SUPREME COURT OF QUEENSLAND

CITATION:	*Pacific Century Production P/L v Jeffrey Tysoe & Lynette Tysoe T/a Lyndee Transport* [2005] QCA 189
PARTIES:	**PACIFIC CENTURY PRODUCTION PTY LTD** ACN 087 505 860 (plaintiff/respondent) **v** **JEFFREY TYSOE & LYNETTE MAVIS TYSOE TRADING AS LYNDEE TRANSPORT** (defendant/appellant)
FILE NO/S:	Appeal No 9451 of 2004 DC No 103 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Rockhampton
DELIVERED ON:	3 June 2005
DELIVERED AT:	Brisbane
HEARING DATE:	22 April 2005
JUDGES:	McPherson, Williams and Jerrard JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed** **2. The learned primary judge's order be varied by deleting from paragraph 1 of the order "$98,317.74 including $14,357.24 for interest" and inserting in lieu thereof "$70,384.75 with interest"** **3. Respondent to pay the appellant's costs of and incidental to the appeal to be assessed**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDING OF FACT - FUNCTION OF APPELLATE COURT – WHERE FINDINGS CLEARLY WRONG – GENERALLY – where appellant constructed roads on a farm property owned by respondent – respondent awarded rectification costs by District Court judge for negligently constructed roads – whether the learned trial judge erred in calculating the cost of rectification over a greater distance of road than in fact constructed by the appellant CONTRACTS – BUILDING, ENGINEERING AND

RELATED CONTRACTS – REMEDIES FOR BREACH OF CONTRACT – DAMAGES – where two options available to rectify the road – whether the learned trial judge erred in allowing the respondent to recover on the augmentation/reconstruction option rather than the augmentation option

Bellgrove v Eldridge (1954) 90 CLR 613, considered

COUNSEL: A M Arnold for the appellant
G C O'Driscoll for the respondent

SOLICITORS: Grant & Simpson for the appellant
H W Litigation for the respondent

[1] **McPHERSON JA:** I have read and agree with the reasons of Williams JA. The appeal should be allowed to the extent and on the terms specified in his Honour's judgment.

[2] **WILLIAMS JA**: The appellant constructed some roads on a farm property owned by the respondent. Relevantly the contract relating to the performance of that work:

(i) did not specify any length of road but there was no dispute between the parties as to the relevant end points;
(ii) provided that some of the roads were to be four metres wide and others six metres wide;
(iii) provided that the roads had to be constructed with a pavement thickness of 150 mm;
(iv) provided that there was to be a cross fall of between 3 mm and 4 mm.

[3] There was no dispute that the required length of the road was constructed by the appellant. Invoices were submitted by the appellant for 15.4468 km of four metre road and 1.8956 km of six metre road. There was evidence that representatives of each party confirmed those measurements.

[4] In the action the respondent (plaintiff) contended that the roads were negligently constructed, in particular because there was not the required pavement thickness of 150 mm and because the cross fall was not in accordance with contractual requirements. The respondent sought rectification costs in accordance with estimates detailed in the report of a consultant civil engineer, Bloxsom. The learned judge at first instance preferred the evidence of Bloxsom to that of the engineer (Grillmeier) called by the appellant and found that the roads were not constructed in accordance with contractual specifications outlined above. His Honour then found that the cost of rectification should be assessed on the basis of Bloxsom's preferred augmentation/reconstruction option, rather than the alternative simple augmentation option preferred by Grillmeier. That resulted in his allowing as the cost of rectification $146,200.

[5] From that amount there was a deduction of $62,239.50, being the amount not paid by the respondent on the appellant's invoices, and which was the subject of a counterclaim. There was therefore judgment for the respondent for $83,960.50 before interest.

[6] The appellant appealed and the principal contentions raised in this Court were:

(a) the learned trial judge erred in allowing the respondent to recover on the augmentation/reconstruction option rather than the mere augmentation option;

(b) the learned trial judge erred in that he calculated the cost of rectification over a greater distance of road than in fact constructed by the appellant;

(c) that in calculating the cost of rectification by the augmentation/reconstruction option too great an allowance was made for additional gravel required;

(d) other items allowed in the calculation of cost of rectification were excessive.

[7] Counsel for the appellant conceded that he could not on the appeal challenge the finding of fact that the roadworks were not in accordance with specification, and further that he could not challenge the credibility finding favouring the evidence of Bloxsom over the appellant's engineer.

[8] The most critical issue relates to the length of road involved.

[9] In his reasons for judgment the learned trial judge said: "The defendants constructed about 15.4 km of four metre wide roads and about 4.6 km of six metre wide roads (see invoices in Exhibit 32)." His Honour clearly erred in so finding. Exhibit 32 comprises invoices 365, 370, 371, 372 and 375. If one tallies the length of roadworks referred to in invoices 365, 370, 372 and 375 one arrives at the lengths as found by the learned trial judge. But, as the written submissions on behalf of the appellant (defendant) put before the learned trial judge made clear (record 459), the roadworks particularised in invoice 365 "did not form part of the contract between the parties before the court". The roadworks in that invoice related to a different contract and there was in fact "no complaint about these roads". At first instance the respondent accepted that position. When the appropriate adjustment is made it is clear that the appellant invoiced the respondent for 15.4468 km of four metre road and 1.8956 km of six metre road. Those are the distances accepted by the witness Benham on behalf of the respondent.

[10] Bloxsom carried out extensive testing to determine pavement depth, surface finish, and shape and drainage, but did not measure the length of the roadworks. In his report, and in determining the cost of rectification, he referred to: "Road length (approx only) - Main Road 2.0 km - Minor Road 17.0 km."

[11] It will be noted that Bloxsom's approximate total length (19 km) approximated the erroneous finding of the learned trial judge (19 km plus). It is perhaps because of that that the learned trial judge did not immediately see any discrepancy.

[12] On appeal, counsel for the respondent contended that no one accurately measured the length of road and, because there was no cross-examination of Bloxsom on the point, the learned judge was entitled, having preferred the evidence of Bloxsom, to act on the figures in his calculations. That cannot be accepted. The learned trial judge made his initial finding by referring to the invoices, and that was clearly appropriate. His error was obvious; he included an irrelevant invoice. There was some checking of distances in invoices 370, 372 and 375 by Benham and the distances stated therein should be accepted.

[13] In my view it is clear that an error was made in calculating the cost of rectification because an excessive length of road was used in the calculation. There must at least be an adjustment so that the cost of rectification is calculated over 15.4468 km of four metre road and 1.8956 km of six metre road.

[14] It is next necessary to consider whether the learned trial judge erred in allowing the cost of rectification on the augmentation/reconstruction basis (option B) rather than on a mere augmentation basis (option A). Relevantly Bloxsom said in his report:

> "It is recommended that option B would be the most viable and practical solution as it will allow proper subgrade preparation prior to augmenting the existing pavement material, compacting and finishing the road to the design shape.
>
> Option A, while still a reasonable approach, is more akin to typical gravel road maintenance where, after having been in use for some time, reshaping and adding more gravel will be required.
>
> Furthermore it would be difficult to ensure that the augmentation process could achieve thickness throughout without exhaustive and ongoing measurement and depth checking; substantial cost in terms of engineering/technical supervision."

[15] It was conceded on the hearing of the appeal that Bloxsom was not specifically cross-examined as to his preference for augmentation/reconstruction over mere augmentation. As already noted, Grillmeier advocated the adding of additional gravel to bring the pavement thickness up to 150 mm, essentially Bloxsom's option A. That proposal was put to Bloxsom in cross-examination. He pointed out the process was more usual in road maintenance, but conceded it was "a method" of making up the deficit in pavement thickness. He then agreed with the proposition that it was "a reasonable method".

[16] The argument by counsel for the appellant, based on the reasoning of the High Court in *Bellgrove v Eldridge* (1954) 90 CLR 613, was that the controlling factors in determining the cost of rectification were: (1) what is proposed must be "necessary to produce conformity"; and (2) it must be a reasonable course to adopt. It was then submitted that option A, mere augmentation, satisfied that test.

[17] The relevant passage in the reasons for judgment at first instance is as follows:

> "Mr Bloxsom's evidence, which I accept, is that to have constructed the roads as specified, it would have been necessary to prepare the sub-grade surface to similar dimensions and cross-sectional shape as the pavement surface (para 4.1 Exhibit 24). Although Mr Bloxsom agreed when cross examined augmentation was a reasonable method, his agreement in that respect was limited to achieving the specified thickness. As I am satisfied the roads as constructed do not conform both as to pavement thickness and cross fall I am persuaded by Mr Bloxsom's evidence that the second approach, although more expensive, is the reasonable method for rectification of the works in the circumstances."

[18] The evidence was that the specifications provided by the respondent for the construction of the roads would mean that if the roads were built to that

specification the roads would last 10 to 20 years. The clear thrust of Bloxsom's evidence, which was accepted by the learned trial judge, was that to achieve that result the road would have to be reconstructed; merely augmenting the depth of gravel in the pavement would not achieve that.

[19] *Bellgrove v Eldridge* is also authority for the proposition that, insofar as money can provide, the party must be placed in the position it would have been if the contract had been performed. The evidence here was that if built to the proposed design the road would last 10 to 20 years. The effect of the evidence of Bloxsom is that that standard could only be reached if the augmentation/reconstruction option was adopted. It follows, in my view, that the learned trial judge did not err in allowing cost of rectification based on the augmentation/reconstruction approach.

[20] With respect to the quantity of gravel necessary to rectify the roads Bloxsom's calculation allowed for using an extra 50 mm of gravel. The required pavement thickness was 150 mm and Bloxsom's extensive testing established that the average pavement thickness was in fact 120 mm. But as Bloxsom pointed out in his evidence with spreading, compaction, and other relevant considerations more than an extra 30 mm of gravel would be required to obtain the required compacted pavement thickness of 150 mm.

[21] The learned trial judge on the evidence was clearly entitled to accept the evidence of Bloxsom as to the quantity of gravel required.

[22] The appellant also challenged the allowance in Bloxsom's calculation of $15,000 for engineering supervision. It is true that Bloxsom was unable under cross-examination to detail precisely how that amount was calculated but it is clear that in the circumstances some engineering supervision was required to ensure the rectification work was carried out to the proper standard and in the circumstances it has not been demonstrated that the amount adopted by Bloxsom was excessive.

[23] Counsel for the appellant also submitted that no allowance was made in determining the cost of rectification for the fact that no cross fall was required in certain sections of the road.

[24] It was clear that certain areas had been designated as not requiring the cross fall because water would naturally flow downhill. However, the Second Road Test report (Exhibit 25) clearly indicated that all areas still required full rectification because of deficient pavement thickness and surface finish and the overall cost of rectification would not be affected by the consideration that over some distance cross fall was not required. The learned trial judge obviously accepted that and it has not been shown he was in error in so doing.

[25] I am not persuaded that the other issues raised by the appellant in the notice of appeal and written outline ought result in any diminution of the amount allowed for rectification.

[26] Counsel for the appellant put before the court a calculation of the cost of rectification using the augmentation/reconstruction method but calculated over distances of 15.4468 km of four metre road and 1.8956 km of six metre road. The only other adjustment to Bloxsom's calculation was that the amount allowed for engineering and supervision was decreased on a pro rata basis. That gave a figure

for the cost of rectification of $132,624.25, and that was not challenged by counsel for the respondent on the assumption that the revised distances had to be used.

[27] Given $132,624.25 is the cost of rectification, after deducting the amount of the counterclaim namely $62,239.50, the net judgment would become $70,384.75.

[28] The appeal should be allowed by deleting from paragraph 1 of the order "$98,317.74 including $14,357.24 for interest" and inserting in lieu thereof "$70,384.75 with interest".

[29] The respondent should pay the appellant's costs of and incidental to the appeal to be assessed.

[30] **JERRARD JA**: In this appeal I have read the reasons for judgment and orders proposed by Williams JA, and respectfully agree with those. It is obvious that the appellants and the respondent had very different ideas about what the contract required of the appellant. One can readily glean that from comparing the detailed specifications the respondent supplied to the appellants, setting out what it required in the road construction, with the somewhat laconic response from the appellants (dated 9 May 2002)[1], which refers only to loading and carting (900) loose metres per kilometre of gravel, "and form up with grader, roller, and water truck"; and "de-grassed material to be brought back onto the shoulder of the road". However, there was no challenge to the findings by the learned trial judge as to the documents which constituted the contract, and those included the respondent's detailed specifications.

[31] Mr Carseldine, a civil engineer who prepared those specifications, gave opinion evidence[2], referred to by Williams JA at paragraph [18] of his reasons, as to the quality of the road which would result from building one to his specification. That opinion was not objected to or challenged.

[32] Likewise there was no challenge to the respondent's case before the learned trial judge, that the appellants did agree to construct a road with a gravel thickness of 150 mm. It is curious that the appellants did not make it as thick as had been specified and agreed, since the respondent was supplying the gravel. The only challenge by the appellants to the respondent's version of their agreements was their denial that they agreed to a minimum 3 – 4 mm rise and fall. On this appeal, they did not challenge the finding by the learned trial judge against them on that point, or the findings on the contract terms, or that those had been breached by them as found by the learned judge.

[33] They challenged only the necessary extent of the remedial or rectification work required to make the road accord with the specifications to which they had agreed by contract. In paragraph [43] of the reasons for judgment, the learned trial judge[3] adopted and accepted Mr Bloxsom's opinion evidence given in paragraph 4.1 of his report (exhibit 24), as to what the contract required the appellant to do. That opinion was that "to have constructed the roads as specified, it would have been necessary to prepare the sub-grade surface to similar dimensions and cross-sectional shape as the pavement surface. However, this was clearly not done and we have not encountered an example of conforming shapes throughout this commission."

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1 At AR 325
2 At AR 42
3 At AR 515

[34] The deficiencies Mr Bloxsom observed in what had been built by the appellants, and which had resulted from not doing as that paragraph in his report had opined to be necessary, appear in the accompanying profiles to his report.[4] They demonstrate that the road the appellants constructed fell a long way short of the specifications.

[35] There was no challenge in the cross-examination to the opinion expressed in that paragraph 4.1, and no challenge made on the appeal to the finding by the learned trial judge which accepted that opinion. The works which Mr Bloxsom proposed in his augmentation/reconstruction method of repair[5] accord with the works that Mr Bloxsom had described, in that paragraph 4.1, as required by the contract. In those circumstances there is really no sensible challenge which the appellants can now mount to the learned trial judge's findings, other than to the actual length of road to be constructed as specified.

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4 At AR 380-391

5 Described at AR 366