

CITATION: Arnhem Contracting (NT) Pty Ltd v Aus Tile QLD Pty Ltd [2016]  
NTLC 010

PARTIES: ARNHEM CONTRACTING (NT) PTY LTD  
V  
AUS TILE QLD PTY LTD

TITLE OF COURT: Local Court

JURISDICTION: Civil

FILE NO(s): 21459114

DELIVERED ON: 1<sup>st</sup> of June 2016

DELIVERED AT: Darwin

HEARING DATE(s): 22<sup>nd</sup> of October 2015, 25<sup>th</sup> of February 2016,  
3<sup>rd</sup> of March 2016 and 29<sup>th</sup> of April.

JUDGMENT OF: Judge Alan Woodcock

**CATCHWORDS:**

Contract inferred from the conduct of the parties.

**REPRESENTATION:**

:

Plaintiff: Mr Philip Hoare, Director  
Defendant: Mr Matthew Stephen, Director

Judgment category classification: B

Number of paragraphs: 47

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

No. 21459114

BETWEEN:

**ARNHEM CONTRACTING (NT) PTY LTD**  
**(ACN; 136 985 969)**  
Plaintiff

AND:

**AUS TILE QLD PTY LTD (ACN; 164 576 578)**  
Defendant

REASONS FOR JUDGMENT

(Delivered 1<sup>st</sup> of June 2016)

1. The Plaintiff is incorporated under the Incorporations Act and is engaged in the business of building residential dwellings. Mr Hoare appeared for the Plaintiff as Managing Director and gave evidence. All of the formal correspondence relied upon by Mr Hoare is signed by him as the Managing Director of Suave Concept Homes, a registered business owned by the Plaintiff.
2. The Defendant is incorporated under the Corporations Act. Mr Stephens appeared for the Defendant as the company director and gave evidence. Mr Stephens agrees that the Defendant was up to mid-2014 engaged in the business of tiling but says at the relevant time in October 2014, it had ceased to trade and actively carry out the business of tiling.

3. Throughout the hearing of this matter there was clear enmity between Mr Hoare and Mr Stephens. Much of the hearing was spent by both men rehashing historic grievances and airing suspicions of bad faith in their business dealings.
4. Mr Hoare did not attend court at 10am on the 22<sup>nd</sup> of October 2015 when the matter was set for hearing preferring to send a note to the court registry saying he was attending a medical appointment and to adjourn the matter to 11am. When he did attend court he gave no explanation. The Plaintiff had not filed and served a case management statement nor provided the Defendant with copies of relevant documents as was ordered on the 21<sup>st</sup> of August 2015. Mr Hoare purported to rely on witnesses but had not summonsed them or arranged for their attendance.
5. Mr Stephen received the documents relied on by the Plaintiff in court and declined an adjournment.
6. The Plaintiff pleads that on or about the 20th of October 2014 Mr Stephens attended the office of the Plaintiff at the request of Mr Hoare. It is claimed a contract was entered into by the parties as follows;
  - a. The Defendant would undertake tiling works and supply tiling materials, not including tiles for the purpose of completing the tiling of a property...12 Steerman Court, Zucolli...("the property");
  - b. Pricing for the work as per the defendants pricing guide for New Developments referred to in Paragraph 2(c);
  - c. Work would be completed within 3 weeks of Friday 24 October 2014;
  - d. The work to be undertaken would be to a proper workmanlike standard, proper building standards and to a standard equal to or greater than that displayed by the plaintiff in its display home, inspected by the defendant"
  - e. The defendant has the skill and the ability to produce a superior result within the required time and the defendant said words or words

to the effect of the plaintiff would “*would not be able to find a better tiler than him*”;

f. That Mr Stephen, Director of the defendant, would carry out the works personally or cause the works to be carried under his direct supervision by properly qualified workers;

g. That the plaintiff would cause the tiled to be delivered to the property on or by Friday 24 October;

h. That the defendant would commence works on the day that the tiles where delivered to the property;

i. That the defendant would invoice for its work, upon completion and the plaintiff would pay for the works within 14 days of receipt of that invoice;

j. That the timing of the work was critical because the plaintiff would suffer damage is the tiling was not on time as pleaded in Paragraphs 4 (c.) (g.) (h.);

k. That the waterproofing to wet areas would be to the satisfaction of the Private Building Certifier and to the proper building standards;

7. It is further claimed that following various breaches of the first contract that on Monday the 24<sup>th</sup> of November 2014 Mr Stephen and Mr Hoare, on behalf of the parties agreed to vary the terms of the contract as follows;

#### **Particulars of Variation**

a. That the defendant would forthwith rectify the works at its expense;

b. That Mr Stephen would personally carry out the rectification works and be onsite between the hours of 0630 and 1630, Monday to Sunday inclusive;

c. That all works would be complete within two weeks;

d. That if the work was not completed within two weeks, the plaintiff would suffer further damage, which would be the responsibility of and chargeable to the defendant”

8. There is no written agreement, minutes of meeting or notes of the agreement or variation. The agreement is not replicated or outlined in any of the contemporaneous text messages or correspondence passing between the parties during the relevant period, with one exception as discussed below.
9. The Plaintiff seeks damages of \$100000.00 as a result of loss said to be caused by breaches of the contract.
10. Mr Hoare gave evidence as follows;

“... my company engaged with Aus Tile Queensland Pty Ltd to carry out tiling works at the property of Lot 11759 Steerman Court in Zuccoli.”

“So on 20 October 2014 Mr Stephens again attended at my office to- at my display home, to discuss a couple of projects and further to that we entered into an agreement that we would engage Mr Stephen, at that time I was lead to believe through AusTile Qld Pty Limited to carry out tiling works at lot 11759....So that meeting took place on or about 21 October. On 24 October which was the Friday I arranged and caused for the tiles for the project to be delivered to the site. A copy of that tax invoice which shows the delivery date I will tender in evidence....

11. I endeavoured to illicit further detail of the agreement;

“Sorry the agreement the long and the short of it was? That he would arrive on the Friday to secure the—

Who would?—Mr Stephen

Yes would arrive on the Friday?—And or his employees or subcontractors, and they would commence moving the tiles inside, securing them, marking the floors showing where the tiles are supposed to be laid and would get a start on the job.”

12. Mr Hoare gave evidence of a meeting with Mr Stephen on site on the 24<sup>th</sup> of November 2014;

“An agreement was reached with Mr Stephen that he would rectify the works at his expense and in a timely fashion. I told him that I was considering terminating the contract unless Mr Stephen agreed to be on site between the hours of 6.30 am and 4.30 pm Monday through Sunday himself and directly undertake the works in person and at all times.”

13. A letter dated 25<sup>th</sup> of November 2014, addressed to Mr Stephen, under the hand of Mr Hoare headed “Notice of failure to perform Contract” was tendered into evidence. Reference is made to discussions between the two men the previous day. There is no mention of an agreement to vary the terms of a contract. Nor is the variation mentioned in the almost daily text message from Mr Hoare to Mr Stephens.

14. The letter sets out in part;

“You are required as per our verbal contract to complete the works in a timely fashion and as per your indication 2 -3 weeks.”

15. At the end of the first day of evidence on the 22<sup>nd</sup> of October 2015, whilst Mr Hoare was still in evidence in- chief, Mr Hoare and Mr Stephen were told;

“.. You’re both self- represented...you have to prove all of the material (facts) that you have pleaded to prove you’re case. Have a read of your statement of claim and bear that in mind.”

16. The hearing was adjourned the 17<sup>th</sup> of February 2016. On that day Mr Stephen failed to attend, forwarding a generic one day medical certificate citing a medical condition. No satisfactory explanation was given for the delay.

17. The matter was adjourned to the 25th of February. Mr Hoare resumed his evidence in chief on that day. He gave no further evidence about the terms of the purported contract or its variation as pleaded.
18. Upon completing his evidence Mr Hoare was asked if he wished to call other witnesses and he was told “you must call all of the witnesses you are going to call now”. He elected to close his case.
19. Mr Stephen then gave evidence which he completed on the subsequent adjourned date of the 3<sup>rd</sup> of March 2016.
20. Subsequently Mr Hoare was given leave, to call Mr Bann, who was employed as a site supervisor for the Plaintiff at the relevant time. Neither party had arranged video conference facilities; this was undertaken by court staff at my urgent request to complete the evidence.
21. Mr Bann attended a meeting with Mr Hoare and Mr Stephen, along with Mr Stephen’s business partner at Mr Hoare’s office “On the 26<sup>th</sup> before that job”.

“We were discussing rates, and what we expected of the timing and then we gave them the (inaudible) on a job that was in our bush community patch. They’d done that job and it was well done...so we then had a discussion with Phil and requested them to do that house then to lead onto possibly more.

Was there a rock solid agreement as far as you were concerned at that point to do the work at Zuccoli at that meeting?---No

It was a discussion about rates and possible work was it?--- that’s correct.”

22. Mr Bann reiterated that his only knowledge of contracts came from what he was told by Mr Hoare. He believed that Aus Tile had been engaged to

perform the tiling works as a result. Mr Bann was a truthful witness, I accept his account.

23. There is no evidence of an agreement for the actual size, scope or specifications of the tiling work. There is no evidence of an agreement as to the basis of calculating payment, notwithstanding significant discussion of a “pricing guide”. Terms such as method and timing of payment and supervision of tradesmen as pleaded are not proven as being agreed directly or inferentially. Mr Hoare makes no mention of these matters in his evidence other than to suggest he considered terminating the contract unless Mr Stephen was onsite supervising the work. It is pleaded that he alone entered into this oral contract with Mr Stephen on the Defendants behalf.
24. Mr Hoare gives evidence that Mr Stephen agrees to rectify the defective works at his expense on the 24<sup>th</sup> of November. Mr Hoare gives no evidence that on the 24<sup>th</sup> of November Mr Stephen agreed to be onsite during business hours, complete the work within two weeks, be liable for further delays as pleaded. Rather than confirm the same, the formal correspondence from the Plaintiff to the defendant the following day is silent as to the supposed agreed variation and complains of a failure to perform the contract.
25. I am unable to accept Mr Hoare’s assertion that a contract was entered into on the 20<sup>th</sup> of October 2014. I accept Mr Bann’s evidence that at the meeting there was a discussion between Mr Hoare and Mr Stephen concerning potential future tiling work, including at the Zuccoli site and potential rates, but no confirmed agreement. It is likely Mr Bann is referring to a meeting as pleaded on the 20<sup>th</sup> October.
26. I am satisfied on all the evidence that during the discussion on the 20<sup>th</sup> of October (in their capacities as directors) between Mr Hoare and Mr

Stephen that Mr Hoare offered work tiling 12 Steerman Court to the Defendant.

27. Tiles to the value of \$13769.66 were delivered to 12 Steerman Court on the 24<sup>th</sup> of October by City Ceramics at the request of the Plaintiff.
28. From his correspondence in evidence, I am satisfied that Mr Hoare subsequently believed that a contract existed between the Plaintiff and the Defendant.
29. Mr Stephen's account is that he did initially agree, on behalf of his company, to perform the works at 12 Steerman Court. However due to commitments in Queensland he concluded the defendant would be unable to do so and so referred the Plaintiff to Steven O'Donovan to perform the tiling works at 12 Steerman Court. His account is that subsequently, when the job was not done well by the Plaintiffs own subcontractor, he engaged Perin, a French woman to perform remedial tiling works. This was done at no expense to the Plaintiff, in the hope of getting future work. Perin was assisted by Davey, a labourer subcontracted by the defendant. Mr Stephen denies engaging an older English gentleman.
30. Mr Stephen produced a tax invoice from Mr O'Donovan in the name of Stephen Dunux Tiling along with a chain of emails, endeavouring to prove its provenance. The 'tax invoice' dated 10<sup>th</sup> of December 2014 was for tiling and waterproofing of new house at 12 Steerman Court and has no ABN number, includes GST and is in the amount of \$25399.00. Mr Stephen purported to be in contact with Mr O'Donovan but did not call him in evidence.
31. Mr Hoare was also given leave, with the consent of the defendant, to call Mr Nicholas Fullerton, tiler, as a witness on the 3<sup>rd</sup> of March 2016. Mr Fullerton gives evidence he was engaged by the Defendant at 12 Steerman Court Zuccoli to perform tiling work. He was engaged by Mr

Stephen on behalf of the Defendant to undertake repairs to a very poor tiling job with numerous defects.

32. Mr Stephen had told him that he had had an older English gentleman working for him who had performed the tiling. He gives evidence Stephen O'Donovan is not a tiler but a labourer learning to tile. The following is an answer by Mr Fullerton to Mr Stephen about Mr O'Donovan;

“I spent a couple of weeks with him on the Zuccoli job where he was also working getting paid by you, taking your instructions to help me...

33. He was also aware that a “French girl” had also worked on the job. She had performed poor work.
34. Mr Bann gave evidence that he personally observed Mr Stephen himself lay a number of tiles at 12 Steerman Court.
35. I accept Mr Fullerton's account as truthful and accurate
36. Given Mr Fullerton's account I have misgivings about the provenance of the invoice from Mr O'Donovan and give it no weight.
37. On the 29<sup>th</sup> of April I had the parties attend court so that Mr Hoare might prove the relationship between Suave Homes and the Plaintiff.
38. Ultimately the Contract of the 20<sup>th</sup> of October 2014 as pleaded has not been proven, nor the variation of the 24<sup>th</sup> of November 2014.
39. I find that Mr Stephens did engage a tiler referred to as the older English gentleman to undertake the initial task of tiling 12 Steerman Court as set out in the evidence of Mr Fullerton. The tiles used were those delivered to the site by City Ceramics as invoiced to the Plaintiff. I find that Mr Stephen on behalf of the defendant engaged Mr Fullerton on a commercial basis for several weeks to repair the tiling works done, Mr

Stephen also engaged Mr O'Donovan as a labourer. Mr Stephen himself undertook some tiling works as per the evidence of Mr Fullerton and Mr Bann. Subsequently Mr Stephen on behalf of the defendant engaged a person referred to only as Perin to undertake further tiling works. I do not accept suggestion work of this magnitude might be performed as a gratuity by a small business such as that of the Defendant. Mr Stephen on behalf of the Defendant has, by his conduct accepted the offer to tile 12 Steerman Court Zuccoli. See *Alford v Ebbage* [2004] QCA 283 and *Hayes and v McNeil* (1906) 8 WALR 186.

40. Though I am not satisfied that a contract was entered into on the 20<sup>th</sup> of October as pleaded, I am satisfied that a contract must be inferred from the conduct of the parties for the tiling of 12 Steerman Court. The contract was entered into after the meeting of the 20<sup>th</sup> of October and before the 25<sup>th</sup> of November when the letter was sent by Mr Hoare claiming failure to perform.
41. Representations had been made by Mr Stephens about the tradesman like quality of the Defendants tiling. The contract included a term as to reasonable quality of workmanship.
42. The contract as found is not pleaded. However the component parts, timing, terms and context, are clearly within the contemplation of the parties as matters of contest. Accordingly there is no unfairness or prejudice. See *Wandel v Halloran* [2015] SASFC 155.
43. I find the works performed as described in the evidence of Mr Fullerton were far below a workman like standard; thus breaching the contract. I accept the evidence the tiling was incapable of repair and would have to be replaced.
44. The only loss that can be established as flowing from this breach is the price of the replacement of the original tiles that would have to be

replaced. I do not accept the submission from Mr Hoare he contemplated a separate proceeding to establish quantum of loss. He was warned to read the pleadings, prove all matters therein and call all his evidence through -out the proceedings.

45. Given my observations of Mr Stephen's evidence I am unable to accept any part of his account that is not corroborated by another witness. Accordingly on the evidence I reject, as pleaded in the Notice of Defence, that Mr Stephen was not acting in his capacity as a director at the relevant time; I do not find proved the referral of The Plaintiff to Stephen O'Donovan by the Defendant; I do not find that the Plaintiff entered into a contract with Stephen James O'Donovan; I reject the proposition that remedial tiling works were performed by the Defendant as a gratuity to the Plaintiff.
46. Specifically I reject the suggestion from Mr Stephen that he was engaged in works for Aus Tile NT Pty Ltd at that time as opposed to the Defendant. I accept Mr Hoare's evidence that it was indeed the Defendant with whom the Plaintiff had contracted.
47. I therefore award damages in the amount of \$13769.99 to the Plaintiff against the Defendant for loss flowing from the breach of contract as set out above.

Dated this 1<sup>st</sup> day of June 2016

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JUDGE ALAN WOODCOCK

LOCAL COURT OF THE  
NORTHERN  
TERRITORY