The Architects Studio Pty Ltd v Thurlow & Anor
[2006] NTSC 25

PARTIES:	THE ARCHITECTS STUDIO PTY LTD (ACN 074 200 758) v THURLOW, ANDREW and INNOCENZI, SUZANNE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	NO LA 19/2005 (20307071)
DELIVERED:	28 MARCH 2006
HEARING DATES:	13 MARCH 2006
JUDGMENT OF:	ANGEL J

CATCHWORDS:

CONTRACT – Interpretation – Subsequent conduct of parties irrelevant.
EVIDENCE & PROCEDURE – Pleadings – Whether party at liberty to pursue case outside pleadings.

REPRESENTATION:

Counsel:

Appellant:	J Kelly
Respondent:	S Gearin

Solicitors:

Appellant:	Cridlands
Respondent:	Withnalls

Judgment category classification:	B
Judgment ID Number:	Ang200607
Number of pages:	16

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

The Architects Studio Pty Ltd v Thurlow & Anor
[2006] NTSC 25
No. LA 19/2005 (20307071)

BETWEEN:

THE ARCHITECTS STUDIO PTY LTD (ACN 074 200 758)
Appellant

AND:

ANDREW THURLOW and SUZANNE INNOCENZI
Respondents

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 28 March 2006)

[1] This is a defendant's appeal against a Local Court judgment in the sum of $21,557.62 for damages for breach of contract. The respondents sued the appellant for damages for breach of contract and breach of duty of care arising out of the appellant's engagement by the respondents to design a house at Bayview Haven.

[2] Having concluded that the appellant was liable to the respondents for breach of contract the presiding Magistrate said: "The duties alleged in tort overlap significantly, if not totally with the matters raised in contract. In my view it

is unproductive and unnecessary to analyse the matter further under duty of care".

[3] The appellant, apart from submitting that the learned Magistrate made findings of fact for which there was no evidence, complained that the learned Magistrate allowed the respondents to argue a case that had not been pleaded and which the appellant had no opportunity to meet and further, that she based her decision on that case thereby depriving the appellant of procedural fairness. In particular the appellant complains that the learned Magistrate found that there was a contract not only different from that pleaded by the respondents but unsupported by any evidence.

[4] In paragraphs 2 and 3 of the Amended Statement of Claim the respondents pleaded a contract between the parties as follows:

> "2. In or about mid December 2000 the plaintiffs contracted with the defendant for the provision of architectural services at lot 6163 Bradhurst Street, Bayview in the Northern Territory of Australia ("the premises").
>
> Particulars of Contract
>
> (a) For the defendant to design a home within the plaintiffs' budget expressed to be $250,000;
>
> (b) For the defendant to provide the architectural services to the plaintiffs for the fee $18,750;
>
> (c) For the defendant to prepare the initial schematic design and to document and supervise design to completion of construction within 35 weeks;

(d) For the defendant to engage consultants on behalf of the plaintiffs to:

(i) Undertake structural design documentation;

(ii) Obtain building certification; and

(iii) Obtain plumbing certification.

(e) To provide a specialist consultant for a budget estimate before proceeding to documentation stage;

(f) To ensure the home was designed within the covenants for lot 6163 Bradhurst Street, Bayview;

(g) It was an express term of the contract that the defendant prepare the documentation and supervise construction to ensure meeting the requirements of the Northern Territory of Australia's First Home Owner's Grant and Quick Start grant concessions;

Particulars of concessions

(i)	First Home Owners Grant	$7,000.00
(ii)	Quick Start NT home being built grant	$5,000.00

(h) To call in tenders in a timely fashion and in such a way as to provide a reasonable time frame to allow proposed tenderers sufficient time to properly prepare tenders.

(i) An implied term to give business efficacy to the contract that the defendant report to the plaintiffs regularly and seek instructions for any design changes and for the plaintiffs to be kept informed of progress and given copies of design documentation;

(j) An implied term that the defendant would exercise all reasonable care skill and diligence in carrying out professional duties as an architect in or about the supervision of the professional services for schematic design to completion of construction.

3. On or about 09 January 2001 the plaintiffs accepted the terms and conditions of contract for the defendant to provide architectural services."

[5] In paragraph 14 of the Amended Statement of Claim the respondents alleged breaches of contract as follows:

"14. The defendant breached the contract for provision of architectural services to the plaintiffs.

PARTICULARS OF BREACH OF CONTRACT

- Failing to prepare a schematic design and/or design documentation in accordance with the express budget restrictions detailed by the plaintiffs;

- Failing to prepare plans, specifications and documentation in accordance with the budgetary restrictions of the plaintiffs;

- Failing to adequately prepare revised schematic design and/or plans including documentation for the house upon receipt of the revised costing plan by the Rawlinsons Group Pty Ltd in the sum of $315,643.00;

- Failing to seek tenders for the construction of the premises within a reasonable time;

- Failing to inform the plaintiffs regularly and seek instructions as to design modifications to meet the plaintiff's budgetary restrictions;

- Failing to obtain tenders for the scope of works specification and for completion to commence in accordance with the restrictions and requirements of the Northern Territory Government First Home Owners Grant and the Quick Start NT New Home Being Built Grant."

[6] It is to be observed:

(a) The respondents allege a contract "(I)n or about mid December 2000" in paragraph 2 of the amended Statement of Claim;

(b) The respondents allege that "(O)n or about 09 January 2001" the respondents "accepted the terms and conditions of contract";

(c) The respondents allege one contract only;

(d) The respondents do not allege a contract in writing or any amendments to the contract entered into;

(e) The respondents in paragraph 14 of the Amended Statement of Claim allege breaches of the alleged contractual obligations pleaded in paragraph 2, particulars (a), (c), (g), (h) and (i) only;

(f) In particular the respondents do not specifically allege a breach of a contractual obligation to exercise reasonable care, skill and diligence in carrying out professional duties as architects, although these matters are the subject of the claim in tort.

[7] The appellant requested particulars of paragraph 2(a) of the Amended Statement of Claim as follows:

"Say what facts and circumstances are relied on by the Plaintiff to allege that a term of the contract was to design a home within a budget expressed to be $250,000.00."

The respondents replied as follows:

> "Not a proper request for particulars – seeking evidence. The plaintiff relies upon the written communication forwarded via facsimile 28 December 2000 – document 1.5 in the defendant's discovery and document 1.6 dated 09 January 2001 being the defendant's response confirming the wish list achievable within the budget of $250,000.00."

The two documents 1.5 and 1.6 became Exhibits P1 and P2.

[8] It is now convenient to refer to some matters of common ground. Following an initial meeting between the respondent Innocenzi and Mr Fletcher of the appellant Ms Innocenzi sent to the appellant a letter (Exhibit P1) which was referred to throughout the evidence as the "wish list".

[9] That Exhibit was in the following terms.

> "To: Peter Fletcher
> Fr: Suzanne Innocenzi & Andrew Thurlow
> Re: "Wish list" for our house
> Fax: 8941 3907
>
> Hi Peter
>
> Following is the list you asked us to put together for our house.
>
> - 3 bedrooms – one with ensuite (this isn't hugely important)
> - 1 guest room – separate from our rooms (I was thinking maybe a separate bungalow?)
> - 1 main bathroom
> - 1 kitchen – not huge
> - 1 playroom for children
> - 1 lounge room for adults
> - 1 study/office – we don't like "study nooks", it needs to be a separate room
> - Laundry
> - Downstairs toilet
> - Separate "quiet room" where we can read. Maybe this can be incorporated into the study.

Peter, we'd like the house to be quite open and airy, but it's important that the "private" rooms such as bedrooms and main bathroom are away from "public" spaces such as lounge room, kitchen etc.

We'd also like rooms that open onto verandahs since we'd spend a lot of time outside.
If you have any questions please call me at home on 8985 4965.

We look forward to seeing what you come up with.

Suzanne".

[10] On 9 January 2001 the appellant wrote a letter to the respondents which comprised Exhibit P2. That letter was in the following terms:

"Suzanne Innocenzi and Andrew Thurlow
PO Box 2790
DARWIN 0801

RE: FEE OFFER FOR ARCHITECTURAL SERVICES
Lot 6163 Bradhurst St. Bayview

Dear Suzanne and Andrew,

Thankyou for the opportunity to work with you on the design of your home at Bayview. We have visited the site and noted the excellent views and aspect to the north. There was also a good breeze coming in from the west.

We have received your 'wish list' of spaces which appears to be achievable within a budget which we understand to be $250,000. This cost of cause (sic) will vary depending on the overall area of the house and finishes selected. We will provide an opinion of probable cost with the initial sketch plans so as (sic) a brief can be finalised that is within your budget.

We note in the design guidelines for Bayview the requirement to provide landscaping plans to the developer for approval with the

house plans. We have the experience in the office to do this for you if you wish.

We understand that you would generally like the house to be open with good ventilation as well as maintaining privacy to bedroom areas and neighbours. This suits us well as the work we usually do focuses on creating these types of environments with the aim of creating cool and comfortable spaces and consequently large savings in energy consumption.

Our fees allow for the full range of services, described in the publication attached. 'You and your Architect'. From the initial schematic design stage through to completion of construction, the process typically takes about 35 weeks plus a further 26 weeks to monitor the building for any defects that may subsequently arise.

Our Fees

These are calculated in accordance with the Royal Australian Institute of Architects recommended fee scale. This takes into account the value of construction work proposed and the scope of architectural services involved.

Based on a construction value in the order of $250,000 the RAIA scheduled fee is 10% of that figure or $25,000. We are able to offer the same level of service for 7.5% or $18750 including GST.

On this basis the various stages of our service would cost as follows:–

Architectural Fees

Stage 1 Schematic Design (12.5%)	$ 2343.75
Stage 2 Design Development (12.5%)	$ 2343.75
Stage 3 Contract Documentation (50%)	$ 9375.00
Stage 4 Contract Administration (25%)	$ 4687.50
Total	**$18750.00**
Landscaping Drawings	$ 1890.00

Other Statutory Fees and Charges

You will need the services of other consultants in order to obtain a building permit. The consultants required are listed below with an **approximate** fee that you should budget for.

Building Certifier, (including inspections)	say,	$ 1000
Structural Engineer, (design, documentation and certification)	say,	$ 3200
Plumbing Certification	say,	$ 250

- Please note our fees allow for engaging consultants on your behalf, instructing these consultants and coordinating the building application process. We can suggest companies to you who we have worked with successfully on similar projects in the past.

Cost Consultant

We recommend engaging a cost consultant at the end of the sketch design phase to provide a detailed estimate of the cost of the house. The estimate is usually broken down into elements and consequently identifies where savings can be made, if required, as well as providing a good check that the building is within budget before proceeding to the documentation stage. The cost of a budget estimate would be in the order of $600. We can recommend reputable companies to you for this purpose.

Terms

We will bill you for our services on a monthly basis and would appreciate payment within 14 working days of the invoice date.

The staging of services shown above allows either party to terminate our agreement at any time, however please be aware The Architects Studio always retains copyright of designs produced.

Acceptance

If you decide to commission The Architects Studio all you need to do is sign the attached copy of this letter as evidence of your acceptance and return it to our office.

Regards,
The Architects Studio Pty Ltd

Greg McNamara
Architect."

[11] The learned Magistrate found the respondents signed and returned an acceptance of that letter. As is immediately apparent and contrary to the case pleaded by the respondents the contract between the parties was struck when the respondents returned the acceptance to the appellant.

[12] The learned Magistrate found the "written contract between the parties is that which is set out in Ex P2", that "the initial instructions contained in P1 were incorporated into the contract", that "the construction of the home within a budget of $250,000.00 was an essential term of the contract", that the respondents "could not build the house that they were told could be designed for them" and that the "plans and designs (generated by the appellant and given to the respondents) were not developed pursuant to the contract". The latter two findings appear to be based on a premise that the appellant had breached the contract by failing to include in the final design all of the features on the wish list.

[13] The respondents' pleading nowhere alleges that the wish list formed part of the contract in the sense that it was a term of the contract alleged by the respondents that the appellant design a house containing all the features on that wish list. The respondents' response to the appellant's request for particulars of paragraph 2(a) of the Amended Statement of Claim does not

purport to form part of the pleadings but rather notice of the evidence to be relied upon. It comprises an explanation as to why the plaintiff says that it was a term of the contract that the defendant design a house within a budget expressed to be $250,000.00, not a house with all the features in the wish list. Nowhere is it alleged in the Amended Statement of Claim that the respondents could not build the house that they were told could be designed for them, a matter expressly found as a fact by the learned Magistrate. Significantly the respondents pleaded no misrepresentation claim against the appellant.

[14] The respondents' case that the wish list was a term of the contract in the sense that the appellant had contracted to design a house incorporating all the features on the wish list and that the appellant had breached it by failing to incorporate all of those features was first introduced by the respondents during cross–examination of the appellant's architect, Mr McNamara. This was after the close of the respondents' case and the cross–examination of the respondent Innocenzi and over the objection of counsel for the appellant. Counsel for the appellant objected to a line of questioning in the cross–examination of Mr McNamara on the ground that the case sought to be made by the respondents had not been pleaded. The objection was overruled.

[15] The respondents' case outside the pleadings was again pursued by counsel for the respondents during final submissions. In her final submissions counsel for the appellant emphasised that the appellant was there to meet the claim that had been pleaded not some alternative claim and again objected

that the respondents' counsel's submissions were not open to the respondents on the pleadings. No application was made to amend the Amended Statement of Claim.

[16] In the circumstances the respondents' contract case before the learned Magistrate miscarried. In *Banque Commerciale SA in liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286–287, Mason CJ and Gaudron J said:

> "The function of pleadings is to state with sufficient clarity the case that must be met … In this way, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision. The rule that, in general, relief is confined to that available on the pleadings secures a party's right to this basic requirement of procedural fairness. Accordingly, the circumstances in which a case may be decided on a basis different from that disclosed by the pleadings are limited to those in which the parties have deliberately chosen some different basis for the determination of their respective rights and liabilities." (omitting reference)

As Burchett J observed in *Multigrip Distribution Services Pty Ltd v TNT Australia Pty Ltd* (1996) ATPR 41–522 "… a claim can not be answered until it is known".

[17] The learned Magistrate found that it was a term of the contract that the defendant design a home within the plaintiff's budget of $250,000.00, that is, for that sum or less. There was no evidence to support that finding. Indeed it flies in the face of all the evidence. The learned Magistrate expressly rejected a finding that the budget was "in the order of"

$250,000.00, even though that was the uncontested evidence of both Mr McNamara for the appellant and the respondent Innocenzi. The witnesses variously spoke of "around", "approximately", "in the order of" the sum of $250,000.00. The respondent Innocenzi specifically gave evidence that $250,000.00 was not a maximum budget and that upon receiving a costing of $257,000.00 for the main part of the house she requested additional changes that added – albeit slightly – to that cost.

[18] The finding that the initial instructions contained in Exhibit P1 were incorporated into the contract between the parties in the sense that the appellant was contracting to design a house with all the features in the wish list also lacks any evidentiary basis. Exhibit P1 is not in its terms "promissory", nor is Exhibit P2 as regards the contents of Exhibit P1. Compare *JJ Savage & Sons Pty Ltd v Blakney* (1970) 119 CLR 435 at 442. Exhibits P1 and P2 when read together do not contain any contractual term that the appellant promised to design a house incorporating all the features on the wish list which could be built for $250,000.00 or less. Yet the learned Magistrate apparently reached this conclusion.

[19] The reasoning of the learned Magistrate was as follows:

> "82. *The written contract between the parties is that which is set out in Ex P2* and reproduced above in these reasons. That contract also incorporates the booklet "You and Your Architect" and also incorporates Ex P1 "the wish list of spaces" within the framework mentioned in the contract, namely "we have received your "wish list" of spaces which appears to be achievable within a budget which we understand to be $250,000." The acceptance of the concept of the house as expressed in the "wish list" is reaffirmed in the contract in

the paragraph beginning: "We understand that you would generally like the house to be open….etc". Initially I was concerned that the "wish list" was merely aspirational however I note that as well as the inclusion of it in P2, *from the time of the conclusion of that contract, both parties proceeded and conducted themselves on the basis that the concept for the house was that as initially identified in the "wish* list". For example, it was those very "spaces" that were included in the initial sketch plan and later in the schematic design. Although of course the contract was capable of variation by agreement, it was that initial concept that ran through the process. In other words, although I initially had some misgivings, *there is no reason why the "wish list", (which is possibly wrongly labelled as such), but effectively incorporates the plaintiff's instructions, should not be considered to be part of the contract between the parties.* If, as Ms Kelly rightly points out, the clients desires and therefore instructions may change throughout the process, there would need to be a variation of the contract, possibly incorporating negotiated consequential cost variations if that is necessary. In my view the instructions incorporated in P1 and P2 are broad enough to be capable of considerable development within the design process. I note Mr McNamara accepted in his evidence that he was required to build the house for the plaintiffs including those items on the wish list. On the balance, in this case, I find the initial instructions contained in P1 were incorporated into the contract. A contract for architectural services would hardly be efficacious without some starting point in the contract of what was actually conceived, at least in general terms, by the parties. I say that with the awareness that there is still a substantial development process that will inevitably occur.

83. The most significant issue concerning the interpretation of the contract is whether an essential term was that the house be constructed for $250,000. Exhibit P2 states "within a budget which we understand to be $250,000. This cost of course will vary depending on the overall area of the house and finishes selected. We will provide an opinion of probable cost with the initial sketch plans so as a brief can be finalised that is within your budget." In the same document concerning calculation of fees it is stated "Based on a construction value in the order of $250,000, the RAIA scheduled fee is… ." Based on the face of the document *and the consistent conduct of the parties* and the evidence given by both Ms Innocenzi and Mr McNamara, I am led to the inevitable conclusion that *the construction of the home within a budget of $250,000 was an essential term of the contract.* It is evident that the Defendant's fee structure was calculated on the basis of the budget. It will be recalled that Ms Innocenzi asked for the initial documentation process to

> cease while she applied for finance in the sum of $250,000; she applied for that finance, was given agreement in principle and advised the defendant." (emphasis added)

[20] As can be seen the learned Magistrate was dissuaded from a view that the wish list "was merely aspirational" by post–contractual conduct of the parties. In this she was in error. The fact the appellant in its preparatory drawings incorporated features from the respondents' wish list does not qualify or add to the contract as found by the learned Magistrate to be constituted by Exhibit P2. Nor, for that matter, does any other post contractual conduct of the parties. In any event the post contractual conduct was inadmissible on the question of what the written contract P2 means. Whilst the present state of the law has been said to be controversial, *Royal Botanic v South Sydney City Council* (2002) 186 ALR 289 at 318 [109] per Kirby J, decisions binding on this Court are to the effect that post–contractual conduct is not admissible on the question of what a contract means as distinct from whether a contract was formed or varied: see in particular *FAI Traders Insurance Co Ltd v Savoy Plaza Pty Ltd* [1993] 2 VR 343, *Ryan v Textile Clothing & Footwear Union of Australia* [1996] 2 VR 235, *Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd* (1990) 20 NSWLR 310, *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153 at 164 [26], per Heydon JA, and the two Privy Council decisions, *Ashton v IRC* [1975] 1 WLR 1615 at 1621 F–G, an appeal from New Zealand, and *AMP Society v Chaplin & Anor* (1978) 18 ALR 385 at 392–393, an appeal from the Supreme Court of South Australia.

[21] As I have said, the respondents only ever pleaded one contract. They never pleaded or sought to prove a contract other than that constituted by Exhibit P2. Nor did they plead any variation or variations of P2. Thus post contractual conduct of the parties was inadmissible as evidence of what the contract between the parties, constituted by Exhibit P2, meant. The respondents did not rely on the type of case discussed by Heydon JA in *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153 at [74] – [79].

[22] The respondents' breach of contract case miscarried. The learned Magistrate found the respondents had failed to make out their case based on either alleged time limits or Government Grant requirements. The respondents' otherwise pleaded breach of contract case should have been dismissed as unproven. There was no evidence that the appellant contracted to design a house with all the features contained in the "wish list" for $250,000 or less, or warranted that such a house could be built.

[23] There remains the respondent's claim in tort. As I have indicated the learned Magistrate did not adjudicate upon the respondent's claim in negligence. In the circumstances it is appropriate to remit the matter back to the Local Court for a decision upon that part of the respondent's claim.

[24] I shall hear the parties as to the appropriate orders and as to costs.
