



New South Wales
Civil and Administrative Tribunal

Case Title: Mark and Linda Birkinshaw v Mujo Cibralic
Mujo Cibralic v Mark and Linda Birkinshaw

Medium Neutral Citation: [2014] NSWCAT

Hearing Date(s): 18 November 2013 and 19 November 2013

Decision Date: 27 May 2014

Division: Consumer and Commercial Division

Before: P Briggs, General Member

Decision:

1. Mr Cibralic is to pay to Mr and Mrs Birkinshaw the sum of \$104,415.00 in relation to the claim and cross claim HB 12/18284 and HB 12/53875 on or before 24 June 2014.
2. Considering the complexity of accounting the parties are to have 14 days from the date of publication of these orders to apply jointly to have any error of calculation corrected in final orders.
3. Leave is granted to each party to file submissions as to costs, or to apply to be heard on the matter of costs on or before 10 June 2014.
4. Costs submissions by Mr and Mrs Birkinshaw to be filed and served on or before 24 June 2014.
5. Costs submissions by Mr Cibralic to be filed and served 22 July 2014.

Catchwords: Enforceability of building contracts. Part written, part oral contracts. Effects of non compliance with *Home Building Act 1989* and *2011*

Legislation Cited: *Home Building Act 1989*
Home Building Amendment Act 2011
Home Building Regulation 2004

Cases Cited: *Beechwood Homes v Kirkpatric* [2002]
NSWSC 87
Eddy Lau Constructions Pty Ltd v
Transdevelopment Enterprise Pty Ltd [2004]
NSWSC 273
Kalokerinos v HIA Insurance Services Pty
Ltd [2004] NSWCA 312
Cory Bros & Co v Mecca [1987] AC 286

Texts Cited: *Bambagiotti P. Building Disputes & the*
Home Building Act 1989 at 68

Category: Principal Judgment

Parties: Mark Birkinshaw and Linda Birkinshaw
(applicants)
Mujo Cibralic (respondent)

Representation

- Counsel: Ms M Daniels (for the respondent Mujo
Cibralic)

- Solicitors: Mr M Birch
Hancock Alidis & Roskov Solicitors

File number(s): HB 12/53875, HB13/29774

Publication Restriction: Unrestricted

REASONS FOR DECISION

- 1 An application was filed in the Tribunal by Mr and Mrs Birkinshaw (the applicants) on 19 October 2012 seeking costs to complete building works and to rectify defective work arising out of a home building contract for the construction of a new dwelling at Roselands.
- 2 The builder, Mr Cibralic (the respondent) and the applicants on or about 22 June 2010 entered into an agreement whereby the builder would construct a dwelling for the home owners at a cost of \$550,000.00.

Contract Documents

- 3 The contract documents are alleged to consist of Architectural plans, sections and elevations prepared by Ergo Design, Structural Engineering plans by Michael Ell, Hydraulic details by CK Engineering and Swimming pool structural plans by Michael Ell. The documents used by Mr Cybralic to cost the proposal was alleged to consist of the Ergo design plans the window schedule and a document entitled "Plan Change Notes" which appears at Annexure F of Mr Cybralic's statement. (2 August 2013)
- 4 The plan changes refer to some minor finish details but are mostly concerned with location and number of electrical outlets and telephone points.
- 5 There is a specification of the works but it was not available to either of the experts and Mr Cybralic said in evidence that he had not seen the document until the hearing.
- 6 There are no terms and conditions of the contract or to the extent that it is claimed that there were, they were oral and have not been articulated by either party, except that there is a live issue concerning an alleged undertaking by Mr Cybralic that the work would be performed in 9 months. Mr Cybralic strongly denies having given any such undertaking.
- 7 On or about 28 April 2012, the parties entered into a further agreement, the Second Building Contract, in settlement of a dispute that had arisen in relation to the First Building Contract.
- 8 The cost of the work was \$20,000.00 which is claimed by Mr and Mrs Birkinshaw to represent an additional contribution by them towards the completion of the original contract scope of works.
- 9 Mr Cybralic claims that the work of the Second Contract includes items which represent an increased scope of the works. Mr Cybralic has claimed that he relied upon a misrepresentation as to the extent of the Second Contract work by the applicants when he signed the Second Contract.
- 10 On or about 17 June 2012 the respondent purported to terminate the contract verbally after the applicants refused to make further payments.
- 11 The owners deny that the builder terminated the contract. The owners rely on what they say was the builder's repudiatory conduct in failing to bring the works to completion on or by 9 months after the commencement of the works. The respondent denies that he represented that the contract would be completed in 9 months.
- 12 The applicants accepted the builder's alleged repudiation and terminated the contract, on or about 3 October 2012 by a notice in writing served upon the builder.

- 13 The termination of the contract triggered recommencement of earlier CTTT proceedings or commencement of new proceedings (the proceedings) in accordance with the terms of the Second Contract.
- 14 An issue arises as to whether the Second Contract was a new contract or simply a variation to the First Contract.
- 15 The respondent has acknowledged receipt of \$445,000.00 on account of work performed, but the applicants dispute that figure and claim to have paid the builder a greater sum.
- 16 The applicant is seeking orders that the respondent pay to the applicants the sum of \$301,336.00 by way of damages for breach of contract, calculated as follows;
- \$19,736.00 being the excess amount alleged to have been paid by the applicants over the adjusted contract sum calculated by Mr Antidormi, the expert engaged by the applicant.
 - \$98,829.90 being the actual amount paid by the applicants to contractors to complete some of the works alleged to have been left incomplete by the respondent.
 - \$182,768.00 being the applicant's estimate of the cost to complete the contracted works in accordance with the plans and specifications.
- 17 The respondent is seeking orders that the applicants pay him a sum between \$50,000.00 and \$80,000.00 for works completed, or in the alternative that the cost of completion is not available to the applicants.

Applicants' Evidence

- 18 Mr Birkinshaw's evidence was that he and his wife entered a building contract with Mujo Cibralic, trading as DSB Civil and Structural Design to construct their two storey house at Roselands on or about 21 May 2010.
- 19 Mr Birkinshaw says that construction work on the site began on or about 29 August 2010 and continued to 13 April 2011.
- 20 It was Mr Birkinshaw's evidence that it was a term of the contract, agreed orally, that the work of the contract would be completed in 9 months, which Mr Birkinshaw has calculated to be 24 May 2011.
- 21 Work was not completed by that date and continued through to 29 June of 2011 when floor heating was installed.
- 22 It was Mr Birkinshaw's evidence that between June 2011 and December 2011 limited work was carried out on the site and that neither the builder or his contractors attended upon the site from January to March 2012 when a plumber attended and installed taps and toilets.

- 23 On or about 28 April 2012 after a dispute which was settled by the parties entering into another building contract (the Second Contract) the applicants allege that the respondent agreed to complete the outstanding work of the First Contract within a period of 6 weeks commencing 30 April 2012 and concluding by or on 11 June 2012.
- 24 Mr Birkinshaw's evidence is that apart from installation of the fire place, frame and locks, tiling of the laundry, rendering of the stairs and painting some sections of the house the respondent failed to complete the house by or within the contract time, Mr Birkinshaw says that the last trade on the site was the painter who attended intermittently during June of 2012.
- 25 On or about 22 August 2012 Mr Birkinshaw instructed a building consultant, Property and Building Assessments Pty Ltd, Mr Angelo Antidormi, to inspect the works, report on the property and provide a Scott Schedule showing defective and incomplete works and an estimate of costs to rectify/complete the works.
- 26 Mr Birkinshaw gave evidence to the effect that he terminated both building contracts on or about 3 October 2012 for the respondent's failure; to complete the works within the contract time, to perform the works in a proper and workmanlike manner and in accordance with the plans and specifications set out in the First and Second Contracts, and to use materials which were good and suitable for the purpose for which they are used; and
To undertake the works with due diligence and within the time stipulated in the First and Second Contracts, to construct the works in accordance with the provisions of the Building Code of Australia, and to construct the works in accordance with the provisions of all other relevant codes, standards and specifications that the works are required to comply with under any law.

Respondent's Evidence

- 27 The respondent, Mr Mujo Cibralic, gave evidence that he is a licensed builder. He holds a master's degree in engineering science from the University of NSW. He has operated a business called DSB Civil & Structural Design since the year 2000.
- 28 The respondent says that he met Mr Birkinshaw on or about 19 April 2010 on the recommendation of a neighbour. Mr Birkinshaw provided plans for a 2 storey house prepared by Ergo Designs Pty Limited, a window and door schedule and a document entitled "Plan Changes/Notes". He requested the respondent to prepare a quotation for the construction of the house.
- 29 Mr Cibralic prepared a quote which he gave to Mr Birkinshaw on or about 21 May 2010. The respondent's evidence is that he contacted the applicant in June to alert him to a 60 day limit on the quote before it would need to be revised.

- 30 Mr Cibralic says that he received a cheque for \$55,000.00 from the applicant on or about 25 June 2010.
- 31 Mr Cibralic alleges that Mr Birkinshaw told him that he had considered selling the existing house on the site but had concluded that it should be demolished. Mr Cibralic says that he quoted \$9,000.00 which the applicant accepted on the telephone.
- 32 Mr Cibralic's evidence was that he met Mr Birkinshaw later the same day at the site. He says that he brought with him 2 copies of the quote to which he added, on one copy, 3 additional items to the scope of works and on the other a progress payment schedule.
- 33 The respondent and the applicant both signed the quotation which showed the additions but neither signed the copy containing the payment Schedule.
- 34 The respondent's evidence is that the only people present at the signing of the quotation, which he refers to as "the Agreement", were Mr Birkinshaw, his wife and the respondent. Mr Birkinshaw says that a neighbour Mr Ken Daizli was also present. Mr Daizli provided a Statement dated 9 March 2012 but was not called to give evidence.
- 35 Mr Cibralic is adamant that he did not give an undertaking to complete the work in 9 months but acknowledges that he did give an estimate of 12 months in May 2010 at the date he provided his quote.

Demolition of the Existing House

- 36 It is the respondent's evidence that the demolition of the house commenced on or about 25 August 2010 which is confirmed by a quotation from Kenco Corporation dated 15 August 2010.
- 37 The respondent says that the demolition of the existing house delayed the commencement of the new works by 3 to 4 weeks.

Swimming Pool

- 38 The respondent says that at the date of signing the First Contract he was given a quote from Sydney Pools and Spas Pty Ltd for the installation of a swimming pool by Mr Birkinshaw. The quoted price was \$38,000.00. (Ex J to the statement of Mujo Cibralic, received 2 August 2013)
- 39 The respondent says that he entered a contract with Sydney Pools and Spas in that sum and during the pool construction was asked by the applicant or by the applicant through his sub contractors to undertake the following extra work;
- Excavation of the swimming pool.
 - Provision of additional steps to the swimming pool.
 - Concreting around the swimming pool.
 - Tiling to the swimming pool surround.

- 40 The respondent says that Linda (Mrs Birkinshaw) on or about 18 October and again on or about 12 December varied the pool contract with resulting cost escalations of \$4,500.00 and \$3,500.00 respectively (Pool variations are annexures "L" and "M" to Mr Cibralic's statement.)
- 41 When excavation of the footings to support the house began the respondent observed that the foundation was unable to support the load to be imposed upon it and sought instructions from Mr Birkinshaw who agreed to meet the cost of 52 piers with a minimum depth of 2 metres at a cost of \$150.00 per metre.
- 42 By late September 2011 the piers and footings for the house had been completed and the respondent estimates that the additional construction time required due to the need for piers was "about one week."
- 43 Mr Cibralic gave evidence about extra work associated with an additional toilet to the laundry, substitution of timber flooring in lieu of tiling to part of the ground floor of the house, travertine tiling to the alfresco area, skylights, and extra electrical work.
- 44 The additional costs for the laundry toilet amounted to \$900.00, timber floor substitution - \$5,990.00, travertine tiling - \$3,000.00, skylights - \$5,344.00 and additional electrical work - \$8,338.00.
- 45 I note that the invoice for piers from Golub Petrovic includes,drilling piers, concrete pump and labour (Annexure P to the statement of Mr Cibralic) and is in the sum of \$17,000.00 excluding GST.
- 46 The respondent's evidence was that at the end of 2011 he suffered a debilitating illness which affected his ability to work and obliged him to employ others to do work that he would have done previously. The effect of this was to slow the progress of the work and increase the cost to the respondent because of the need to pay another person to perform tasks which he would have undertaken himself.
- 47 At about this time the respondent records that he sought payment for the work which he had undertaken beyond the contract works or in the alternative an acknowledgement from the applicants that there was a debt owing.
- 48 It is the respondent's evidence that the applicants declined to acknowledge any debt and instead raised a complaint with the Office of Fair Trading which was referred onto the CTTT when the OFT could not resolve the dispute.
- 49 The parties met, in an attempt to resolve the dispute themselves and complete the works, they signed another agreement – "the Second Contract."

- 50 It is the respondent's evidence that at the point of signing the Second Contract the work of the first contract was 95% complete and the remaining work was completion of;
- Air conditioning.
 - Internal tiling.
 - Painting.
 - Architraves.
 - Timber floor polishing and sanding.
 - Installation of switches
- 51 In addition the respondent says that he was required to pay the 4th swimming pool progress payment and had completed \$53,972.00 of further work, but had not received a payment from the applicants since about the middle of June 2011, he says that he was in a difficult financial position and could not complete the work until the applicants paid him.
- 52 Mr Cibralic says that the applicants brought with them to the meeting a document that was to become the Second Contract when it was signed by the parties.
- 53 Mr Cibralic says that he had forgotten his reading glasses and was unable to read the document but was assured by the applicants that it was simply a reaffirmation of the quote (the First Contract) with the addition of a six week timeframe.
- 54 Mr Cibralic signed the document and the Second Contract was formalised, his evidence is that he did not read the Second Contract until some time later and realised that it included an increased scope of works but only provided for payment by the applicants of a further \$20,000.00.
- 55 The respondent's evidence is that he had been unable to reach an agreement with the painter originally employed because he insisted on full "up-front" payment so in June 2012 he engaged another painter but fell into dispute again with applicants because Mr Birkinshaw insisted on the painter performing additional work beyond the scope of the contract/s.
- 56 The respondent's evidence is that in two telephone discussions Mr Birkinshaw said that he would not pay any more money and threatened to bankrupt the respondent. The respondent said that he formed the view that the applicants would not pay any more money and as a result he did not return to the site, thereby terminating the contract.
- 57 It is the respondent's evidence that he received written advice of the applicants' termination of the contract on or about 3 October 2012 but it is his belief that he had terminated the contract in about June 2012.

The Expert Evidence

- 58 Both parties engaged experts to assist the Tribunal in the consideration of the claims made in relation to defective and incomplete work.
- 59 The applicants engaged the services of Mr Angelo Antidormi, Property and Building Assessments Pty Ltd to undertake an inspection of the site of the works and prepare a report and Scott Schedule setting out his opinions of the cost to complete outstanding work and rectify defects arising out of the incomplete work carried out by Mujo Cibralic.
- 60 Mr Antidorme is a consultant with 32 years' experience in the building industry.
- 61 He relied upon architectural drawings prepared by Ergo Designs Pty Ltd job No 508/326 Drawing No Ao1-A21 inclusive Revision B 18 May 2012 and the quotation/Contract prepared by Mujo Cibralic pages 1-5 dated 21 May 2010.
- 62 Mr Antidormi was asked to assume that the agreement was executed on 22 June 2010, that the agreed construction period was 9 months and that the original contract sum was \$550,000.00 to which were added variations to the value of \$37,940.00 bringing the total adjusted contract sum to \$587,940.00.
- 63 Mr Antidormi also assumed that the applicants had paid \$607,676.00 including GST.
- 64 It was assumed by Mr Antidormi that the parties settled a dispute which arose during the work by reaching a further agreement dated 28 April 2012 which was directed at the completion of the outstanding works.
- 65 Mr Antidormi was instructed to assume that the respondent had requested the applicants to pay some sub-contractors directly and that payments made would be deducted from the final contract sum.
- 66 Based upon his estimates Mr Antidorme summarised the contract as follows;
- | | |
|--|--------------|
| a) Amended Contract Sum. | \$587,940.00 |
| b) Amount paid to the respondent. | \$607,676.00 |
| c) Assessed value to rectify and complete. | \$281,599.69 |
| d) Assessed loss b)-a) + c) | \$301,335.69 |
- 67 The rationale and supporting calculations are set out in the a Schedule attached to Mr Antidormi's report as items 2.01 to item 6.
- 68 The respondent engaged the services of Mr Peter Haikalis, John Worthington & Associates Pty Ltd and sought his response to the report and Scott Schedule referred to above prepared by Mr Antidormi.
- 69 Mr Haikalis was briefed with the following documents;

Letter of engagement from Equity Lawyers 9 July 2013
Hancock Aldis & Roskov Application to CTTT including the applicants' statements.

21 May 2012 DSB Civil and Structural quote/contract.
22 May 2012 Pools and spas quote/contract.
28 April 2012 contract to finish home and schedule of works.
22 August 2012 Property and Building Assessments building report/Scott Schedule and Annexures A-E.
3 October 2012 Termination notice.
2.03 8 August 2013 Cibralic letter/statement.
2.04 13 July 2013 RH Tiling statement.
2.05 10 September 2013 Golub Petrovic invoice excavation for pool.
2.06 20 September 2013 Golub Petrovic Invoice piers.
Windows, doors and electrical schedule.
Plans elevations architectural Ergo drawings.
Engineering Michael Ell.
Plan elevation stormwater detail CK Engineering Services.
Pool structural Michael Ell engineering.

70 The brief to which Mr Haikalis responded required him to address each of the Scott schedule items listed by Mr Antidormi with specific consideration of;

01. Whether the task in each item was included within the scope of the quotation/contract prepared by the respondent.
02. If so, were each of the items performed in a proper and workmanlike manner and if not what is the reasonable cost of rectifying or completing the work.
03. Provide an opinion on additional works as claimed by the respondent and noted in a letter from Equity lawyers. Indicate whether the works were in fact performed in a proper and workmanlike manner and what would be the reasonable charge for the additional works.
04. In forming the opinions take into consideration all correspondence as submitted by the claimants and respondents.

71 In general terms Mr Haikalis formed the view that;

01. the building work has been carried out in a workmanlike manner.
02. additional works were a variation to the original agreement and plans.
03. the cost of additional works appear unpaid and remain outstanding.
04. the view developed was that the shortage of funds arising from 03 above would affect the progress of the works.

72 Mr Haikalis provided a detailed assessment of each claim on the Antodormi Scott Schedule and concluded after analysis that the applicants were in the respondent's debt in the sum of \$37,041.00.

73 Mr Haikalis also established from the respondent that he did not receive the additional payment of \$20,000.00 which was to be made under the Second Contract.

Discussion and Findings

74 Counsel for the respondent has helpfully identified the issues to be determined as follows;

1. What were the terms of the agreement; particularly
 - 1.1 the scope of the building work required under the Agreement.
 - 1.2 Whether time was of the essence.
 - 1.3 Value of allowances permitted.
 - 1.4 The amount of payments the Builder received.
2. The effect, if any, of the "Second Contract".
3. Did either party breach an essential term of the Agreement, giving the other party a right to terminate?
4. If the Builder is found to have breached an essential term of the Agreement, the cost of rectification?
5. If the Builder has breached a statutory warranty by defective building works, the cost of rectification.
6. If the Builder received more money than was due pursuant to the agreement are the owners entitled to a refund.

75 It is common ground that there were 2 "Agreements" to do work involved in the construction of a new two storey dwelling at Roselands.

76 There is also common ground that neither of the Agreements meet the requirements of the *Home Building Act 1989* as to the form of contracts for residential building work, at the date of signing the First Agreement the existing fibro house was still on the site, no date for commencement was agreed and there is disagreement between the parties as to an alleged warranty by Mr Cybralic that the work would be completed in 9 months.

77 In chief, Mr Cybralic, a builder with some 16 years' experience and having constructed 120 houses, said that he did not undertake to complete the house in 9 months and he rejected the applicants' evidence that a neighbour was present at the signing of the agreement when he was alleged to have given that undertaking.

78 It is Mr Cybralic's evidence that "It is my practice to never give an exact completion date. Building is subject to a number of variables such as subcontractors, weather and unforeseen complications. At best I provide a range of time that the build might be completed by." And, "in this particular case I gave an estimate of 12 months to complete the project. I gave this estimate in May 2010, at the time of providing my quote." (paras18 &19 Statement of Mujo Cibralic dated and received 2 Aug 2013).

79 The document referred to as the First contract consists of 5 pages under the letterhead of DSB Design, headed "Quotation, Building and Construction of

Double Storey House include:" the document then lists preliminary matters under the heading "Insurance" followed by Stages 1 to 9. (the signed quotation appears at Annexure G to the Statement of Mujo Cybralic dated 2 August 2013). At stage 8 there is a hand written addition to the scope of works at point 3 "fence" in the following words "Automatic gate with remote control. Roof attic ladder+storage floor in roof area", the handwritten note is signed Mujo Cybralic and dated 22 June 2010.

80	Also included are allowances for;	
	Kitchen	\$10,000.00 - \$12,000.00
	Air-Conditioning	\$10,000.00 - \$12,000.00
	Bath and Laundry accessories	\$ 8,000.00
	Floor and Wall Tiles	\$30.00 - \$35/m2
	Timber floor	\$55.00 - \$60/m2
	Wardrobes	\$ 5,000.00
	Front Door	\$ 2,500.00 - \$3,000.00
	Front Lock	\$ 300.00
	Internal Lock	\$ 100.00

There is also included a further hand written note "Swimming Pool as per specifications from Sydney Pools and Spas included in above price and also signed Mujo Cybralic and dated 22 June 2010.

I should note that in subsequent Amended Points of Counter Claim the respondent has also included an allowance of \$42,000.00 for windows which does not appear on the signed agreement.

- 81 The total cost of construction is recorded as \$550,000.00 incl GST. Included is a requirement that on acceptance the owner is to pay 10% deposit of the total cost, which Mr Cybralic records was paid on 25 June 2010.
- 82 The document is signed by Mujo Cybralic as Designer and Builder and by the owners Mark and Linda Birkinshaw.
- 83 The construction stages are set out and an allowance for progress payments has been made against them on another copy of the agreement. Effectively the agreement or contract is a detailed scope of works with total cost identified but with no indication of the time required to construct the entire dwelling or its component stages. This appears to me to be consistent with Mr Cybralic's evidence of his normal practice and inconsistent with an owner's needs if time was of the essence.
- 84 The contract, such as it is, has no provision for liquidated damages so the applicants would rely on actual damages in the event of time over run on the basis that the work took longer than a "reasonable time", which would be the default position in my view.
- 85 In any event the 9 month period went by without demur from the owners who, in my view, have waived their right to damages for the breach of the oral term, if there was one, that the works would be completed in 9 months. There is no utility in exploring the 9 month construction period further

because there is no evidence of any agreed starting time nor any allowances for wet weather, holidays or the like. I therefore find that the 9 month construction time was not a term of the contract but rather the implied term is that the work would be completed in a reasonable time.

86 Furthermore, based upon the behaviour of the applicants, in allowing the work to continue beyond what they say was the contract time in the First Contract and beyond the express time allowance in the Second Contract, I have formed the view that time was not of the essence.

87 Based upon what is written in the contract, it is my view that the value of allowances was unclear due to the inclusion of variable rates such as, for example Kitchen - \$10,000.00 - \$12,000.00, Floor and wall tiles \$30.00 - \$35.00/m2 and Front door \$2,500.00 - \$3,000.00, however, in his counter claim Mr Cybralic has allocated a particular quantification of these allowances. Mr and Mrs Birkinshaw appear to have adopted the allowances made by Mr Cybralic and I have accepted them as they are referenced in Mr Cybralic's Points of Counter Claim as the contract allowances as follows;

Kitchen	\$ 12,000.00
Air Conditioning	\$ 12,000.00
Windows	\$ 42,000.00
Bath & Laundry Accessories	\$ 8,000.00
Tiles	\$ 13,335.00
Timber Floor	\$ 10,200.00
Wardrobes	\$ 5,000.00
Front door	\$ 3,000.00
Front lock	\$ 300.00
Internal lock	\$ 100.00 (\$1,700.00)
Total	\$105,935.00

88 I have calculated the allowances at \$105,935.00 but I note that calculation only allows a single internal door lock. I find that the contract sum of the First Contract was \$550,000.00 of which \$105,935.00 is in the form of provisional allowances.

89 It is further submitted in Mr Cybralic's Points of Counter claim that it was an express term of the agreement that the contract price was to be payable in the following progress payments.

Deposit	\$ 55,000.00
Stages 1 & 2	\$100,000.00
Stages 3 & 4	\$ 80,000.00
Stages 5 & 6	\$100,000.00
Stage 7	\$ 75,000.00
Stage 8	\$ 40,000.00
Stage 9	\$100,000.00
Total	\$550,000.00

- 90 The underlying assumption in the above schedule is that there would be no Provisional sum adjustments, that is, the allowances in the previous table would be exactly achieved. It appears that they were not.
- 91 It is the evidence of the applicants per Mr Birkinshaw that they have paid \$607,676.00 to Mr Cibralic, his contractors and suppliers calculated as follows;
- \$478,000.00 calculated in accordance with schedule in para 33 of Mr Birkinshaw's statement (25 October 2013).
 - \$42,000.00 paid to window supplier.
 - \$66,588.00 allowances detailed in Schedule (para 35 Statement of Mr Birkinshaw)
 - \$13,188.00 for alleged double claims by Mr Cibralic (para 34 direct supply payments) Statement of Mr Birkinshaw.
 - \$9,000.00 to tiler as part of second contract direct payment.
 - \$8,000.00 to carpenter as part of second contract.
 - \$1,000.00 paid to renderer to rectify render defects prior to painting.

I will deal with the Second Contract below. There are appendices to Mr Birkinshaw's statement which appear to be receipts or quotes for certain works. I am unable to reconcile these payments or quotes to the sum claimed as direct payments to sub-contractors and I am not disposed to conduct a forensic accounting exercise to prove or disprove claims by the litigants.

- 92 In relation to the first dot point above, I note that it is not directly comparable to the schedule relied upon by Mr Cibralic insofar as it includes \$67,000.00 for fencing and \$25,000.00 for unspecified electrical work including an acknowledged variation of \$2,250.00.
- 93 A direct comparison of the contract sum inclusive of allowances appears to result in contract payments of \$420,000.00; payments made on 25 October 2011 and 2 March 2011 for \$11,000.00 and \$22,900.00 relate to a fence which is included in Stage 8 work. Of the contract works exclusive of provisional allowances, \$70,000.00 was paid in cash.
- 94 Doing the best I can, I calculate that Mr and Mrs Birkinshaw claim to have paid Mr Cibralic the sum of \$453,900.00 for contract work exclusive of provisional allowances.
- 95 Mr Cibralic claims that he has received \$445,000.00 from the applicants. If I accept that, then clearly there were cash payments received by the respondent but there is a discrepancy of \$8,900.00 between the applicant and the respondent as to the amount paid and received.
- 96 The applicants have identified what they say was the actual expenditure against the provisional allowances as \$66,588.00 (para 35 Statement of Mr Birkinshaw). In order to calculate the adjusted contract sum it is necessary

to deduct the provisional allowances from the contract sum and add back the actual net cost of the items.

97 Using Mr Birkinshaw’s table at para 35 of his 2013 statement that calculation becomes – the contract price less provisional allowances plus actual cost of provisional items. That is \$550,000.00 - \$73,998.00 + \$66,588.00 = **\$542,590.00** (adjusted contract sum without bringing variations to account)

98 Both parties acknowledge that there were variations or “additional works” to the first Contract and both acknowledge that these/or some of them, arose from verbal instructions to the respondent or his sub-contractors. Leaving aside for the moment the validity of the variations under s 7 of the *Home Building Act* it is the Mr Cibralic’s amended claim that “...between June 2010 and May 2012, the Owners requested the Builder provide the following additional works (collectively, **Additional Works**).”

Date	Additional Work	Cost incl GST.
22 June 2010	demolition of existing house	\$14,797.00
Sept 2010	extra concrete piers	\$12,446.00
Sept 2010	excavation for pool	\$ 8,982.00
October 2010	supply/install toilet in laundry	\$ 1,814.00
November 2010	extra concreting around pool	\$ 2,814.00
March 2011	supply skylights	\$ 5,344.00
March 2011	extra electrical work	\$ 8,440.00
June 2011	extra timber flooring in lieu of tiles	\$ 2,983.75
November 2011	extra over for travertine	\$ 9,000.00
May 2012	tiling around pool	\$ 900.00
	Altered porch structure	\$ 6,212.18
November 2010 (Not pressed)	construction of pool feature	\$ 2,353.00
	Sub Total	\$73,773.00
	Overhead /profit @ 20%	\$14,754.60
	GST	\$ 8,852.75
	Total	\$ 97,380.00

99 The expert evidence of Mr Haikalis after analysis of the claims of the respective parties and his own site investigation was that the builder had performed works additional to that which was apparently required by the construction documentation. He concluded that the additional works are a variation to the original plans and therefore to the contract.

100 Mr Antidormi, the expert engaged by the applicants, assumed that there was additional work undertaken by the builder and that the value of that work was \$37,940.00. He has not visited the scope of works beyond the assumptions that he made. His inspection of the works was confined to “...identifying instances of defective works that could be viewed visually...”, consequently his assessment of the amended contract sum is infected by his assumptions.

- 101 In the present case two scopes of works, and associated terms of the Second Contract are the only written document signed by both parties to confirm their agreements. I have formed the view that it is not a “sufficient description” of the work. It is clear on the face of the documents that the requirements of s7 of the Act, particularly sub (2)(f) which requires that the statutory warranties set out in Pt 2C at s 18B of the Act must be set out notwithstanding that they are to be implied into every contract to do residential building work have not been set out. (*Beechwood Homes v Kirkpatric* [2002] NSWSC 87)
- 102 Furthermore, the license holder has failed to comply with the requirement of the *Home Building Amendment Act 2011* which applies to all contracts in which the contract sum or the value of the work exceeds the prescribed amount (*Home Building Amendment Act 2011, Home Building Regulation 2004* - \$5,000.00) which this contract does, to provide to the other party a copy of the booklet produced by the Office of Fair Trading which explains the operation of the *Home Building Act*.
- 103 The failure to provide a sufficient description of the work triggers s 10 “Enforceability of contracts and other rights” at sub (1)(b)
- 1(b) under a contract to which the requirements of section 7 apply that is not in writing or that does not have sufficient description of the work to which it relates (not being a contract entered into in the circumstances in section 6(2), or.....
is not entitled to damages or to enforce any other remedy in respect of the breach of the contract committed by any other party to the contract to do the work. However, the person is liable for damages and subject to any other remedy in respect of a breach of the contract committed by the person.
- 104 The operation of this section continues to be controversial however, the authorities now support the view that s10 does not prevent a builder from exercising a contractual right to terminate a contract for the owner’s breach or to enjoy any “contractual entitlement” such as suspension of work for non- payment (*Eddy Lau Constructions Pty Ltd v Transdevelopment Enterprise Pty Ltd* [2004] NSWSC 273 at [40] and [101] per Barrett J and *Kalokerinos v HIA Insurance Services Pty Ltd* [2004] NSWCA 312 at [33] to [55] per Santow and Bryson JJA.) (*Kalokerinos v HIA Insurance Services Pty Ltd* [2004] NSWCA 312 at [33] to [55] at 68. (*Bambagiotti P. Building Disputes & the Home Building Act 1989* at 68.)
- 105 Non-compliance with the other parts of s 7 give rise to penal provisions which are not relevant to my consideration.
- 106 Mr Birkinshaw’s evidence was that respondent did little work on the site between June 2011 and December 2011 and ceased to do work under the First Contract in March 2012 when a plumber attended the site to install taps and toilets (Statement of Mark Birkinshaw 5 July 2012 at para7)

The Second Contract

- 107 In April 2012 the parties in consideration of terminating proceedings in the Consumer, Trader & Tenancy Tribunal entered into a Second Contract whereby the applicants would pay the respondent \$20,000.00, as part contribution to sub-contractors costs for completion, by 11 June 2012, of the works described in that contract scope.
- 108 The terms of the Second Contract are controversial in so far as Mr Cibralic recalled that he signed the agreement without reading it, his evidence was that he had left his reading glasses behind and took Mr Birkinshaw's word as to the contents of the agreement. It is his evidence that the scope of works contained in the second contract is greater than the scope that he was lead by the owners to expect to do to complete the contract/s.
- 109 There are also differences between the parties as to the place where the second contract was signed and the manner of its presentation.
- 110 Mr and Mrs Birkinshaw say that it was developed on a laptop, at the house, with Mr Cibralic's participation in the development of the document. Upon agreement it was printed at Mr Birkinshaw's mother's residence which is close to the site and then signed by both parties.
- 111 Mr Cibralic says that Mr Birkinshaw attended the site with the printed document which he could not read for the reason previously noted.
- 112 Mrs Birkinshaw said in cross examination that there was no issue raised by Mr Cibralic that he was unable to read or understand the document but she was unable to recall if the scope of works reflected the original contract or called for extra work.
- 113 Mrs Birkinshaw opined that the payment in the Second Contract was to be construed as payment to the builder or to subcontractors.
- 114 The terms of the Second Contract, (5 pages) which is headed "Contract to Finish..." is to be found at Appendix F of the Statement of Mr Birkinshaw. In general terms it provides for the completion of works to the house, front fence and pool. The work was to commence on Monday 30 April 2012 and reach completion by Monday 11 June 2012.
- 115 In consideration of completion of the works *"An amount of \$20,000.00 will be provided by the owner to contribute to pay for the works that will be paid to contractors direct on completion of their work. The remaining cost of all works will be paid by the Builder."*
- 116 It is a further term of the Second Contract that by signing the document the builder agrees that he will have no further financial claims on the owner, and that in the event that the builder fails to complete the Schedule of works

appended to the terms of the contract, the CTTT proceedings would be re-activated.

Termination of the Contract/s

- 117 It is the evidence of Mr Cibralic (Statement para 124 - 127) that he told Mr Birkinshaw in a telephone conversation that he would not return to the site until he was paid what was owed. Mr Cibralic's evidence is that Mr Birkinshaw wanted a further \$4,000.00 of painting work carried out by Bozjo Ingjatovic (Bob's Painting and Decorating Services) but refused to pay any more money or any money. Mr Cybralic's account of this conversation was that Mr Birkinshaw said *"if the painting isn't done I will stop you working as a builder, I will bankrupt you"*.
- 118 Following that and another telephone conversation with Mr Birkinshaw Mr Cibralic says that he became convinced that Mark and Linda would not pay him anymore money and neither he nor his sub-contractor's returned to the site. He relies on this conversation and sequence of events that followed it as his termination of the contract/s.
- 119 It is submitted for the builder that his duties under the contract were discharged in June 2012 for the owner's non-payment.
- 120 The submission refers to two alternate bases for the Builder's right to terminate;

The first at 5.2.1 of respondent's outline of Submissions is that the additional work was a variation to the agreement.

"The Owners unwillingness to fulfil their obligations under the Agreement (ie paying the Builder), was repudiatory conduct, or At 5.2.2, The Additional Work was a separate agreement and accordingly, more than one debt was owed to the Builder. In the absence of a clear intention from the Owners, the Builder appropriated the Owner's payments between the amount due for work performed pursuant to the Agreement and the Additional Work done at the Owner's request (see Cibralic Statement Annexure X). It follows, the Owners refusal to pay any further amounts to the Builder was repudiatory conduct."

I have formed the view that the parties clearly set out to create a second legally enforceable agreement – they each describe the agreement as the Second Contract and Mr Cybralic relies, at least in part, on the owners' failure to meet payments as a trigger for termination.

- 121 Mr Birkinshaw (Statement dated 25 October 2013) denies the telephone conversations reported by the builder took place and denies receiving "any communication from Mr Cybralic either written or oral that he terminated the contract.

- 122 Mr and Mrs Birkinshaw, on the other hand say that the builder breached essential terms of both the First and Second Contract and they accepted his repudiatory conduct and terminated both contracts by notice in writing dated 30 October 2012 which was served personally on the builder.
- 123 I find that there was a Second Contract, I am not persuaded by Mr Cybralic's explanation of the circumstances of the formalisation of that contract because there was no particular reason that it was to be signed at the date it was prepared when it called for the commencement of work by the end of April 2012.
- 124 Mr Birkinshaw has also recorded at para 38 of his statement (25 October 2013 in relation to the day the Second contract was signed, that "*Mr Cybralic appeared to read each item on the document and sought clarification at the time about each item on the document. Mr Cybralic did not complain that he could not read the document.*"
- 125 Furthermore, and possibly most telling, is the fact that Mr Cybralic commenced the work, presumably after he became aware that the contract was not in the terms which he anticipated. Mr Cybralic says that he did not read the contract immediately but I find it difficult to accept that a builder of his experience would not raise such an important issue as the terms of an agreement that he says he was tricked into signing until 11 September 2012 when the contract called for completion of the work by 11 June 2012.
- 126 I also find that Mr Cybralic's reliance on a telephone conversation followed by non-attendance at the site is an insufficient basis for me to conclude that he had terminated the contract/s.
- 127 The termination of a building contract is a matter of significance in that it profoundly affects the rights and obligations of the parties.
- 128 Looking at the conduct of the works over the entire period I note that the respondent's performance slowed significantly and stopped after the alleged completion time of the First Contract.
- 129 In the absence of any terms of contract, failure to meet progress claims or to pay for work done among other things, is sufficient ground for suspension and/or termination of a building contract for breach but there must be identification of the repudiatory conduct and acceptance of the breaching party's intention not to be bound by the contract and termination. Withdrawal of services in the context of the conduct of this work is in my view insufficient notice of termination. I find that Mr Cybralic failed to terminate the contract/s notwithstanding that he had an intention to do so.
- 130 I should say that I do not accept that the alleged warranty that work would be completed in 9 months has any legal significance. I find the "undertaking", if it was given, was given prior to signing the First Contract, to have force a significant condition of the contract should be shown on the face of the written document, and could easily have been added as were

other items such as for example, the swimming pool and the installation of air conditioning. It was not, and I find that it was not a term of the First Contract that the work was to be completed in 9 months.

- 131 The effect of that finding is not that time was at large but rather that the work would be completed in a “reasonable time”. I find that the work, even if it was 95% complete in accordance with Mr Cybralic’s evidence at the date of the Second Contract, would not be able to be completed in a “reasonable time”.
- 132 It must follow that although time was not of the essence, the applicants had a ground for termination in accordance with the Statutory Warranties for the builder’s failure to bring the works to completion with due diligence within the time stipulated in the First and Second Contracts or “...if no time is stipulated within a reasonable time.”
- 133 Having said that, I find that there were variations to the contract/s and that those variations could have given rise to delays in completion of the works but I am satisfied that even had the builder sought to have those delays taken into account, which he did not, the works were not completed in a “reasonable time”.
- 134 I note that time was a consideration in the second contract but I also note that the owners failed to raise the issue at the date the time constraint expired. It was not until 3 October 2012 that they served notice of termination, when the date for completion of the Second Contract was 6 weeks after 30 April 2012 (11 June 2012).
- 135 It has been submitted on behalf of Mr Cybralic that he had a legal right to claim a reasonable amount for the additional work. Since the parties had made no arrangement as to how the payments by Mr and Mrs Birkinshaw should be appropriated, the general rule as stated by Lord Macnaughten in *Cory Bros & Co v Mecca* [1987] AC 286 at 288 applies;

“when a debtor is making a payment to his creditor he may appropriate the money as he pleases, and the creditor must apply it accordingly. If the debtor does not make any appropriation at the time when he makes the payment the right of application devolves on the creditor.”

- 136 At Annexure F of the Statement of Mujo Cibralic is a table of the payments received by Mr Cibralic from the owners apportioned as between contract payments and payments for Additional works.

Date	Contract	Additional Work
24 June 2010	\$ 55,000.00	\$ 0.00
30 August 2010	\$100,000.00	\$ 0.00
2 November 2010	\$ 48,700.00	\$34,300.00
15 January 2011	\$ 90,000.00	\$ 0.00
23 March 2011	\$ 88,376.00	\$ 5,344.00
21 June 2011	\$ 10,672.00	\$14,328.00
	\$391,028.00	\$53,972.00

Total Payments **\$445,000.00**

- 137 It must follow from the finding in 129 above that the owners are entitled to the costs of rectification and the costs of completion of the works as they were described in the contract/s. Mr Cybralic acknowledged that the contract included the implied condition that works would be constructed in accordance with the *Home Building Act* and any other law and that this warranty extended to the DA conditions.
- 138 I should also note that the project accounting by both parties is difficult to follow and made more so by the payments alleged to have been made by Mr and Mrs Birkinshaw to suppliers and sub-contractors of the builder. The possibility exists that some suppliers or sub-contractors may have been paid by both parties. This could explain the discrepancy between Mr Birkinshaw's accounting and that of Mr Cybralic which reveals a difference between the two of \$19,736.00 in respect of the amount Mr Birkinshaw says he paid and the amount Mr Cybralic says he received. I have previously referred to the accounting problems raised by the issue of cash payments.
- 139 The experts were required to meet in conclave while lay evidence was taken, their task was to consider and if possible agree the cost of defective work and to consider and if possible to agree the value of completed work. They were able to reach substantial agreement as to the cost of defective work.
- 140 It is submitted on behalf of Mr and Mrs Birkinshaw that the contract adjustments should be calculated as First and Second Contract prices \$570,000.00 (\$550,000.00 + \$20,000.00)
Add Variations \$4,594.00 (Pool step, Laundry toilet, Timber floor.
Total \$574,594.00.

I disagree with this calculation in relation to the value of variations. I find that the respondent completed variations set out in paragraph 94 above but I disagree with the amounts claimed.

Date	Additional Work	Cost incl GST.
22 June 2010	demolition of existing house allowed	\$ 9,000.00
Sept 2010	extra concrete piers	\$12,446.00
Sept 2010	excavation for pool	\$ 8,982.00
October 2010	supply/install toilet in laundry	\$ 1,814.00
November 2010	extra concreting around pool	\$ 2,814.00
March 2011	supply skylights	\$ 5,344.00
March 2011	extra electrical work	\$ 8,440.00
June 2011	extra timber flooring in lieu of tiles	\$ 2,983.75
November 2011	extra over for travertine	\$ 9,000.00
May 2012	tiling around pool	\$ 900.00
	Altered porch structure	Nil allowance

I find that the claim in relation to the porch arose from a mistake by the builder.

	Total	\$ 61,723.75
Plus OHP @20%		\$ 12,345.00
Plus GST @ 10%		\$ 1,235.00
	Total	\$ 75,304.00



I find that the adjusted contract sum is therefore	\$570,000.00
Plus Variations	\$ 75,304.00
Adjusted contract sum	\$645,304.00
Accepting that Mr and Mrs Birkinshaw have paid	\$609,676.00
Therefore a total of \$35,628.00 is unexpended	
In the adjusted contract sum	\$ 35,628.00

Less the value of rectification and completion costs	
In accordance with Schedule developed from the Joint Memorandum prepared by the experts except that I have Substituted findings in respect of the following items,	
2.05 found	\$ 834.00
2.10 found	\$ 1,200.00
2.11 not in contract	\$ Nil
2.17 Cost of paint	\$ 760.00
2.25 Actual cost	\$17,363.00
Total for completion costs	\$140,043.00
LESS unexpended contract sum	\$ 35,628.00
	\$104,415.00

The above calculations are inclusive of GST.

141 It has been submitted on behalf of Mr and Mrs Birkinshaw that I should add both preliminaries and margin plus GST to the above, however, some of the work has been completed by Mr and Mrs Birkinshaw and accounted for at the actual cost of that work, and, the nature of the rectification/completion works remaining are such that I have formed the view that the work would fall into a category that would be subcontracted. There would be a measure of double counting involved if I added builder's overhead and profit to the resulting calculation.

142 In respect of both contracts the builder should pay to the owners the sum of \$104,415.00.

P Briggs
General Member
Civil and Administrative Tribunal of New South Wales

27 May 2014