten on behalf of the Plaintiffs in that matter in that sum.

Dated: 5 September 2006

**DAVID LOADMAN**  
STIPENDIARY MAGISTRATE