

CITATION: *Patrick Flynn v Brett Moore [2007] NTMC 070*

PARTIES: PATRICK FLYNN (Trading as THE PRACTICE)

v

BRETT MOORE (Trading as SUREFIX ALUMINIMUM PTY LTD)

TITLE OF COURT: Local Court

JURISDICTION: Small Claims

FILE NO(s): 20617309

DELIVERED ON: 18 October 2007

DELIVERED AT: Darwin

HEARING DATE(s): 26 July 2007

JUDGMENT OF: Ms Sue Oliver SM

CATCHWORDS:

Contracts – Uncertainty of Terms – Total Failure of Consideration

REPRESENTATION:

Counsel:

Plaintiff: In person

Defendant: In person

Solicitors:

Plaintiff: Self Represented

Defendant: Self Represented

Judgment category classification: B

Judgment ID number: [2007] NTMC 070

Number of paragraphs: 29

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

No. 20617309

[2007] NTMC 070

BETWEEN:

PATRICK FLYNN
(Trading as **THE PRACTICE**)
Plaintiff

AND:

BRETT MOORE
(Trading as **SUREFIX ALUMIMUM PTY LTD**)
Defendant

REASONS FOR DECISION

(Delivered 18 October 2007)

MS SUE OLIVER SM:

1. The Plaintiff, by an amended Statement of Claim, seeks an order for the payment of \$9999 from the Defendant as monies said to be outstanding pursuant to an agreement between them. In his Statement of Claim, the Plaintiff pleads that he was instructed by the Defendant in February 2006 to “document drawings for an office fit out” at premises in Cavenagh Street, Darwin. The Statement of Claim asserts that Mr Moore did not request a fee offer in relation to the drawings and this fact is not disputed by the Defendant.
2. In his amended Statement of Claim, the Plaintiff says that he handed over a completed set of drawings to the Defendant and was told that the workmen could not read them. The Defendant then asked the Plaintiff to re-draw the drawings to his instructions. No fee was negotiated for this. No payment has been made for the second set of drawings. The amended Statement of

Claim does not particularise how the \$9999 is made up, although this was set out at page 19 of the 29 pages that were attached to the Plaintiff's original Statement of Claim and in the course of the hearing, copies of invoices relating to the amounts claimed were tendered. The amount is said to be made up as follows:-

(a) First documentation drawings \$2794

(b) Second documentation drawings \$5544

(c) Project building certifiers building certification account \$1947

3. By his amended Notice of Defence, the Defendant pleads that the Plaintiff failed to follow his instructions, drawing up plans for things to be done which had not been requested and that as a consequence there was an overcharge for the job required. Further, the Defendant pleads that the Plaintiff was employed to do a service which he did not provide. The Defendant has counterclaimed the amount of \$4400 on the basis that the Plaintiff asked for and was paid progress payments whilst carrying out the work on the first drawings and that no benefit has been received from those services.
4. The matter proceeded to hearing on 26 July 2007. Both the Plaintiff and the Defendant gave oral evidence and tendered various documents, in particular, building plans related to the premises in Cavenagh Street, the subject of their agreement. The Plaintiff tendered, in addition to plans and correspondence between the parties, copious notes which I take to be intended to form part of his submissions in this matter.
5. Both parties agreed that there was no formal written agreement between them. If a contract exists, it must therefore be based on, and the terms comprised of, the oral agreement and any documentation that might be found to be part of that agreement.

6. It is clear that the parties did not agree to a fixed price for the performance services by the Plaintiff for the Defendant. The Plaintiff's claim is based on an hourly rate for the drawing of the plans.
7. Not all agreements are enforceable at law. A legally enforceable agreement, what is referred to as a contract, requires amongst other things that there be certainty of the terms of the agreement. Unless the terms are certain no contract exists and neither party may enforce the agreement. However, courts are reluctant to strike down an agreement between parties which they intended to have legal effect if it is possible to ascertain the parties' intention in regard to the terms of their agreement. Where an agreement lacks that certainty, it is not enforceable as a contract by either of the parties.
8. The absence of a price for the contract is often one which leads to such uncertainty. However, in this case, I am satisfied that the uncertainty can be overcome. I am satisfied that both parties intended that the work was to be performed at an hourly rate and that the hourly rate was to be fixed by the fee commonly charged in the industry for the preparation of building plans. There was no suggestion by the defendant that the hourly fee that the Plaintiff was claiming, \$60 per hour, was in itself an excessive fee. It is, as part of his defence, the quantum ascertained by the number of hours claimed that he disputes.
9. As I have said the plaintiff tendered many documents. A bundle of documents were tendered by the Plaintiff in a folder marked # 2 and were designated by him as "Design brief from Mr Moore to Patrick Flynn". These documents comprise of a photocopy of a floor layout of the premises, entitled "Builder's Plan" which upon them have handwritten notes in Mr Moore's handwriting indicating the nature of the works. A document marked as page 1 by the Plaintiff shows that the works comprise a new entrance at the corner of Cavenagh and Knuckey Streets and work to be done

in the area of the existing toilets, towards the back of the premises. No work is indicated in the major part of the building. Page 2 indicates a new concrete ramp for vehicle access to the rear carpark. Page 3 shows the new front doorway. Page 4 shows the Knuckey Street entrance to the existing toilets. Page 5 is a drawing of the outside view of the new entry way, including measurements. Page 6 is a drawing of door to be fitted into an existing stud wall. Page 7 is a note from Mr Moore to Mr Flynn regarding a person to contact for access to the Building Board file. Page 8 is an enlargement of the toilet area, the Defendant's note being to remove the ramp, replace with raised floor and step. Page 9 shows the positions of doors in the internal fit out of the major area and page 10 is an enlargement of the toilet area, showing the requirement for new disabled and staff toilets.

10. No evidence was given of instructions regarding anything further than is contained in these notes and I find that the term of the contract regarding the scope of the work was to produce plans that were suitable to obtain building certification for the project in accordance with those notes.
11. The Plaintiff tendered the first set of drawings that he completed. These are in a folder he marked # 3. The plans do not show certification by a building certifier. They run to 31 pages.
12. The Plaintiff tendered in a folder marked # 4, the second set of plans, which bundle of documents also includes photocopies of the instructions he received from the Defendant regarding the request to redraw the earlier plans he had received. The second set of plans run to 98 pages, including coversheets. One of the instructions is contained in a document from the Defendant to the Plaintiff dated 31 March 2006, with a request in the following terms:-

“I'm having trouble undertaking the drawings, understanding the drawings you did for the above premises. Therefore, I am giving you a list of the way I would like the drawings to be presented”.

Thereafter follows a list of items numbered one to five of the things that are requested to be shown on the plan and limiting things which are not required on the plans.

13. The instructions conclude with the following statement:-

“What I have listed on the other sheets is what I need so that we can show the client what they are getting – so we can show what I am building – so I can show the workers what they have to do and of course, so we can get a building permit. I trust you are able to do this for me”.

14. A considerable period of time for the drawing of the requested plans then occurred. A copy of a letter dated 8 June 2006 appears in the bundle of documents tendered by the Defendant and marked as D2, that is a letter to a building certifier, asking that the certifier advise of the status of the building permit for the project and stating that the Plaintiff has said that the permit is a couple of days away. “He has been saying this for over a month”. On 24 July, again taken from a document in the same tendered bundle of documents, the Defendant sent a faxed letter to the Plaintiff. Only part of that letter appears. It is in the following terms:-

“I need the building permit for this project now. If I don’t receive it, I will be consulting someone else to provide one, thus deeming the existing permit worthless. I am prepared to pay for the permit only, right now.

This in no way prejudices your right to sue me, however, if you hold out any longer, then your claim will be diminished as your input will be reduced, plus you have already prejudiced me and my client by holding ... “.

15. The copy document finishes at this point. The reference to the ‘existing permit’ being tendered worthless is curious. There was no certification on the first set of plans and the Plaintiff did not tender a permit for those plans. Indeed the Plaintiff says in his defence to the counterclaim in reference to the first set of drawings, that “ ... the drawings were drawn on computer to the Australian Standards guidelines for drafting and **would** have been

approved by the building certifier and structural engineer who must sign off the drawings in the process of being granted a building permit” (emphasis provided by me).

16. The Defendant’s reference in his instructional notes to the existing permit seems to me likely to have been a reference to the second set of drawings certified by a Building Certifier that the Plaintiff had refused to hand over until he received payment.
17. The Plaintiff agreed in his evidence that he refused to hand over the second set of plans and building permit until he received payment for them.
18. The Defendant’s evidence was that when the plaintiff refused to hand over the plans he then consulted a further drafter to obtain drawings for the building works. This set of drawings was tendered both by the Plaintiff and the Defendant. These plans (which I shall refer to as the “final plans”) were ultimately used by the defendant to perform the building work. The final plans are in simple terms - five pages in all, showing the work to be done in the toilet area, including the flooring of the building. A building permit was issued for them.
19. The Defendant’s oral evidence was that the scope of the building works amounted to construction work to the value of approximately \$60,000.
20. The Plaintiff has the burden of proof to show, on the balance of probabilities, that a contract existed and that the terms of the contract were such and his performance of them such, that he is entitled to the amount claimed in his Statement of Claim.
21. I am satisfied that a contractual relationship existed between the parties. In my view, the fundamental term of a contract was that the Plaintiff would draw for the Defendant plans for the renovation of the existing toilet area at the premises in order to provide for a disabled toilet and new entry way, with some other minor works involving the front doorway and the existing

concrete ramp area from the car park. I do not consider that it was a term of the contract that the Plaintiff was engaged to develop a “design brief” for the premises as a whole. The terms of the contract were quite limited and quite straightforward, being based on the builder’s plan drawings that were given by the Defendant to the Plaintiff as his initial instructions and as I have noted above on a reasonable hourly rate for the preparation of plans for the construction project as requested and described in the instructions.

22. I am not satisfied on the balance of probabilities that the work performed by the Plaintiff was in accordance with those terms. The plans that were produced, both the first and second set of drawings, were well in excess of what was required for the nature and scope of the building works to be undertaken. That plans for building works of around \$60,000 would cost all up \$14,300 (\$4,440 already paid and the further \$9,900 claimed in respect of the second set) is clearly disproportionate and excessive. That builders could be expected to utilise 31 pages of plans, (let alone 98 pages of the second plans) for a simple renovation is unrealistic and impractical.
23. I am persuaded in this view by the final plans which were tendered both by the Defendant and the Plaintiff. As I noted above, there were five pages in total, quite simple plans detailing the matters which the Defendant had requested. They were used for the building works.
24. Even if I were of the view that the second set of plans were in accordance with the terms of the contract, the Plaintiff would not be able to sustain his claim for the work involved in producing them because he refused to supply them to the defendant. The terms of the contract that I have determined, were relatively simple. The Plaintiff was to supply drawings to the Defendant to enable a building permit to be obtained for the construction works. There is nothing to suggest that it was a term of the contract that either progress payments be made or that payment was required in advance of the plans being provided and the defendant gave the plaintiff very clear

notice that he would regard the contract as being at an end if the plaintiff failed to deliver the drawings to him. He suggested, quite rightly, to the plaintiff that he should deliver the plans and any argument that was to be had as to cost could be engaged later. Had the Plaintiff provided the plans, he might have had some claim for the work performed, but he did not do so.

25. I find that the Plaintiff therefore failed to perform his part of the contract because the first set of the plans did not have certification by a building certifier which was I have found to be a term of the contract. The drawings were requested to be done again in accordance with the defendants instructions and although drawings were produced that were not delivered up to the Defendant.
26. I now turn to the Defendant's counterclaim. The Defendant claims the sum of \$4,400 paid to the Plaintiff in advance for the first set of drawings. These drawings were not certified and no building permit was issued in relation to them. As I have noted, the Defendant's evidence was that his workmen were unable to read the plans and that he requested that they be revised to contain the detail that he wanted.
27. The Defendant also carries a burden of proof, on balance of probabilities, for his counterclaim, of showing that there was a total failure of consideration by the Plaintiff in performance of the contract so as to be entitled to a return of the monies paid.
28. I am satisfied that the Defendant has discharged this burden. As I have said, neither building permit nor building certification appears to have been issued in relation to the first set of drawings. That there was no benefit taken by the defendant of the first set of drawings is borne out by his rejection of the first set of drawings and his ultimate resort to another drafter for plans for the project. Were the first set of plans capable of being used there would be little point in his throwing away the \$4,400 he had already paid to the plaintiff and paying again another person to again

produce plans. There has been a total failure of consideration (the production and delivery of plans suitable for the project and certified in order for a building permit to be issued) on the part of the Plaintiff.

29. The Plaintiff's claim against the Defendant is therefore dismissed. Judgement will be entered for the defendant on his counterclaim in the sum of \$4400.

Dated this day of 2007.

Sue Oliver
STIPENDIARY MAGISTRATE