SUPREME COURT OF QUEENSLAND

CITATION:	*Allaro Homes Cairns Pty Ltd v O'Reilly & Anor* [2012] QCA 286
PARTIES:	**ALLARO HOMES CAIRNS PTY LTD (FORMERLY TRADING AS BETTER HOMES QUEENSLAND PTY LTD)** ACN 070 056 996 (applicant) **v** **SCOTT O'REILLY** (first respondent) **MEILYN O'REILLY** (second respondent)
FILE NO/S:	Appeal No 2581 of 2012 QCAT No 224 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Queensland Civil and Administrative Tribunal Act*
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal at Cairns
DELIVERED ON:	23 October 2012
DELIVERED AT:	Brisbane
HEARING DATE:	14 August 2012
JUDGES:	Holmes and Muir JJA and North J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application for leave to appeal be refused.** **2. The applicant pay the respondents' costs of and incidental to the application to be assessed on the standard basis.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – THE CONTRACT – CONSTRUCTION OF PARTICULAR CONTRACTS AND IMPLIED CONDITIONS – VARIATIONS – where there was a written document for a contract variation – where the applicant sought to recover the costs of the variation in the Queensland Civil and Administrative Tribunal – where the Tribunal found against this claim – where the applicant appealed to the Appeal Tribunal – where the appeal was dismissed – where the applicant applies for leave to appeal in this Court

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – ADJUDICATION OF PAYMENT CLAIMS – where the entitlement to recover costs for the variation works is governed by section 84 of the *Domestic Building Contracts Act* 2000 (Qld) – whether the event of requiring work to be conducted urgently falls under an exceptional circumstance – whether unreasonable hardship was suffered by the applicant – whether there was error on part of the Appeal Tribunal

Domestic Building Contracts Act 2000 (Qld), s 3, s 79, s 80, s 80(2), s 80(2)(e), s 82, s 83, s 84, s 84(2), s 84(2)(b), s 84(4), s 84(4)(a)(i), s 84(4)(a)(ii), s 84(4)(b)
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 150, s 150(3)(a)

Better Homes Queensland Pty Limited v O'Reilly & Anor [2012] QCATA 37, related
Haoucher v Minister for Immigration and Ethnic Affairs (1990) 169 CLR 648; [1990] HCA 22, cited
Yu Feng Pty Ltd v Maroochy Shire Council [2000] 1 Qd R 306; [1996] QCA 226, cited

COUNSEL: M A Johnson for the applicant
D P Morzone for the first and second respondents

SOLICITORS: Miller Bou-Samra Lawyers for the applicant
Turner Freeman Lawyers for the first and second respondents

[1] **HOLMES JA**: I have read and agree with the reasons for judgment of North J and with the orders he proposes. I will add some brief comments on three matters which the applicant raised in argument. Firstly, he contended that the appeal tribunal wrongly had regard (in its reasons as set out in paragraph [18] of North J's judgment) to his failure to cost the variation. But it was he who asserted as an exceptional circumstance that the cost was able to be ascertained, or at least capped; the tribunal was accordingly entitled to, and properly did, deal with the contention.

[2] Secondly, it was argued that the applicant would have been entitled to recover on a quantum meruit basis, and that the appeal tribunal should have taken that fact into account. But the tribunal recorded what would have been relevant on a quantum meruit claim, namely the (uncontentious) evidence that the work was done, was done at the respondents' request, and was done to their satisfaction.[1] Indeed, those facts formed a large part of the circumstances relied on by the applicant as exceptional and were considered by the tribunal in arriving at its contrary conclusion.[2] The further circumstance that they might otherwise have founded a successful quantum meruit claim was irrelevant to the interpretation or application of the statutory tests of exceptional circumstances and unreasonable hardship.

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1 *Better Homes Queensland Pty Limited v O'Reilly & Anor* [2012] QCATA 37 at [52]-[54].
2 [53]-[54].

[3] Thirdly, it was suggested that the appeal tribunal had wrongly taken the view that the magnitude of the unpaid variation in a particular case could never support a finding of unreasonable hardship. To the contrary: the Deputy President, having observed that the mere fact of inability to recover the cost of variation could not, without more, constitute unreasonable hardship, went on to say, correctly, in my respectful view:

> "The test of unreasonable hardship requires an assessment of the impact of that sanction on the builder in the circumstances in which the non-compliance occurred. That is both a subjective and an objective enquiry: subjective, in that evidence must be led to demonstrate hardship to the builder; and objective, in that the nature and extent of the hardship must be unreasonable in the circumstances in which it occurs.
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> The magnitude of the sum that cannot be recovered is a relevant consideration in both respects. Subjectively, the inability to recover an amount may or may not cause hardship to the builder, depending on its financial circumstances. A small sum for a sole operator whose margins are slim might have a greater financial impact on that builder than a much larger sum would have on an enterprise with a large turnover and good profit margin."[3]

[4] **MUIR JA**: I agree with the reasons of North J and with the orders he proposes.

[5] **NORTH J:** The appellant, formerly Better Homes Queensland Pty Ltd, is a building contractor who was engaged by the respondents in 2005 to construct a dwelling at Harbour Drive in Cairns.

[6] The parties executed a written contract, it is not contentious that the contract was for domestic building works and was subject to the *Domestic Building Contracts Act* 2000 *("the Act").* The contract price was $415,607.28 (excluding GST) and the original specifications for works included a requirement for the appellant to construct a 20 square metre deck between the pool and the canal frontage of the block. Shortly before hand over of the dwelling to the owner, the owner requested a variation to the contract with respect to the deck as varied the deck was to run the full width of the block thereby increasing its size to approximately 74 square metres.

[7] A typed document bearing the date 21 May 2007 styled "Contract Variations for Job: O'Reilly"[4] was prepared. The typed document (signed by or on behalf of the parties) made provision for a credit for the PC amount originally provided for under the written contract. Handwritten upon the document the following words were included:

> "RE BACK DECK – COMPLETION IS OUTSTANDING AT COST"

[8] It is accepted that this document did not meet the requirements of the *Act* as a properly documented variation required by section 80(2) and in particular, in the circumstances of the contract being a fixed price contract, section 80(2)(e) because

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3 [29]-[30].

4 AR 106.

the document did not state the change of the contract price because of the variation nor state how the change of the contract price might be worked out.[5]

[9] In the proceedings below and before this Court, mention was made of other respects in which it might be contended that the variation document failed to comply with section 80(2),[6] but it is unnecessary to elaborate upon those matters for the reasons that will appear hereafter.

[10] In the Queensland Civil and Administrative Tribunal the applicant sought to recover $47,147.97 as costs said to have been incurred by the applicant who caused the variation works to be performed by a subcontractor.[7] At first instance, the member found against the applicant's claim holding that the applicant had failed to bring itself within section 84(4) of the *Act* with the consequence that the applicant was not entitled to recovery.[8]

[11] The applicant appealed from the Tribunal to the Appeal Tribunal[9] which dismissed the appeal. It is from the dismissal of that appeal that the applicant now applies for leave to appeal. Leave to appeal is necessary by reason of section 150 of the *Queensland Civil and Administrative Tribunal Act* 2009 and if granted an appeal can only be made on a question of law.[10]

[12] The applicant's entitlement to recover the cost of the variation works is governed by section 84 of the *Act*. Where the variation was originally sought by the building owner,[11] the building contractor can recover for the variation only if the building contractor has complied with sections 79, 80, 82 and 83[12] or only with the tribunal's approval given on an application made to the tribunal by the building contractor.[13] In the circumstances of such application section 84(4) is engaged and provides:

> "(4) The tribunal may approve the recovery of an amount by a building contractor for a variation only if the tribunal is satisfied that –
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> (a) either of the following applies –
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> (i) there are exceptional circumstances to warrant the conferring of an entitlement on the building contractor for recovery of an amount for the variation;
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> (ii) the building contractor would suffer unreasonable hardship by the operation of subsection (2)(a) or (3)(a); and
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> (b) it would not be unfair to the building owner for the building contractor to recover an amount."

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5 In argument before us counsel for the appellant was disposed to submit that the words "at cost" were apt to indicate how the change in the price was to be worked out but ultimately he did not press this unattractive submission.

6 For example it did not describe the variation as required by s 80(2)(b).

7 In the Outline of Argument prepared by counsel on behalf of the applicant before us the amount contended for ultimately was $44,866.33.

8 It might be observed in passing that the member also made findings upon the evidence, preferring certain witnesses to those called on behalf of the applicant and ultimately assessed the cost at some $20,540.

9 Comprising her Honour Judge Kingham, Deputy President and Mr Apel, member.

10 See s 150(3)(a) *Queensland Civil and Administrative Tribunal Act* 2009 (Qld).

11 Section 84(2).

12 I have already noted that it was common ground that the applicant failed to comply with section 80.

13 See s 84(2)(b).

[13] The Appeal Tribunal held that the applicant had demonstrated neither exceptional circumstances within s 84(4)(a)(i) nor unreasonable hardship within s 84(4)(a)(ii) of the Act with the consequence that the appeal was dismissed. Separate consideration was not given to whether or not it would be "unfair to the building owner" for the building contractor to recover the amount within s 84(4)(b) (that issue arose only if one of the matters arising under s 84(4)(a) was satisfied).

[14] In her reasons for dismissing the appeal, the Deputy President correctly pointed out that care should be taken not to conflate the two distinct concepts of exceptional circumstance and unreasonable hardship.

[15] The phrase "exceptional circumstances" is not defined. It is found in an act whose purpose or object is to achieve a reasonable balance between the interests of building contractors and building owners and to maintain appropriate standards of conduct in the industry.[14] It may be vague[15] but the matters that might be considered relevant to such an inquiry will be indicated by the particular way in which the Act was not complied with and the circumstances particular to the dispute. In this Act, it directs attention to those circumstances which are exceptional and warrant conferring upon the building contractor an entitlement to recovery for the variation which its conduct, by failing to meet the obligations imposed by the statute, deprived it. It would therefore suggest, in the context of this dispute, attention might be directed to the circumstances that applied that prevented compliance or explained non-compliance with s 80(2)(e), which required the building contractor to state the change of the contract price because of the variation or how the change in price might be worked out. Circumstances such as an unanticipated event requiring work to be done urgently might, for example, afford an explanation and constitute an "exceptional circumstance". But this comment should not be regarded as exhaustive, the term is broad and it is not desirable to attempt an exhaustive statement of what might be in any given dispute an exceptional circumstance.

[16] The reasons of the Appeal Tribunal show that a number of circumstances were urged upon it by the applicant's counsel which included:

1. The work was done at the owner's request;
2. There was a considerable departure from the original plan;
3. The work was done;
4. The work was done to the owner's satisfaction;
5. The builder was not profiting from the deck's construction;[16]
6. The variation was documented, albeit only poorly;
7. The construction of the deck proceeded as a consensual arrangement;
8. The cost of which the owner was exposed was not open-ended – it was able to be ascertained; and
9. Issues relating to the loss of control of the site.

[17] It should not be overlooked that the Tribunal at first instance held that it would have been possible for the builder to cost the work and the Tribunal accepted the respondents' evidence that there had been a number of requests for this to be done.

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14 See s 3 of the Act.

15 *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 684.

16 In large measure passing on the cost of a subcontractor.

[18] In the Appeal Tribunal the member who sat with the Deputy President gave reasons for his concurrence in the orders made. Concerning the nine issues contended for he said:

> "Looking at these issues in turn, I make the following observations:-
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> (a) Items 1, 3 & 4 do not of themselves constitute any exceptional circumstance and are what any Owner ought to expect from a job. Counsel for the Appellant conceded that these items were put forward as what might be considered to be a 'double negative' i.e. to counter any allegation that may be raised by the Owner that either the works were unknown to, or a surprise to the Owner, that they were either not performed or were unsatisfactorily performed. None of those arguments are raised by the Owner, so these issues do not assist in the consideration of exceptional circumstances.
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> (b) Item 2 - Whilst it is clear that the revised deck specification was a significant departure from the original deck plan, in the context of the total building contract (of which the deck formed part) the total variation to the deck at its highest cost would amount to less than 10% of the contract value. I do not therefore accept that the change in the scope of the deck works is such as to constitute such a significant departure from the original plan as to be able to be considered an exceptional circumstance.
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> (c) Item 5 - Whilst it is reasonable to expect that a Builder, as a business operator, would factor in a profit on work that they perform, does the absence of a request for profit contribution on part of a job constitute an exceptional circumstance? In this case the Builder did not attempt to cost the job, and for his own commercial reasons elected to do the job 'at cost' (though there was some debate as to what that term was intended to mean).
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> The Builder is in the position of control in this situation as to whether he seeks to profit on his work or not. That he has chosen not to in this case does not logically equate to an exceptional circumstance for the purposes of Section 84 (4)(a)(i) of the Act. This is an exercise of commercial judgement on the part of the Building Contractor, and I do not see it as an exceptional circumstance.
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> (d) Items 6 & 7 - The attempt at documenting the variation is not sufficient to meet the requirements of the Act, and therefore insufficient at Law.
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> The Act imposes requirements on the documentation of variations, for good reason and to avoid disputes precisely of this nature. That the parties proceeded on the basis of a defective document, all be it consensually, is not evidence of an exceptional circumstance, only of non compliance.

(e) Item 8 - I have difficulty accepting this assertion, in circumstances where the Builder himself, with access to the costing information, had to make several attempts at calculation of his final claim.

If the Builder with that information at his finger tips experienced that difficulty, what hope would the Owner have had of knowing what the extent of his liability may be for the job? It is clear on the evidence that the Builder had no intention of doing the work himself, and that at all times it was his intention to engage a Subcontractor to do the job. He did so, but did not request of that Subcontractor a quote for the job. The Builder therefore made no attempt to cost the job himself (noting his earlier comments as to why that may have been a difficult task, but none the less it was not attempted) and the Builder did not attempt to obtain a cost estimate or quote from the Subcontractor who had the responsibility of performing the job.

The Owner has their contractual relationship with the Builder, not the Subcontractor. The Home Owner was not in a position of being able to request a costing from the Subcontractor, and neither should the Home Owner have been put in the position of having to pursue that. It is clear that the Builder's intention was that whatever the Subcontractor delivered as their final bill for the deck was passed on to the Owner. Without any prior quotation or estimate of what those costs might be, that cost could only be considered open ended. I do not see that this assertion is borne out on the evidence and it therefore cannot be taken to be an issue which may constitute an exceptional circumstance.

(f) Item 9 - There is no evidence to suggest the Builder's ability to cost, or construct the deck were complicated by access issues. There had been handover of the site to the Owners but there is no evidence of any actual restriction of access. I do not see from the evidence that this an exceptional circumstance to warrant the conferring of an entitlement upon the Builder for recovery of an amount for the variation."[17]

[19] "The question whether facts fully found fall within the provision of a statutory enactment properly construed is not a question of law, where the words to be construed are used according to their common understanding; but whether the material reasonably admits of different conclusions as to whether the facts fall within the ordinary meaning is a question of law."[18] It is difficult to see how issues such as 1, 3, 4, 6 and 7 might be "exceptional". It might be expected they would often arise in the context of a dispute involving a poorly documented agreement for variation such as this. The observation upon the other issues involved a consideration and evaluation of the evidence. Whether any of the conclusions are

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17 AB at [54].

18 *Yu Feng Pty Ltd v Maroochy Shire Council* [2000] 1 Qd R 306 at 343 per Pincus JA.

one of fact or law might be debated but even if it be a question of law, I can detect no error on the part of the Appeal Tribunal in either its reasoning or its conclusion.

[20] Turning to the question of "unreasonable hardship". The evidence before the Appeal Tribunal was scant but included the contract price, the cost of and findings with respect to the cost of the variation and the circumstance that the work had been performed but not paid for. In addition, there was evidence from the director of the applicant of the turnover of the applicant's business. Plainly, it was a substantial building company with a turnover varying over three years between $11,000,000 and $17,000,000. There was no evidence going to the consequences for the applicant of non-payment.

[21] The circumstance that a builder might be unpaid for work done does not necessarily lead to an inference that hardship is suffered. Something more than non-payment should be demonstrated to establish "unreasonable hardship" suffered from the operation of the Act. Both the Tribunal and the Appeal Tribunal concluded that the applicant had demonstrated neither hardship nor that it was unreasonable. That conclusion is dictated by the evidence in this case and I can see no error of fact or law in that conclusion.

[22] In the circumstances, the application for leave to appeal should be refused. At the outset of the hearing of the application the applicant made an unopposed application to amend the name of the applicant.[19]

[23] The orders I propose are:

1. The application for leave to appeal be refused.
2. The applicant pay the respondents' costs of and incidental to the application to be assessed on the standard basis.

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[19] The applicant company has changed its name to Allaro Homes Cairns Pty Ltd.