CITATION: *K & J Burns Electrical Pty Ltd v Fotini Gikas* [2011] NTMC 013

PARTIES:	K & J BURNS ELECTRICAL PTY LTD
	v
	FOTINI GIKAS
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	Small Claims
FILE NO(s):	20920126
DELIVERED ON:	19 April 2011
DELIVERED AT:	Darwin
HEARING DATE(s):	21 June 2010, 19 August 2010 and 11 November 2010
JUDGMENT OF:	R J Wallace, SM

CATCHWORDS:

Contract – Mutual Withdrawal – Qantum Meruit – Assessment of Damages

REPRESENTATION:

Counsel:

Plaintiff:	Melanie Burns (Director)
Defendant:	D. Story

Solicitors:

Plaintiff:	-
Defendant:	Story & Associates

Judgment category classification:	B
Judgment ID number:	20920126
Number of paragraphs:	53

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

No. 20920126

BETWEEN:

K & J Burns Electrical Pty Ltd
Plaintiff

AND:

Fotini Gikas
Defendant

REASONS FOR JUDGMENT

(Delivered 2011)

Mr R J Wallace SM:

INTRODUCTION

1. This is an action bought for monies due in respect of work done by the plaintiff company (hereinafter "K & J") for the defendant ("Ms Gikas"). In 2008 Ms Gikas was building her house in Farrar, Palmerston. She contracted with K & J to do the electrical work.

2. The nearest thing to a written contract between the parties is a "Quote", Ex 1 dated 20 February 2008, "Quoted by Keith Burns". Keith Burns was a principal of K & J. Sadly, Keith Burns died not long after this quote was accepted. The firm carried on, with Jarrod Burns, ("Mr Burns"), Keith Burn's son, taking over as the leading electrician in the business, and Melanie Burns, Keith Burn's daughter, continuing on in her established role as office manager.

3. A second copy of Ex 1 turned up later in the course of the fragmented hearing of the matter. It became Ex 13, and has appended to it the

handwritten original of the quote, in Keith Burns's writing with figures added in pencil, probably by him as well. That additional document did not add much to the case.

4. There were, it seems, plans and drawings relevant to the quote and the works, but I have not seen them. The uncontradicted evidence is that Ms Gikas accepted the quote and engaged K & J to do the works. They attended her site and did those works, or nearly all of them, to "fit out" stage, that is, they laid cables and conduit so that wires emerged from various holes in walls and ceiling ready to have fittings attached to them. So far, as the quoted works were concerned, this work was done in a proper efficient manner at the appropriate stage of the building process, in concert with other contractors.

5. There came to be, however, other works, additional to or varying the quoted works and these were not all so efficiently done. These "extras" were added at the request, at various times, made to Mr Burns by Ms Gikas. As far as I can tell on the evidence there was never a quotation for any of the extra works. Ms Gikas concedes that in some respects these extras resulted from folly on her behalf: in one instance - lights and power points in a bedroom - she had quoted works changed, then changed her mind again so that further work had to be done to put things back as they had been.

6. In other respects the extras involved not so much folly as ignorance on her part. The best example of this was her late decision to have lights installed on three pillars that support the front porch of the house. Had those works been done at an early stage the extra work would have been relatively cheap and simple. Ms Gikas's request coming late in the piece, Mr Burns had to "chase" - that is, chisel out, channels in established block work in order to lay the wires to these lights, and then cover up the chasing: a laborious and expensive process.

7. During the course of the works, K & J submitted an invoice for a progress payment to Ms Gikas, and Ms Gikas paid it - $3,993.46. There is not in the evidence any sign of a written contractual basis for the request for a progress payment, nor is there any evidence of any oral agreements about part payments. However, Ms Gikas's evidence as to her making their payment was to the effect that it was fair enough: that she expected to make progress payments. From this, I conclude that there was an implied term, of the vaguest sort permitting K & J to make and committing Ms Gikas to pay, demands for progress payments. This implied term is enough to defeat any notion that the contract may have been an entire contract – a notion the law has come to be reluctant to arrive at in virtually any context, anyhow. Other than that, the implied term says nothing as to the stages at which progress payments could be appropriately asked for, nor which works could appropriately make the subject of requests for progress payments. It is not self evident, and there was no explicit agreement, that the extra works were to be paid for on the same schedule as the quoted work.

8. The next invoices for progress payments became Ex 3 and Ex 4, and requested payment of $10,542.30 and $396.00 respectively. The occasion of Ex 3 being sent (it is dated 2 March 2009) seems to have been the completion of at least all the quoted works to fit out stage. The occasion for Ex 4 (dated 22 April 2009) is not clear on the evidence – whether it is for extras, pure and simple, or works mistakenly omitted from Ex 3, or a mixture of the two. The "Tax Invoice Notes" attached to each invoice, which might have been expected to clarify such things for Ms Gikas – and ultimately for me – are identical in both cases and identical to the Tax Invoice Notes attached to Ex 2, dated 27 June 2008, the invoice for $3,993.46 which Ms Gikas had paid. The notes include works dated through to March 2009, so their attachment to an invoice dated 27 June 2008 is nonsensical – I don't know when it happened. But the attachment of the

noted to Ex 3 and Ex 4, if it was done, when these invoices were sent to Ms Gikas, would have led anyone to wonder, what am I being asked to pay for?

9. Ms Gikas asked herself that, and also wondered, more urgently, what the final bill for the works would be, when completed. Her concern in that respect is easily understood, when one notes, as she did, that the invoices for work (admittedly including variations and extras) to fit out stage added up to an amount almost equal to the entire sum quoted by Keith Burns – the only quote Ms Gikas had ever received. She began to suspect that she was being in her words, ripped off. She did however pay a further $3,000.00 on 1 April 2009.

10. On the other side, Ms Burns was forming her own suspicions. Invoice No 2 had been paid late. The quote provided for payment terms strictly 7 days, and Ms Gikas's questions about the quantum of Invoices 3 and 4, and about the unknown total price, seemed to Ms Burns to betoken a simple unwillingness on Ms Gikas's part to pay monies due. To Ms Burns it made no difference whether Ms Gikas had run out of money, or was simply trying on some swindle to bargain down the amount due. It is not clear, but my guess is that Ms Burns interpreted Ms Gikas's payment of $3,000.00 not as a gesture of good faith, but as evidence of Ms Gikas's shortage of money.

11. In short, each party simultaneously lost trust in the other. A series of meetings did nothing to restore it – the contrary if anything. K & J never returned to the site. Ms Gikas eventually had another contractor complete the electrical work in her house. The terms of the contract - as to progress payments, and price, for example – being so uncertain, it is unclear which of the parties walked away from it. The contract must be regarded as terminated by mutual consent (or mutual discontent, but, in any event, mutually).

12. The plaintiff's claim accordingly falls to be decided as one in quasi-contract, quantum meruit, what the work was worth. It is for the plaintiff to

persuade me as to the worth. In the event, that task proved to be far from easy.

DIFFICULTIES OF PROOF

13. The evolution of the facts of the matter makes it quite impossible for anyone to price precisely the value of work done. That is no surprise. What is surprising is the difficulty of grasping any reliable means of beginning to approximate a fair price. The reasons for this difficulty are numerous.

14. Touching on every item, whether quoted works or extras, is the fact that the works were unfinished – taken only to the stage when the house was ready for "fit out".

15. In many building contracts the terms in relation to progress payments, payable as defined stages in the process of the works, give a strong hint of the value of the works from stage to stage, it being generally safe to assume that each progress payment is in respect of work done to that stage. It may be that the work is worth more than the payment, but the usual understanding is that it is not worth less.

16. In this case there was no schedule of progress payments as part of the contract. Accordingly, that basis for valuing the works, from stage to stage, or not less than x, or y, simply does not exist.

17. In relation to the quoted works alone, the incompleteness of the works would ordinarily not be too great a problem. Evidence could be given – as it was in this case – by the plaintiff as to the usual apportioning of the value of works between their various stages. Evidence could be called – as it was in this case – by the defendant asserting a different apportionment. The court could decide the issue on the evidence, and apply the proper apportionment to the contract price, to arrive at a figure that ought to be at least a first approximation of the value. That can, indeed, be done in this case, but the

approximation applies only to the quoted works. In relation to the extra works, although once again the apportionment can be done, there never was a price quoted, let alone agreed, to apply to that apportionment.

18. Lacking that price, one is driven to consider other sources of information from which works can be approximately valued. The plaintiff was eventually induced to supply a bundle of documents Ex 12. This bundle included Employee Job Sheets, detailing the hours spent working on Ms Gikas's house, a quote for the supply of hardware, allegedly for the extras, and spreadsheets setting out the calculations for both the quoted works and the extras.

19. I think it is fair to say that the evidence of Ms Burns does not for my purposes go much beyond what these documents disclose. As the record keeper for the plaintiff, she received information from workers – mostly, but not always from Mr Burns – and processed it through her systems.

20. I have no reason to doubt her competence and accuracy in entering the information and processing it through her systems in order to produce the invoices presented to Ms Gikas. I am less confident – not confident at all really – that the division of works in the spreadsheets between quoted and extra works – can be relied upon. At the end of the evidence I still did not understand how that division could be reliably drawn.

21. I say that because I cannot see, and neither Ms Burns nor Mr Burns was able to point me to any set of ongoing documentation that distinguished quoted work done from extra work done. Indeed, when Mr Story was cross-examining Mr Burns through the works done, detail by detail, asking if a given job was quoted, or extra works, Mr Burns was able to answer in nearly all instances and was visibly doing so from memory. I can only conclude that the separation of the works in the spreadsheets was possible by making a similar appeal to Mr Burns's memory at some other time well after the litigation had commenced.

22. Mr Burns was, in my opinion, doing his best when giving evidence in this respect, and I expect he was doing his best whenever it was he and Ms Burns did whatever they did to separate out the extra works for the purpose of the spreadsheets. However, the task was, on the evidence, impossible to perform perfectly. For one thing, there were times when quoted works and extra works were going ahead on the same day. How much tradesman's time was expended on the one and how much on the other involved a guess (an educated guess from Mr Burns). For another, there seem to be some jobs that even Mr Burns cannot be sure were extras or quoted works.

23. That then, outlines the problems of proof facing the plaintiff. At the time the case began there were two more problems for the plaintiff but these can be dealt with briefly and need not be further considered.

THE COUNTERCLAIM

24. Ms Gikas filed a counterclaim with her original defence – a document drafted by her, which, even by the standards of the Small Claims Court stood a far way apart from the form expected. But all of that was tidied up eventually.

25. After being more regularly pleaded once Ms Gikas had retained a lawyer, the counterclaim dwindled piece by piece. Part was abandoned well before the hearing commenced when a request for further and better particulars apparently caused second thoughts on Ms Gikas's part. Other parts of the counterclaim were abandoned as the hearing went on, in I think two, but it may have been three stages.

26. I mention it really only to comment upon the effect on Ms Gikas' credit. Many defendants in cases like this file counterclaims alleging (as Ms Gikas did) faulty workmanship. Some such counterclaims appear to be made sincerely enough – some indeed succeed, to a greater or lesser degree. But in many a trial it becomes evident that the counterclaim never was much more

than a cynical invention by a meritless defendant attempting perhaps to frighten the plaintiff, perhaps to create something to bargain with in settlement negotiations. When a counterclaim is abandoned as Ms Gikas's was, one could be forgiven for assuming that it was one of the meritless many.

27. I did not think so. During the evidence, when part of the counterclaim was still on foot, she tendered a video recording (Ex 7) of views of her house, in which she appeared pointing out the electrical items with which she was dissatisfied. There could be no doubt that her dissatisfaction was sincere – indeed, the bitterness with which she spoke in that recording gave me a very useful insight into how profound her lack of trust in the plaintiff had become. Further, I could see, from that recording, what it was that she was complaining about, at least in respect of some of the items of the counterclaim. The item I remember best related to the placement of some outside light fittings.

28. As the evidence in the hearing emerged, it become apparent that in respect of some of the items the counterclaim would almost certainly fail. Again, the best remembered item is these light fittings, of which Mr Burns said (and he was not contradicted) that Ms Gikas had nominated, or at least approved the placement. Other items, of an essentially aesthetic character, even if proved were not such as would result in any award of damages, even where it was easy to understand why Ms Gikas was upset about them. Finally, in relation to what was left, for which there was at least prospect of an arguable case being made, my guess is that they were abandoned as not being worth the time and expense of proof, assuming that was possible.

29. Because I take this view of Ms Gikas progressive abandonment of counterclaim, I do not find in it a reason to be suspicious of her bona fides. I might also add that her bitterness evident in the video recording, had diminished a lot when she was giving her evidence, as I suppose one would

expect – the video recorded an unfurnished house with work suspended: by the time she gave her evidence the house was furnished and she was living in it.

THE QUALITY OF CONTRACTED FINISHES

30. Ms Gikas gave evidence that the finishes and fittings in her house were, in many if not all respects, above average. The electrical fittings were to be no exception, and with regard particularly to ceiling fans, her agreement with Keith Burns was that superior items were to be installed. Consequently she argues that the work left undone by K & J saved K & J more money than one would ordinarily expect, because the fittings they did not install, having walked off the job, (and therefore did not have to purchase) would have been more expensive than standard fittings.

31. I accept that argument, but, I am not persuaded of its basic premise, namely, the alleged agreement between Ms Gikas and Keith Burns. His handwritten quotation document is in evidence. There is no sign in it of any requirement of special fittings. Had there been any such specific agreement, I would think it certain that some sort of a note of it would be on the quote, as an aide memoire if nothing else. Furthermore, even Ms Gikas did not in her evidence give the kind of particulars – of brand, size etc – of the superior items she was saying that had been agreed. The best she could do was to speak of stainless steel (rather than the standard aluminium) fans.

32. I do not entirely disbelieve Ms Gikas, and I think that it is more likely than not that she did raise with Keith Burns her desire for superior fittings in general and stainless steel fans is particular. But I am not persuaded that the quoted price for the quoted works included an undertaking to provide any particular item or particular quality of item. It seems to me most probable that the topic of special fittings, and of any extra costs that would go with them, was left to be revisited nearer the fit out stage.

THE ASSESSMENT OF DAMAGES

33. Ms Burns's presentation of K & J's case was, I think, the worst of any I have seen in a case of this kind – and building cases are, alas, not uncommon. It seldom aids clarity when evidence is heard, as it was here, on three different days, months apart from each other. That aspect of the matter was not Ms Burns's fault. On the other hand, the breaks between the hearing days did give her the opportunity of bringing forward more documents, at the urging of Mr Story and of me, and in particular the documents in Ex 12. Without these documents I think K & J's case would have failed since Ms Burns's original evidence, the pith of the case as put as the first hearing day (21/06/2010) could be (cruelly) summarised as "I put the figures into our system, a black box, and this is what came out and it's correct."

34. I was unable to understand her evidence then, and later, sufficiently to form any opinion as to whether her figures were correct or not. I have read it through, alone, and against the documents half a dozen times, and I have continued to fail to see what I told her during the hearing that I was unable then to see, how her invoices are related to actual work done and that work's value.

35. The documents eventually produced in Ex 12 offer a different starting point. Mr Story's detailed cross-examination of Mr Burns, focusing on the job sheets, permits me to decide what work is proved to have been done at least in man hours, and to differentiate between the quoted works and extras.

36. I proceed as follows. First I take the quoted price for the quoted works and reduce it by the appropriate amount to account for the fit out work not done. As I mentioned above, there was conflicting evidence between, on the one hand Mr Burns, and, on the other, a quantity surveyor Mr Farmer, on the other, as to what that reduction should be.

37. In cases of conflicts like this, courts usually prefer the industry standard, rather than the practice of the individual firm and so I do in this case. I can

explain some of the reasons. I have no idea how K & J came to arrive at the figure of 25%. I suppose that was the figure customarily used by Keith Burns when he ran the company. I do not know whether the figure was ever scrutinised, or whether, for example, Keith Burns simply adopted it from whoever taught him his trade and business practices. If the figure ever was realistic, it may not have been checked against reality for a long time.

38. Cost structures change in any industry. Some costs fall. Chinese made components are relatively – and in some cases absolutely – cheaper than Australian or European made components were two decades ago. Labour costs rise, irregularly, but the time taken for a given job tends to fall as a result of technical advances in tools and the design of components. Other factors, most notoriously increasing regulations, increase costs by reason of intensified safety precautions, more inspections, or insistence on more robust or safer components. There are just a few examples that come to mind of changing factors influencing costs.

39. It is unlikely that, in any given period, the changes that take place would impact cost equally in each stage of electrical work. If the price of copper, say, rises or falls dramatically, as it seems to from time to time, I would expect that appreciably to affect the price of electrical cable, and thus the early stages of the job, but to have little effect on the fit out. It is at least possible that, over time, enough of these changes would substantially shift the ratio of costs between the various stages. It would, I think, be pretty difficult for a contractor like K & J to have an intuitive grasp of that change, and pretty rare to have occasion to seriously re-examine the firm's costs in order to see whether its working ratio needs to be adjusted.

40. Quantity surveyors like Mr Farmer have access to industry – wide knowledge, and in at least two relevant respects that knowledge is predictably updated. The first is through the close attention paid to costs at all stages of work and production, by modern firms. There is, of course,

nothing new in such attention being paid, and the implication that this or that tycoon has done something novel and original by paring to the bone his company's costs, would be laughed to scorn by an earlier generation of businessmen, who thought they had done just that themselves. What has changed is the technology used to keep track of costs. With data management being ever cheaper and ever more intrusive, and able to yield up ever finer details, cost structures can be examined almost continually, giving rise to one set of up–to-date knowledge.

41. Secondly, contracts are sometimes let in stages, giving rise to real indisputable figures: firm X tenders for this stage of the work at this much, firm Y tenders for another stage of that much and these prices are facts, and sometimes matters of public record.

42. With continuing access to such material, a quantity surveyor ought to have a better notion of the cost ratio between stages than a business which has not bestirred itself to investigate its own peculiar position. If K & J have so bestirred themselves in recent times, I have not heard of it.

43. So for these reasons in this ease I would apply the ratios provided by Mr Farmer, the quantity surveyor called by the Defendant.

44. It is perhaps also worth noting that, for absolute values, rather than relative ones, there might be reason to accept the firm's fees, rather than the industry standard. For example, Mr Burns's evidence was that tradesman's work is charged out by K & J at $90.00 per hour plus GST - $99.00. That is a real figure, not a notion carried for years or decades. Based on that charge out rate, K & J submit quotes, win work and stay in business and, I assume retain their tradesman at least for a while. If a quantity surveyor said that the usual industry figure was $80.00, or $85.00 (not that Mr Farmer did) the K & J figure of $99.00 would nonetheless have realistic credentials for electrical work on a new house project in Palmerston in 2008-2009 and I might well prefer it.

45. Mr Story arrived at a figure of $4,335.00, applying Mr Farmer's rates to the number of fixtures in the quoted works. I accept that figure not only because I have made the sums come out to the same number, sometimes, but more because other solutions are so close to that figure as to make little difference.

46. I then deduct the sums paid by Ms Gikas.

Original price quoted	$14,740.00 (inc. GST)
Less value of fit out (not done)	$ 4,335.00
	$10,405.00
Less Invoice No 1 + $3000 (paid)	$ 6,993.46
	$ 3,411.54
Plus proved value of extras	?

THE PROVED VALUE OF EXTRAS

47. Mr Story's closing submission was that his cross examination had established 21 hours of chargeable electrical contractor's time attributable to extras. He did not argue with K & J's charge out figure of $90.00 excluding GST per hour. I have been through these figures repeatedly and I arrive consistently at a total of 23 hours. Mr Story's address was, through no fault of his own, hurried, and I cannot pinpoint where the difference between us lies.

48. So in skilled tradesman's labour alone the extras are worth at least 23 x $99.00 - $2,277.00. K & J, and in particular Mr Burns, also ask for the value of consumables – drill bits and grinding gear used up in the extensive chasing, for example, and also hardware – wiring and conduit – used in the extra work. Mr Story argues that it is impossible to discern anywhere in the paperwork any charge for consumables, and I agree with him about that.

Further, in the case of consumables, K & J in their second invoice, Ex 3, explicitly charge nothing for "Consumables and Custom materials". That zero charge was never satisfactorily explained and I think I have to regard any charge for those items as having been waived. The first invoice Ex 2, the one Ms Gikas paid, did include $13.00 under this head.

49. In the case of hardware – cables and accessories, I think I must do the best I can. With the materials available this is pretty rough. The best approach I can think of is this. In the Invoice Ex 2, labour is changed at $2,543.25; and everything else at $1,087.17, a ratio of about 2 ½: 1. That stage of the works one would expect to be heavier on material than the next stage, even without all the additional fiddling about with labour-heavy extras. Sure enough, combining the Invoices Ex 3 and Ex 4, the labour component totals $8,035.00 and everything else $1,928.91 – a ratio of about 4:1. From all the evidence, the extras alone would have had an even greater ratio of labour to hardware, I guess about twice as high as the total works (extras plus some quoted works) invoiced in Ex 3 and Ex 4 (All the figures to this point in this paragraph are before GST). I do not believe that an amount of $350.00, including GST, would be unfair to the Defendant.

50. So:

Proved value of Extras Labour		$2,277.00
	Cables etc	$ 350.00
		$2,627.00
From paragraph 46	+	$3,411.54
		$6,038.54

51. I am conscious that that this final figure may well be less than the true value of work done by the plaintiff, but the evidence is what it is. I have not been able to find another way of processing the evidence I understand to arrive at

anything more. The plaintiff was the burden of proof, and this is, in my judgement what has been proved.

52. There will be judgment for the plaintiff in the sum of $6,038.54, plus $196.30 (filing and service fee). In this case I do not believe it is just to award interest from the time the debt arose, nor from the time of filing the claim, because at those times K & J had not provided sufficient explanation of the basis of their demand to Ms Gikas. Not until the last of Mr Burns's evidence was heard on 11/11/10, and only in the light of the then recently provided Ex 12, was it really possible for Ms Gikas to start to assess what she really owed. The process of assessment was not simple or quick. In the circumstances I decline to award interest.

53. The Defendant is to pay the Plaintiff $6,234.84.

Dated this 19th day of April 2011

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R J Wallace
STIPENDIARY MAGISTRATE