Ray Laurence Constructions Pty Ltd & Anor v Nolks [2010] NTSC 37

PARTIES:	RAY LAURENCE CONSTRUCTIONS PTY LTD (ACN 108 063 387) AND: CHARLES DICKMAN T/as RAY LAURENCE CONSTRUCTIONS v THORSTEN NOLKS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	152 of 2006 (20631733)
DELIVERED:	16 July 2010
HEARING DATES:	7, 8, 9, 10 & 11 December 2009
JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

CONTRACTS – Building contract – scope of the work – contract documents – contract price – practical completion – builder's entitlement to payment – counterclaim – defects – delay – loss of use of house

Clyde Contractors Pty Limited 'trading as Clyde Constructions' v Northern Beaches Developments Pty Limited [2001] QCA 314; *Murphy Corporation v Ackuman Design & Development 'Queensland' Pty Limited* unreported Supreme Court of Queensland 19 December 1991; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 79 ALJR 129; *Walter Construction Group Ltd v Walker Corporation Ltd* [2001] NSWSC 283, applied

Inverugie Investments Limited v Hackett [1995] 3 All ER 841; *Westwood v Cordwell* [1983] Qd R 276, referred to

REPRESENTATION:

Counsel:

Plaintiffs:	M Keith
Defendant:	W Roper

Solicitors:

Plaintiffs:	Minter Ellison
Defendant:	De Silva Hebron

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

Ray Laurence Constructions Pty Ltd & Anor v Nolks [2010] NTSC 37
No 152 of 2006 (20631733)

BETWEEN:

RAY LAURENCE CONSTRUCTIONS PTY LTD
(ACN 108 063 387)
First Plaintiff

AND:

CHARLES DICKMAN T/as RAY LAURENCE CONSTRUCTIONS
Second Plaintiff

AND:

THORSTEN NOLKS
Defendant

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 16 July 2010)

Introduction

[1] This proceeding involves a building dispute between Mr Charles Dickman, the builder, and Mr Thorsten Nolks, the property owner, about the construction of a house at 385 Reedbeds Road, Darwin River during the second half of 2004.

[2] Mr Dickman claims that the work he was required to undertake reached a stage of practical completion and that under cl 18 of the building contract he was entitled to be paid in full. He claims the sum of $52,438 which is made up as follows:

1.	Final progress claim	$32,100.00
2.	Variation for lining of veranda ceiling	$13,625.00
3.	Variation for installation of guttering	$1,502.00
4.	Variation for stencilling veranda floor	$7,800.00
5.	Variation for installation of gable vents	$330.00
Less		
	Variations reducing the scope of the work	$2,919.00

[3] In addition, Mr Dickman claims interest on the amount of $52,438.00 at a rate of 15 per cent per annum from 15 December 2004 under cl 5 of the building contract.

[4] Mr Nolks denies Mr Dickman is entitled to be paid the amounts he has claimed, and Mr Nolks has counterclaimed for various defects in the work and for breaches of contract. The extent of Mr Nolks' counterclaim decreased during the course of the hearing of the proceeding. Ultimately, he did not press a number of claims pleaded in the Further Amended Defence to Further Amended Statement of Claim and Set-off and Counterclaim filed on 3 November 2009. He also abandoned his claim for breach of statutory duty. The extent of Mr Nolks' claims are summarised in a document

entitled, ‘Defendant’s Damages’, which was filed in court on 11 December 2009.

[5] Mr Nolks alleges that Mr Dickman is not entitled to payment of his claim on the following grounds. (1) The works undertaken by Mr Dickman did not reach a stage of practical completion and, under the building contract, the builder only became entitled to payment of his final claim upon practical completion of the building works. According to Mr Nolks, the building works undertaken by Mr Dickman did not reach the stage of practical completion because, as a result of the defects in the work and Mr Dickman’s breaches of contract, the certifier could not certify the works and an occupancy permit could not be issued. (2) The contract price was $160,500. Mr Dickman has incorrectly inflated the total contract price and therefore his claim by $10,000. (3) Mr Dickman did not provide a quote for the variation to clad the ceiling of the veranda of the house with colour bond sheeting and Mr Nolks did not accept the price of $13,625 which Mr Dickman claims for that work. (4) The quantum of Mr Nolks’ counterclaim exceeds the quantum of Mr Dickman’s claim.

[6] Mr Nolks conceded that on his behalf his father, Mr Frank Nolks, agreed to the four variations that are referred to in par [2] above which increased the scope of the contract works; and Mr Dickman completed the works which were the subject of each of those variations. He also accepts the prices claimed for the variations for the guttering, stencilling of the veranda floor and gable vents.

[7] Mr Dickman conceded that he is liable for the following defective works and the parties have agreed the cost of rectifying the works as set out below:

1.	PVC pipes for waste condensate for air conditioning	$261.80
2.	The height of the finished concrete floor above the surrounding ground is lower than specified in the plans and drainage works around the house are required to intercept and divert stormwater.	$11,000.00
3.	Defective gutter system	$2,327.60
4.	Defective door seals to external swing doors	$27.50
5.	Missing pop rivets in the soffit lining	$71.50
6.	Nonconforming overflow relief pipe over the overflow relief gully	$330.00
7.	Septic tank lid needs to be raised	$1,100.00

[8] In addition to the defective works set out in par [7] above, Mr Nolks claims damages for the following matters which remain in dispute:

1.	Defective mortar at the perpendicular ends of the blocks used to build the eastern and kitchen walls of the house	$1,853.50
2.	Additional costs of the preparation of ‘as constructed’ plans arising as a result of the builders failure to complete all of the works in accordance with the plans and engineering specifications	$2,000.00
3.	General damages for loss of use of the house arising as a result of the delay caused by the builders failure to build the house in accordance with the approved plans and engineering specifications	$69,454.00
4.	Interest on the damages for loss of use of the house	$16,454.60
5.	Damages for investigating and diagnosing the defects	$10,925.00

[9] The total amount of damages claimed by Mr Nolks is $115,806.10.

[10] The damages claimed for loss of use of the house and for investigating and diagnosing the defects are said to be caused by the builder's failure to repair the defects and by the time taken to obtain the necessary certificates and approvals for other works which were not done in conformity with the plans and engineering specifications including, a failure to adequately compact the pad on which the house was built and constructing the concrete slab floor at a height less than that specified in the plans. Mr Nolks maintains that as a result of the defective works undertaken by Mr Dickman and his failures to comply with the plans and specifications when constructing the house, the house was not reasonably fit for use because Mr Nolks was unable to obtain an occupancy permit.

The issues

[11] The following issues are the principal issues in the proceeding. (1) What was the contract price? (2) What were the contract documents? (3) Was Mr Dickman required to construct the pad on which the house was built? (4) Did the works undertaken by Mr Dickman reach the stage of practical completion? (5) Was Mr Dickman entitled to the payment of his final accounts in full? (6) What was the price of the variation for cladding the veranda ceiling? (7) Was the mortar at the perpendicular ends of the blocks used to construct the walls of the house defective? (8) Did Mr Dickman's defective works and his breaches of contract prevent Mr Nolks from

obtaining an occupancy permit and cause him to suffer a loss of use of the house for a period of time? (9) Was Mr Nolks entitled to recover the costs of having the defects and breaches of contract investigated? (10) Was Mr Nolks entitled to the cost of preparing the 'as constructed' plans?

The evidence

[12] The evidence in this proceeding was largely affidavit evidence with a number of the deponents of the affidavits being called at the hearing to supplement the evidence contained in their affidavits and to be cross examined. On behalf of Mr Dickman the following affidavits were read: an affidavit of Mr Dickman sworn on 14 October 2009, an affidavit of Bede Joseph Rodeghiero sworn on 14 October 2009, an affidavit of Grant O'Callaghan sworn on 14 October 2009, an affidavit of Konrad Schultz sworn on 14 October 2009, an affidavit of John Fong sworn on 21 October 2009, an affidavit of John Brears sworn on 2 October 2009, an affidavit of Percy James Williams sworn on 30 September 2009, an affidavit of Colin Pascoe sworn on 7 October 2009, a further affidavit of Mr Dickman sworn on 13 November 2009, a further affidavit of Percy James Williams sworn on 12 November 2009, and a further affidavit of Grant O'Callaghan sworn on 4 December 2009. A video of the house and the mortar at the perpendicular ends of the blocks used to construct the walls of the house was also tendered in evidence.

[13] The following affidavits were read on behalf of Mr Nolks: an affidavit of Mr Nolks sworn on 29 October 2009, a further affidavit of Mr Nolks sworn on 24 November 2009, an affidavit of Frank Nolks sworn on 30 October 2009, a further affidavit of Mr Frank Nolks sworn on 24 November 2009, an affidavit of John Scott sworn on 21 October 2009, an affidavit of Andrew Williams sworn on 19 September 2009, an affidavit of John Bradley sworn on 29 October 2009, an affidavit of David Bowler sworn on 29 October 2009 and, in addition, oral evidence was led from Terrence John Roth.

Assignment of the contract

[14] Before dealing with the principal issues referred to in par [11] above it is necessary to briefly deal with the question of assignment of the contract. During the hearing of this proceeding the first plaintiff, Ray Laurence Constructions Pty Ltd, and Mr Dickman conceded that Mr Dickman had not validly assigned his interest under the building contract to the company. However, up until the hearing the plaintiffs maintained there had been such an assignment.

[15] In par 19 of the Further Amended Statement of Claim it is pleaded that Ray Laurence Constructions Pty Ltd registered a workmen's lien on 8 March 2005 for an adjusted contract price of $190,838.00 which amount had become payable under s 10(2)(b) of the *Workmen's Lien Act (NT)* upon service of a notice of demand for that amount upon the defendant on 4 March 2005. Further, by way of relief pleaded in the Further Amended

Statement Claim, the first plaintiff sought enforcement of the workmen's lien pursuant to the *Workmen's Lien Act* and insofar as is necessary s 142 of the *Land Title Act* for the debt of $58,805.12.

[16] The effect of the plaintiffs' concession is that Ray Laurence Constructions Pty Ltd was not entitled to register a workmen's lien and the company is not entitled to any relief as claimed in the Further Amended Statement of Claim.

The contract price

[17] Mr Dickman claimed the total contract price for the building work was $170,500. Mr Nolks maintained the contract price was $160,500. The dispute arose because the building contract which was executed by the parties on 30 March 2004 states, on page one, that the total price for the building works to be undertaken by Mr Dickman was $160,500. Indeed, on Mr Dickman's copy of the building contract, the price of $170,722 had been crossed out and the price of $160,500 had been written down.

[18] I find that the contract price was $170,500. I accept the evidence of Mr Dickman about this topic. In summary, Mr Dickman's evidence was that the price in the building contract was not the true contract price. He had been asked by Mr Nolks and his father, Mr Frank Nolks, to provide a quote for the construction of a house at 385 Reedbed Road. He obtained instructions about the scope of the work that he was to undertake, he visited the site and he prepared a written quote and a schedule of finishes that delineated the scope of the work he was to undertake. He emailed or faxed

his quote and schedule of finishes to the Nolks in or about February or March 2004. His quote was accepted. However, before the building contract was executed Mr Nolks asked him to change the price shown on the building contract because their bank had only agreed to lend him $160,500. Mr Nolks told Mr Dickman that he would be paid $10,000, which was the balance of the contract price or thereabouts, in cash. In accordance with Mr Nolks' request the price written in the building contract was varied to reflect the maximum amount the bank was prepared to lend Mr Nolks.

[19] In more detail Mr Dickman's evidence was as follows.

[20] In about January 2004 he was contacted by Mr Frank Nolks, who is the father of Mr Thorsten Nolks, about quoting on building a house for Mr Thorsten Nolks. At the time he had this discussion he was not given any plans or additional information about the house. Sometime after this discussion he saw Mr Frank Nolks at his screen printing business and Mr Frank Nolks told him not to bother about the quote as he already had somebody organised to do the job. However, during February 2004, he received a telephone call from Mr Frank Nolks who said he now wanted Mr Dickman to quote on building the house. They arranged to meet at Mr Frank Nolks' home in Ludmilla. The meeting took place in a caravan in the backyard of their home. At the meeting Mr Dickman was handed a set of plans and asked to quote on the job. In his oral evidence, Mr Dickman also conceded that either at this meeting or prior to having the plans certified he was also given a copy of a Section 40 Certificate of Compliance

prepared by an engineer, Mr Charles Chew. The Section 40 Certificate of Compliance specified a safe foundation bearing capacity of 150.0 kPa.

[21] Before providing a quote for the building works Mr Dickman inspected the site at Reedbeds Road with Mr Frank Nolks. At the time he determined that the block would need some scrub cleared and the site levelled before construction could commence. Mr Frank Nolks said he would organise the site clearing and levelling earthworks for the house pad. Mr Dickman then provided a quote and a list of finishes outlining the scope of the building work he was to do for Mr Nolks. The schedule of finishes also recorded the building work which was to remain Mr Nolks' responsibility.

[22] The final quote Mr Dickman provided for the work was a quote of $170,772. That was his price for undertaking the building works delineated in his schedule of finishes in accordance with the relevant plans and specifications that had been provided to him. The schedule of finishes was Annexure CD3 to the affidavit of Mr Dickman sworn on 14 October 2009. It is apparent from the schedule of finishes that certain works were to be undertaken by Mr Dickman and other works were left to be undertaken by Mr Nolks. In particular, all of the electrical works and all of the painting were to be done by Mr Nolks.

[23] It was then agreed between the parties that it would be necessary to complete a written contract. Prior to Mr Dickman meeting with Mr Nolks and his father, he filled in a copy of the HIA Plain Language Northern

Territory Building Contract. He dropped the contract off to the Nolks' residence for them to look over. On 30 March 2004, the parties met to execute the contract. Upon arriving at the Nolks' residence Mr Frank Nolks stated that they would have to change the contract price to $160,500. Mr Nolks said the Bank was only willing to lend them $160,500. Consequently, the additional $10,000 would be paid in cash. Mr Dickman accepted this proposition. He then crossed out the figure of $170,722 in the building contract and proceeded to fill in another contract with the figure of $160,500. He gave the Nolks' a copy of the contract which only had the price of $160,500 written on it so they could show it to their Bank. He kept the duplicate contract with him as his copy. Because Mr Frank Nolks stated that he would pay the balance of the contract price of $10,000 in cash Mr Dickman did not pursue the additional amount of $222.

[24] The parties then executed the contracts. Both Mr Thorsten Nolks and Mr Dickman initialled each page of the contract. Of significance, on page 3 of both documents under the heading "Extra Contract Terms" is an asterisk and a notation "Deposit as per quote". Mr Dickman gave evidence to the effect that the purpose of this notation was to acknowledge the fact that $10,000 was being paid in cash to make up the total contract price of $170,500. It is also common ground that, after the building contract was executed by the parties and prior to payment of the first progress payment claim, Mr Nolks paid Mr Dickman the sum of $10,000 in cash. The payment

of the $10,000 is admitted in par 17 of Mr Nolks' Further Amended Defence to the Further Amended Statement of Claim and Setoff and Counterclaim.

[25] Both Mr Thorsten Nolks and Mr Frank Nolks deny receiving a written quotation and a schedule of finishes from Mr Dickman. Their evidence is that Mr Dickman agreed to build the house for $160,500 in accordance with the quote of another builder, Mr Bilias, which they provided to him. They assert that at or about the time the building contract was executed Mr Dickman enquired about the specifications for four external doors that were to be fitted to the house. They told Mr Dickman the doors were to be powder coated French doors. Mr Dickman then said that he had not allowed for powder coated French doors in his quote and he would need an extra $10,000 in cash to pay for the doors.

[26] During his cross examination, Mr Nolks stated the following. When Mr Dickman initially said to him he could build the house for the same price as Mr Bilias had quoted, Mr Dickman did not realise that four powder coated external French doors were to be erected. When he realised this, Mr Dickman told Mr Nolks the French doors were going to cost an extra $10,000 and he would need a deposit for the doors. Mr Nolks said to Mr Dickman, "Not a problem". He went on to say people make mistakes. Mr Dickman made an error in the quote which we accepted and it was an extra $10,000 for the French doors. He told Mr Dickman, "That is fine. I will give you that money. I have no problem with that." The effect of Mr Nolks' evidence is really to concede the point in any event.

[27] I do not accept either Mr Thorsten Nolks or Mr Frank Nolks' evidence that they did not receive either Mr Dickman's quote or his schedule of finishes. Their evidence is inconsistent with the notation on page 3 of the building contract that a deposit was to be provided in accordance with the quotation. It is also inconsistent with the fact that Mr Thorsten Nolks discovered the schedule of finishes in his list of documents as a document that was in his possession. Without the schedule of finishes there was no way of knowing what work was to be done by Mr Nolks. It is inconceivable that Mr Dickman would have provided the schedule of finishes without also providing the written quote. Nor do I accept Mr Thorsten Nolks' evidence that he did not see the words, "* Deposit as per quote", written on page three of the building contract. He initialled each page of the contract. There is very little on page three of the building contract. In any event, Mr Nolks must be taken to have bound himself to the contract by his signature[1].

Contract documents

[28] Clause 1.7 of the building contract defines the contract documents as follows:

> "*The contract documents*: the plans, building schedule, building specification and other documents showing what we are to do for you."

[29] Clause 1.8 of the building contract defines the work as follows:

[1] *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 79 ALJR 129 at 137.

"*The work*: the work to be done and completed under this contract as shown in the *contract documents*."

[30] In par 5.1 of the Further Amended Defence to the Further Amended Statement of Claim and Set-off and Counterclaim, Mr Nolks claims that the contract documents are comprised of:

1. Plans and drawings with endorsed specifications and detailed instructions – 9 sheets numbered D4142-9 inclusive dated March 2003, and in relation to D4142-1 and D4142-2 amended on 26 April 2005, showing the building work to be done under the contract.

2. Northern Territory Building Act 1993 "Section 40 Certificate of Compliance" dated 13 March 2003.

3. Northern Territory Building Act 1993 Building Permit No. 160/82023/3/2 dated 13 April 2004.

4. Schedule of Conditions to Northern Territory Building Act 1993 Building Permit No. 160/82023/3/2.

5. Occupancy Check List attached to the Northern Territory Building Act 1993 Building Permit No. 160/82023/3/2.

[31] Mr Dickman claims that the contract documents are comprised of the schedule of finishes he gave to Mr Nolks and the plans and drawings he was given by Mr Nolks. He denies that the contractual documents included the Building Permit, the Schedule attached thereto, the Occupancy Checklist or the Section 40 Certificate of Compliance.

[32] I find that the contract documents are comprised of the following documents: the Schedule of Finishes provided by Mr Dickman to Mr Nolks; the plans and drawings (endorsed with specifications and detailed

instructions) provided to Mr Dickman by Mr Nolks as certified by Mr Grant O'Callaghan; the Section 40 Certificate of Compliance; the Building Permit; and the Schedule of Conditions attached to the Building Permit.

[33] As to the schedule of finishes, it is clear that the plans contain more works than that shown on the schedule of finishes. It is common ground that Mr Dickman was not required to complete all of the works contained in the plans. Mr Dickman's price was based on the work the schedule of finishes stated he was to complete. His price was accepted by Mr Nolks.

[34] Clause 2 of the building contract is headed, "Our Main Obligations". Clause 2 states that Mr Dickman was to do the work for Mr Nolks at the site, he was to do the work properly and skilfully, he was to do the work as required by the engineer and by any statute and he was to use good and proper materials. The effect of the requirement to do the work as required by the engineer and by any statute is to establish that it was the intention of the parties to incorporate the Section 40 Certificate of Compliance and the Schedule annexed to the Building Permit as contract documents. The works could not go ahead without a Building Permit being obtained. Mr Dickman also acknowledged that he received a copy of the Section 40 Certificate of Compliance at about the time he received a copy of the plans.

[35] The relevance of the contract documents is that they contain the scope of the work to be done by the builder. The effect of the inclusion of the schedule of finishes as a contract document is as follows. The floor of the veranda

was to be constructed using grey concrete with a non-slip finish. The ceilings of the veranda were to be open rafters. There was no requirement that the builder was to prepare the pad on which the house was to be constructed. Consistent with this, there was a notation in the schedule of finishes that there was no applicable soil test required so far as the footings were concerned. The owner was to paint any part of the verandas that required painting. All sanitary tap wear and fittings were to be supplied by the owner. All laundry tubs and tap wear were to be supplied by the owner. The shower screens were to be supplied by the owner. The owner was responsible for all electrical work. All tiles were to be supplied by the owner. The kitchen was to be supplied by the owner. The bedroom robes including the robes in the master bedroom were to be supplied by the owner. All painting was to be completed by the owner. All air conditioning was to be supplied by the owner.

[36] The effect of the inclusion of the schedule of conditions annexed to the Building Permit was as follows. The building could not be occupied unless a Permit to Occupy had been issued by the building certifier (cl 4). It was the builder's responsibility to confirm that the minimum safe bearing capacity as noted on the structural engineer's certificate and/or certified drawings is achieved by the foundation prior to placement of any footings. Should the bearing capacity not be achieved, revised footing and/or slab details are to be provided by the builder for approval (cl 14). Prior to the commencement of building works, the site classification report prepared by

geo-technical engineer shall be provided to the building certifier. The said report is required to confirm a site classification of Class S in accordance with the requirements of the certifying structural engineer (cl 15). Significantly, the only onus, of relevance, cast upon the builder was to check that the minimum safe bearing capacity was achieved by the foundation prior to the placement of any footings and, if it was not, to obtain a revised footing and/or slab detail. The builder was not required to obtain a site classification report.

Was Mr Dickman required to construct the pad for the house?

[37] I find that Mr Dickman was not required to construct the earth pad on which the house was built. Such work was not included in Mr Dickman's schedule of finishes. I also accept Mr Dickman's evidence in this regard. I prefer his evidence to the evidence of Mr Nolks and Mr Frank Nolks.

[38] Mr Dickman's evidence was that before providing a quote for the works he inspected the site at Reedbeds Road with Mr Frank Nolks. At the time he determined that the block would need some scrub cleared and the site would need to be levelled prior to construction commencing. Mr Frank Nolks stated that he would organise the site clearing and levelling works for the house pad. Mr Dickman advised Mr Nolks that he would need the site cleared of scrub and levelled before the footings could be dug. Mr Frank Nolks advised him that he had a contractor to do the work, Mick from Mick's Dirt Works.

[39] In or about June 2004 Mr Dickman checked the site at Reedbeds Road for the purpose of inspecting the earthwork. Nothing had been done. After he inspected the site Mr Dickman telephoned Mr Frank Nolks and told him that no scrub clearing or earthworks had been done at the site. Mr Nolks said the earthworks guy has been busy. He would see if he could do the job. Some earthworks were then done and after the earthworks had been done both Mr Dickman and Mr Nolks attended at the site. Mr Dickman noted that the scrub had been cleared and he asked if the house pad site was going to be levelled. Mr Nolks replied that the earthworks guy was too busy and could not do it. Mr Nolks also said something to the effect that he would have to sort something out. Several days after this attendance Mr Dickman again attended at the site for the purpose of pegging the house for the plumber. He again noted that the levelling of the site and the compaction of the ground had not been done although some scrub had been cleared. Approximately one week later he pegged the area where the house was to be constructed so the plumber could dig the trenches for the plumbing works. At the time the plumber dug the trenches, no further earthworks had been completed at the site. On 13 July 2004 he went to the site and dug the footings. While digging the footings he had to remove additional vegetation including tree roots from the site. Mr Dickman had no problem digging the footings other than the fact he had to remove some vegetation at the same time.

Practical completion

[40] Counsel for Mr Nolks submitted that the building works completed by Mr Dickman had not reached a stage of practical completion. He submitted that in order for the works to reach the stage of practical completion the works had to be reasonably fit for use. The relevant use of a home is occupation of the home. As the home could not be occupied when Mr Dickman completed his works the works were not fit for use. The home could not be occupied because the defects in the work and Mr Dickman's breaches of contract precluded the certifier from approving the works and this meant an occupancy permit could not issue. The relevance of this submission is that, if the works which had been undertaken by Mr Dickman had not reached practical completion, Mr Dickman was not entitled to final payment in accordance with cl 18 of the building contract.

[41] Clause 18 of the building contract provides:

> "18.1 When the work reaches practical completion, we will give you a final account.
>
> 18.2 Within 7 days you must
>
> 18.2.1 inspect the work together with us
>
> 18.2.2 write down anything that is defective or incomplete in a certificate of practical completion and sign it and give it to us and
>
> 18.2.3 pay the final account in full 'that is, with no set off or reduction' by cash or bank cheque

18.3 Then we will hand over the work, and return possession of the site to you.

18.4 So far as we accept responsibility, we must fix the items written in the certificate of practical completion within a responsible time after hand over."

[42] In my opinion, the submissions made by counsel for Mr Nolks cannot be sustained. The provisions of cl 18 and cl 1.10 and cl 1.15 of the contract do not require the works to be defect free, nor do they require a certifiers approval for an occupancy certificate before a builder is entitled to payment of his final account. The standard form HIA Northern Territory Building Contract which was executed by the parties contemplates two stages of completion and provides for a defects liability period. The first stage is the point in time when the possession of the works is handed back to the owner and the defects liability period commences to run. The second stage is final completion. Clause 19.2 of the building contract states that the owner's obligation to pay is not subject to an Occupancy Permit issuing for the work. Clause 20.2 of the building contract states the owner should give the builder written notice of any defective or incomplete parts of the work about three months after practical completion. Clause 21.1 of the building contract states that so far as the builder accepts responsibility for any defects the builder has a right to do the work and cl 21.3 provides that the builder must complete such work within a reasonable time. The defects liability provisions of the building contract do not replace the owner's ordinary entitlement to claim damages for breach of contract or for defects. If the

builder does not fix the work within a reasonable time or does not accept responsibility for a defect, the owner is entitled to maintain a claim for damages which would ordinarily be assessed by reference to the cost of engaging other builders to rectify the defective work. Further, the building contract does not contain any provisions whereby the owner can direct the builder to rectify any defects that are discovered during the course of the works.

[43] Practical completion is a question of fact to be determined on the material evidence[2]. Unless the contract provides otherwise a certificate of practical completion is not essential for practical completion to be reached. The meaning of practical completion will be determined in most cases by the definition found in the subject contract[3]. It is not necessary for the works to be defect free in order for practical completion to be reached[4].

[44] The definition of practical completion in the building contract in this case also needs to be interpreted in its relevant factual matrix. Objectively assessing the intention of the parties, it cannot be said that it was their intention that upon the completion of Mr Dickman's work a certifier would be able to give his approval for the issue of an Occupancy Permit. At all times it was contemplated that there would still be further works to be undertaken and completed by Mr Nolks before an Occupancy Permit could

[2] *Clyde Contractors Pty Limited 'trading as Clyde Constructions' v Northern Beaches Developments Pty Limited* [2001] QCA 314.
[3] *Murphy Corporation v Ackuman Design & Development 'Queensland' Pty Limited* unreported Supreme Court of Queensland 19 December 1991 per Gee and Williams JJ.
[4] *Walter Construction Group Ltd v Walker Corporation Ltd* [2001] NSWSC 283.

be issued. What was contemplated by cl 1.10 and cl 1.15 of the building contract was that Mr Dickman's work be substantially complete such that the stages to be undertaken by Mr Nolks could be started. At no stage did Mr Dickman undertake to do all of the work necessary to be completed so that an occupancy permit could issue.

[45] I find that practical completion was reached on 8 December 2004. The evidence establishes that as at 8 December 2004 the works to be undertaken by Mr Dickman were substantially complete. The house had been built and possession of the works was handed to the owner. Only the following defects existed: a dyna bolt to the French doors; door seals; door hinges; defective PVC pipes for waste condensate for air conditioning; defective gutter system; defective door seals to external swinging doors; missing pop rivets in the soffit lining; the septic tank lid needed to be raised; there was a nonconforming overflow relief pipe over the overflow relief gully; various other minor defects; and there was a failure to construct the concrete slab floor of the house at the minimum height above ground level which was specified by the plans. This, in turn, had consequences for the height of the step down to the veranda slab and for the slope of the ground adjoining the veranda slab. None of these defects was such that the owner was precluded from starting and completing the stages of the works that he was to undertake.

[46] It was Mr Brears' opinion that the affect of the defects identified were not such as would prevent handover of the building works to the owner. The

items listed by Mr O'Callaghan on his final inspection report to be completed were largely items which Mr Nolks had accepted that he was to undertake. The drainage works recommended by Mr Pascoe to rectify the problems created by the height of the slab have no impact on the structure of the building.

[47] While there were issues about the height of the overflow relief gully, the safe bearing capacity of the foundations, and the compaction of the fill under the concrete slab these issues were ultimately resolved in favour of Mr Dickman. Mr Hadfield found that the overflow relief gully had been constructed in conformity with Schedule 5, Regulation 4 of the National Plumbing Code, a new Section 40 Certificate of Compliance was obtained from Mr Rodeghiero and Mr Fong determined that 100 kPa was an allowable bearing capacity which met AS2870 requirements. Mr Fong considered the requirement for 150 kPa allowable safe bearing capacity for this type of lightly loaded raft footing system to be excessive irrespective of the site classification. As to the compaction of the sand fill which had been placed under the slab of the premises by Mr Dickman, Mr Fong stated that he believed the level of compaction of the sand fill under the slab of the premises would have negligible effect on the performance of the footing system. He believed that the sand layer of approximately 145 mm thick would be of little structural significance to the performance of the slab whether it had been compacted or not. The predicted settlement of 3 mm was within the structural tolerance of the slab. Further, assuming the

footing beams were founded into firm natural ground as required, then it would be unlikely that cracking of the floor slab/masonry walls of the premises could be attributed to settlement of the sand. From observations that he made during his site inspection on 19 April 2006 he did not consider the premises had suffered abnormal settlement and cracking of the floor slab and of the masonry walls.

[48] In his report, which was in evidence, Mr Fong went on to state as follows. From his site inspection, he found the house had been substantially completed structurally and generally appeared to be as per the certified drawings with some noted exceptions architecturally. Internally, little distress was noted on the ceiling/walls/floor. Externally, hairline cracks on the block walls were found on all four walls, the majority of which were located above or below window/door openings. The walls were partially painted, some 'perpend' joints had obviously been raked out, presumably from previous investigations and some appeared to have been repaired. It would appear some movement in the walls were from initial settlement and/or from shrinkage of the concrete block walls. From observations made during his site inspection on 19 April 2006 he did not consider the premises to have suffered abnormal settlement and cracking of the floor slab and of masonry walls. He considered the movement which was evident was minor and it exhibited a likeness to shrinkage cracks. That is, normal shrinkage of the block works.

[49] Mr Hadfield, who is a Senior Technical Officer (Plumbing) in Building Advisory Services, stated in an email to Mr Grant O'Callaghan that the spill level of the shower is the same level as the floor waste, which is 100 mm above the overflow relief gully, and complies with Schedule 5, Regulation 4 of the National Plumbing Code. During his re-examination by counsel for Mr Dickman, Mr O'Callaghan agreed that the issue involving the height of the overflow relief gully was a matter of interpretation of the relevant provisions.

Was Mr Dickman entitled to the payment of his final account in full?

[50] As practical completion had been reached then, under cl 18.2.3 of the building contract, Mr Nolks was required to pay the final account of Mr Dickman in full.

The price of the variation for cladding the veranda ceiling

[51] The only matter in dispute in relation to the variations which added to the scope of Mr Dickman's work was the price of lining or cladding the veranda ceiling. The schedule of finishes establishes that prior to this variation being agreed, the veranda ceiling was to be comprised of open rafters. In par 9 of the Further Amended Defence to the Further Amended Statement of Claim and Setoff and Counterclaim, Mr Nolks admits he agreed to these additional works.

[52] Mr Dickman gave evidence that in September 2004 Mr Frank Nolks asked him to do additional works on the site. Those additional works involved the

lining of the veranda ceilings with colour bond custom orb roof sheeting including the eaves and all necessary flashing; and the supply and installation of 23 metres of cottage green 200 mm half round guttering with 3 x 100 mm downpipes. He said that following this request he prepared a quotation for the works which he faxed through to Mr Frank Nolks on 20 September 2004. The total amount of the quotation for these variations was $15,126 inclusive of GST. The quotation is CD8 to the affidavit of Mr Dickman sworn on 14 October 2009. The quotation was made up of the sum of $13,625 for lining all veranda ceilings with colour bond custom orb roof sheeting including all eaves with all flashing fixed; and $1,502 to supply and install 23 metres of cottage green 200 mm half round guttering with 3 x 100 mm PVC downpipes.

[53] There is now no dispute in relation to the price charged for the guttering. Mr Nolks disputes that he received the quote for the lining of the veranda ceilings with colour bond. Mr Nolks said that he and his father were told that there would only be an extra charge of $2,000 to $3,000 if they changed from vermin mesh protection to putting a lining on the veranda ceiling.

[54] I prefer the evidence of Mr Dickman to Mr Nolks in this regard. As to the difference involved in the work, Mr Dickman gave the following evidence. The vermin mesh is only used to seal off between the trusses so that vermin cannot get into the building by passing over the top of the external block walls. Vermin mesh is comprised of pieces of mesh about 900 mm x 200 mm. It only goes in between the trusses around the perimeter of the

house immediately above the block walls. It is nothing to do with the lining of the veranda ceiling. The vermin mesh goes in vertically above the finished external block walls near where the trusses sit on top of the blocks. In contrast, the under side of the veranda ceiling is in some areas approximately 3 metres wide and in other areas 4 metres wide. The veranda surrounds the whole of the external area of the house. Cladding the ceiling involved cladding an area of approximately 195 m^2 with colour bond custom orb roof sheeting. In order to place the colour bond on the ceiling of the veranda it was also necessary to first attach steel batons to the veranda trusses or rafters.

[55] It is unrealistic to suggest, as Mr Nolks did, that the agreed variation would only involve an additional cost of some $2,000 to $3,000. I do not accept his evidence that Mr Dickman said he could do the extra work for that amount. Nor do I accept his evidence that Mr Dickman did not provide him with a written price for this variation. Mr Dickman consistently provided written quotes for any work he was to undertake.

Was the mortar defective?

[56] In par 40 to par 47 of the Further Amended Defence and Counterclaim to the Further Amended Statement of Claim and Setoff and Counterclaim Mr Nolks pleads as follows:

> "40. Drawing D4142-4 of the plans and drawings pleaded in paragraph 5.1.2 of the defence, note 8, specified as follows:

"External block work and roof to be weather proofed to prevent the penetration of water that could cause unhealthy or dangerous conditions or loss of amenity for occupants and undue dampness or deterioration to building."

41. Drawing D4142-4 of the plans and drawings pleaded in paragraph 5.1.2 of the defence, note 16, specified as follows:

"Concrete masonry walls shall be constructed in accordance with the requirements of AS3700."

42. The mortar in the eastern and kitchen walls of the dwelling is of low strength and does not meet the standard of M3 or M4 quality specified in AS3700.

43. The weak mortar pleaded in the previous paragraph is disintegrating, allowing water and moisture penetration into the dwelling and is at risk of further disintegrating.

44. The external block work of the dwelling is not weather proof as specified.

45. In some areas of the eastern and kitchen walls of the dwelling mortar is missing.

46. The second plaintiff, or in the alternative the first plaintiff, breached his contractual obligations in that:

46.1 The mortar in the eastern and kitchen sides of the dwelling is of low strength and does not meet the standard specified in AS3700.

46.2 He failed to construct the external block work to be weather proof to prevent the penetration of water.

47. As a consequence of the breaches pleaded in paragraph 46 there is a need for the removal of all soft and lose mortar and injection of suitable replacement grout of an adequate strength and durability before the defendant may usefully paint the external block work or have such painting carried out by others."

[57] The burden of proof of these matters lies on Mr Nolks. In support of this claim Mr Nolks principally relied on the evidence of Mr John Scott and his father, Mr Frank Nolks. Mr John Scott's evidence was that throughout the block walls of the building the mortar in the bed and perpend joints is soft and, in many cases, falling out. He stated it was also noticeable that the mortar in the lower courses appears to be adequate, however, at a level of around the fourth and fifth course there were obvious differences in the mortar quality.

[58] The evidence of Mr Frank Nolks was that he raised the issue of the mortar with Mr Dickman. He used his fingernail to show him how soft some of the mortar was. He recalled that on another occasion he was able to scrape out the mortar using a 20 cent coin. He realised there was something wrong with the mortar when he was painting the inside walls with a roller and the mortar between the block work started sticking to the roller. When he saw what was happening he examined the mortar and found it to be quite soft and sandy in texture.

[59] As to mortar sticking to a roller, Mr Dickman gave the following explanation. He said it will happen when you have mortar roll joint block works. The block walls are covered in sand. The mortar does not actually fall out in clumps. In order to avoid material sticking to a roller being used to apply paint to the wall, it is necessary to prepare the wall which is to be painted by brushing it first with a broom. Brushing the wall with a broom will take off all of the loose bits of sand. Mr Dickman never saw any

evidence of the mortar coming out in chunks. He also denied that the mortar had arrived at the site as at 1 June 2004.

[60] The evidence of Mr Brears, who Mr Dickman relied on, is that during his site inspection on or about 23 October 2006, he observed a number of vertical joints between the blocks ('perpends') to be only partially filled with mortar. He said this was not uncommon in block work and is due to a lack of attention to detail by the block layer when laying the blocks. These gaps in the joints are normally rectified either by the block layer with the use of a rounding tool to smooth out and make even the horizontal and vertical joints if the block work is to be fair faced and painted or, alternatively, by the application of a coat of render which is then painted. Mr Brears said some of the exterior walls of the house had been painted, but from his observations the mortar to the unpainted walls appeared normal and was not disintegrating. It should be understood that the concrete blocks and mortar are porous and if they are not painted or coated by some other means they would allow moisture into the building. The barrier to moisture is the coat of paint on the external surface of the block walls. Normally three coats of a specific type of exterior quality paint are applied to the external surface of block walls. Mr Brears did not see any moisture on the inside of the building.

[61] Mr Dickman gave evidence that he attended at the site on or about 6 December 2004 and repaired the 'perpends' in the block work as necessary. When he inspected the walls there was no mortar which came out

in clumps. He also prepared a video of the walls which was tendered in evidence and he took away a piece of mortar for testing.

[62] In my opinion, the evidence called on behalf of Mr Nolks does not establish that the concrete masonry walls were not constructed in accordance with the requirements of AS3700 or that the mortar in the eastern and kitchen walls was of low strength which did not meet the standard of M3 or M4 quality as specified in AS3700. Nor does the evidence establish that the cement was disintegrating allowing water and moisture penetration into the dwelling. All that is established by the evidence is that some of the mortar in the 'perpends' in the block walls has not been finished off in a workmanlike manner. As is apparent from the evidence of Mr Brears, to the extent there was any defective workmanship, it was not such as to preclude painting. On his evidence a number of the inside walls have been painted. The proper approach to the resolution of this problem was to ask Mr Dickman to fill in the 'perpends' as necessary with grout and, if he failed to do so within a reasonable time, to have the work attended to by the painter or someone else.

[63] In my opinion the mortar is only defective in a minor way. The work is defective in the sense that some of the mortar at the 'perpends' of the blocks was not finished off properly. But for the fact that the parties have agreed that the quantum of rectifying this defect is $1,853.50, I would have accepted Mr Brears' evidence that it would only cost about $1000 to rectify this defect.

Loss of use of the house

[64] Mr Nolks has claimed $69,454.60 as damages for delay. The amount is based on rental returns for an equivalent property to the Reedbeds Road house over the relevant period of the claim. In addition, he has claimed $16,454.60 as interest on these damages. Mr Nolks has claimed these damages in circumstances where no financial loss has been suffered by him. He did not intend to rent out the house that was being built at 385 Reedbeds Road and he was not incurring any rental or other expenses while the house was being built. The basis of the delay claim is Mr Dickman's failure to complete the building work in accordance with the contract. Mr Nolks maintains that, as a consequence of Mr Dickman's failures, he has not been able to obtain an occupancy permit which would have enabled him to occupy and enjoy the house.

[65] I have not been able to find any case which considers such a claim for damages for breach of contract. Damages for delay are more often than not covered by specific contractual provisions which provide for damages for delay. Claims for damages for loss of use of the premises in circumstances where there has been no financial loss are more commonly found in cases involving the tort of trespass to land. For example, in *Westwood v Cordwell*[5] McPherson J held that the plaintiffs were entitled to damages for loss of use of the premises even though instead of letting the premises to another they were themselves in occupation when the premises were

[5] [1983] Qd R 276

destroyed. He held that such damages are measured by the rental value of the premises confined to the period reasonably required to rebuild the premises. Again, in *Inverugie Investments Limited v Hackett*[6] the Privy Counsel held a person who let out goods on hire or the landlord of residential property was entitled to recover damages from a trespasser who wrongfully used his property irrespective of whether or not he could show that he would have let the property to anybody else and whether or not he would have used the property himself. Although the plaintiff might not have suffered any actual financial loss by being deprived of the use of his property, he was entitled to recover a reasonable rent for the wrongful use of his property by the trespasser, and similarly, although the trespasser might not have derived any actual benefit from the use of the property, he was obliged to pay a reasonable rent for the use he enjoyed. There is some force in the argument that such damages should also be available in respect of damages for delay for breach of contract. Such damages seem to be a suitable remedy for the expectational loss involved in delay claims. However, in view of what I have stated below about causation, it is not necessary to resolve this question. As such damages are in the nature of general damages (because there has been no financial loss), there would be no entitlement to interest on such damages in any event.

[66] As at 2 December 2009 Mr Nolks had still not attended to the following work which was his responsibility: electrical works including wiring of all

[6] [1995] 3 All ER 841

fittings, installing smoke detectors, and ensuring power supply installation to pump and septic tank complies with AS3000 Standards; installing cooking facility; installing wash basin in the bathroom and kitchen sink; proper markings to the electrical board and metre box; the provision of a termite certificate; the provision of an electrical certificate of compliance; and painting of the external walls. The fact that these matters have not been attended to means that an occupancy permit could not issue regardless of whether the works completed by Mr Dickman were defective.

[67] There was nothing to preclude Mr Nolks attending to the matters referred to above. The reason he did not attend to these matters was that he unreasonably took the view that the house had to be demolished. He did so in circumstances where he was essentially unhappy about the house that he had chosen to build. During cross examination he was asked the following question and he gave the following answer.

> COUNSEL: When did you decide that the house was going to have to be demolished?
>
> MR NOLKS: When did I decide that? Mmm. Well, after getting told that I can't get a certificate obviously because I haven't got a Section 40 and the levels that the house was on. And it's not what I've asked for to be built on the plan. Alright, I have an idea in my head of what I want, I had it put on paper by a draftsman, I gave it to a builder and he built something that was in his mind, not what I wanted.

[68] The Section 40 Certificate of Compliance was never truly a major issue. The Ulman and Nolan report established that the land on which the house

was built complied with condition 15 of the schedule attached to the building permit and the 100 kPa bearing capacity found by Ulman and Nolan did not require any design changes to the footings or concrete slab of the house. The 150 kPa specified by Mr Chew was an over design requirement. Further, over what is now quite an extensive period of time there has been no settlement of the sand used as fill beneath the slab of the house which has caused any structural problems. Interestingly, in a report which Mr Nolks obtained from Mr Neil Clarke on 15 May 2007, Mr Clarke stated:

> The permit to build schedule of conditions – document 6 has points 14 and 15 that relate to ground conditions. Point 14 calls for the specified minimum safe bearing capacity to be confirmed onsite. Point 15 calls for class S ground conditions to be verified onsite. Point 14 was reviewed by the Ulman and Nolan test report where the bearing capacity was reduced from 150 kPa to 100 kPa. We are of the opinion that the document foundation system is adequate for 100 kPa. Point 15 was confirmed by the Ulman and Nolan report. Further, the Ulman and Nolan report tested the degree of compaction of the sandy fill under the concrete floor. This material is approximately 150 mm thick and is lightly compacted. It is being used to level the site and to act as protection to the waterproof membrane. We did not expect this material to be under the slab beams that support the masonry walls.
>
> Our inspection of March 2007 did not highlight any structural movement or deterioration in the raft concrete slab or the walls supported by it and thus it would appear the fill material has not deteriorated.
>
> We have found no reference in the documents we received that indicates the building certifier has requested structural certification of the fill material under the raft slab.
>
> The permit to build drawings do not specify the compaction level of the placed fill under the raft slab and only refer to “compacted fill” and call for 50 mm of sand. It would appear the builder has met this basic requirement.

[69] In my opinion, Mr Nolks has failed to mitigate his loss. Given the contents of Ulman and Nolan report which he obtained in March 2005, there was nothing to prevent him obtaining a further Section 40 Certificate of Compliance early in the piece. Nor was there anything precluding him from organising other tradesmen to attend to the defects in Mr Dickman's work. Further, between 2007 and 2009 he prevented Mr Dickman from going onto site to attend to the repair of defects.

[70] In my opinion, Mr Dickman's breaches of contract have not caused Mr Nolks' loss of use of the house. Mr Nolks' claim for damages for loss of use of the house is not made out.

Is Mr Nolks entitled to recover the cost of having the defects and breaches of the contact investigated?

[71] I find that Mr Nolks was entitled to the cost of obtaining the Ulman and Nolan report. The fees charged by Ulman and Nolan were $1,705. It was Mr Dickman's responsibility to check the safe bearing capacity of the foundations. This requirement arose under condition 14 of the schedule to the building permit. While, ultimately, no issue arose in this regard Mr Dickman, nonetheless, failed to undertake the necessary check. In the circumstances it was reasonable for Mr Nolks to obtain the Ulman and Nolan report.

[72] Mr Nolks is not entitled to claim the costs of obtaining the other reports. Those reports by and large related to issues which have not been established

by Mr Nolks. I accept the submissions of Mr Dickman's counsel in this regard. The defendant has not relied on many of the consultants from whom reports were obtained.

Is Mr Nolks entitled to the costs of preparing the "as constructed" plans?

[73] As a result of the manner in which Mr Dickman constructed the concrete slab floor of the house and as a result of the manner in which the overflow release gully has been constructed, it will be necessary to amend the plans in order to prepare the "as constructed" plans. Mr Platt estimated that the cost of repairing these plans would be $2,000. I find that Mr Nolks is entitled to recover the sum of $2,000 for the preparation of these plans.

Summary of Mr Dickman's damages

[74] I find that Mr Dickman is entitled to the amounts set out in par [2] above. In addition, under the building contract, he is entitled to interest on this amount at the rate of 15 per cent per annum from 15 December 2004 until the date of judgment. Interest amounts to $43,917. This gives a total amount of $96,355.

Summary of Mr Nolks' damages

[75] In addition to the damages which are admitted by Mr Dickman as set out in par [7] above, I find that Mr Nolks is entitled to damages for the defective mortar in the sum of $1,853.50; the cost of the Ulman and Nolan report of $1,705; and the costs of preparation of the "as constructed" plans in the

amount of $2,000. In total, in respect of Mr Nolks' claims against Mr Dickman his damages amounted to $20,677.00.

Orders

[76] In the circumstances, I order that there be judgment for Mr Dickman against Mr Nolks in the sum of $75,678. In respect of Ray Laurence Pty Ltd's claims against Mr Nolks I order that there be judgment in favour of Mr Nolks. I will hear the parties further as to costs and any ancillary orders.
