24/05; [2005] VSC 240

SUPREME COURT OF VICTORIA

HUGHES v MOLLOY & ANOR

Byrne J

28, 29 June 2005

CIVIL PROCEEDINGS – RESTITUTION – IMPROVEMENTS TO HOUSE – EVIDENCE GIVEN AS TO COSTS OF IMPROVEMENTS AND THE INCREASE IN VALUE OF THE PROPERTY – MAGISTRATE ADOPTED THE INCREASE IN VALUE OF THE PROPERTY AS THE MEASURE OF COMPENSATION – WHETHER MAGISTRATE IN ERROR.

H. owned a house which was rented by M. Over a period of time, M. and other tradespeople carried out work on the house which enhanced its value. After M. moved out of the house, M. claimed they were entitled to be paid on the basis of the market value of the labour and materials provided. The magistrate declined to adopt this course and valued the benefit to H as being the amount by which the unpaid work increased the value of the property as at the date M. moved out. Upon appeal—

HELD: Appeal dismissed.
In considering the question of the measure of compensation, the starting point is the passage from the judgment of Deane J in *Pavey & Matthews v Paul* [1987] HCA 5; (1987) 162 CLR 221; (1987) 69 ALR 577; 61 ALJR 151. What the concept of monetary restitution involves is the payment of an amount which constitutes, in all the relevant circumstances, fair and just compensation for the benefit or 'enrichment' actually or constructively accepted. In the present case, the remuneration of M. at the reasonable rate would have exceeded the increase in value by some 235%. In the circumstances, the magistrate was not in error in preferring the enhanced value of the property as the appropriate measure.

BYRNE J:

1. Before the court is an appeal and a cross-appeal against an order of the Magistrates' Court of Melbourne made on 14 September 2004 The proceeding before the Magistrates' Court was commenced as long ago as 24 December 2001 by Robert Molloy and Michelle D'Arcy, whom I shall refer to as "the Molloys", against David Hughes seeking a little less than $40,000, being the reasonable cost of refurbishment work carried out at a home owned by Mr Hughes at 11 Eclipse Court, Watsonia. The claim is put in contract and in restitution. Other causes of action asserted are not now relevant. Mr Hughes filed a defence and, on 14 August 2003, a counterclaim. By its order the Magistrates' Court awarded the Molloys $14,000 on the claim and Mr Hughes, $2,940 on his counterclaim. The appeals do not concern the counterclaim.

2. Mr Hughes purchased the house as an investment in 1990. It was then a basic three bedroom house. In 1991 he agreed to let the house to the Molloys at a weekly rental of $130. No formal agreement was entered into, perhaps because Mr Hughes and Mr Molloy were workmates at the Victoria Market.

3. It seems that Mr Molloy was a qualified carpenter and it was agreed in or about 1993 that he would build certain extensions to the house to accommodate the Molloy family. This agreement was also of an informal character and was made in the expectation of all parties that the Molloys might, in the future, purchase the property. The magistrate, however, found no agreement for the purchase was ever made.

4. Meantime, the Molloys over the years carried out extensions to this house. These too were carried out in an informal manner. The magistrate found that Mr Molloy carried out the carpentry work himself and he had other work carried out by tradespeople who were paid, not in currency but on a barter system. Similarly, the kitchen was provided by a firm which owed wages to Mr Molloy by way of set-off.

5. The magistrate found too that Mr Hughes was aware improvements were being made to his house and that he paid $17,000 for some of them. His Honour found too that the improvements

did, and were known to Mr Hughes to enhance the value of his property. He, Mr Hughes, was content to accept this.

6. In the circumstances the magistrate accepted the contention of the Molloys that they were entitled to an award of restitution under the principles set out in *Pavey & Matthews v Paul*[1].

7. His Honour rejected their contention that they were entitled to be paid on the basis of the market value of the labour and materials provided. He valued the benefit to Mr Hughes as being the amount by which their unpaid work increased the value of the property as at the date they moved out in September 2001.

8. The appeals in essence raise two points of law:

> (1) did the magistrate err in adopting the increase in value of the property as the measure of compensation?
>
> (2) if this be the correct measure, did the magistrate include in the award the sum of $6,000 for the bathroom and toilet, contrary to the evidence?

The measure of compensation

9. The starting point for a consideration of this issue must be the oft quoted passage from the judgment of Justice Deane in *Pavey's* case:

> "What the concept of monetary restitution involves is the payment of an amount which constitutes, in all the relevant circumstances, fair and just compensation for the benefit or 'enrichment' actually or constructively accepted. Ordinarily, that will correspond to the fair value of the benefit provided (e.g. remuneration calculated at a reasonable rate for work actually done or the fair market value of materials supplied). In some categories of case, however, it would be to affront rather than satisfy the requirements of good conscience and justice which inspire the concept or principle of restitution or unjust enrichment to determine what constitutes fair and just compensation for a benefit accepted by reference only to what would represent a fair remuneration for the work involved or a fair market value of materials supplied. One such category of case is that in which unsolicited but subsequently accepted work is done in improving property in circumstances where remuneration for the unsolicited work calculated at what was a reasonable rate would far exceed the enhanced value of the property."[2]

10. In the present case the evidence of Kelvin John Hegarty, the building consultant called on behalf of the Molloys, was to the effect that the work carried out by the Molloys would, if carried out by a professional builder at current rates, cost $59,900. Mr Hegarty's opinion was based on an inspection carried out on 28 September 2001 and supported by photographs taken by him on that occasion. Allowing for the permitted payment of $17,000, the unpaid balance was $32,900.

11. On the other hand, the evidence of a sworn valuer, Kenneth John Moroney, was to the effect that the property, which had been sold for $198,500 in July 2001, had been increased in value by the work, other than that for which payment had been made, to the extent of $8,000. The contention of the Molloys, which the magistrate accepted, was that this increase should be adjusted to $14,000. I mention in passing that Mr Moroney's assessment was carried out following an inspection by him on 7 September 2002.

12. In terms of the comparison mentioned by Deane J in the quoted passage from *Pavey's* case, the remuneration of the Molloys at the reasonable rate would exceed the increase in value by some 235 per cent.

13. The modern law of restitution in Australia dates from *Pavey's* case in 1987. The 1978 New Zealand case of *Van den Berg v Giles*[3] is therefore of limited value. In that case Jeffries J appears to accept, without analysis, that enhancement of the value is the appropriate measure in a restitution case. Nevertheless, the facts before His Honour had very much resemblance to the present and His Honour's conclusion was adopted by the magistrate.

14. The Queensland case of *Sunstar Fruit Pty Ltd v Cosmo*[4] was decided in 1991, four years after *Pavey's* case. Surprisingly, however, *Pavey's* case does not appear among the authorities cited in the judgment. Although Derrington J denied the plaintiff relief in restitution, he went on to value the compensation which might have been payable. His Honour concluded that absent

"some features of conscience which causes it to be appropriate that the amount of money expended should be restored to the party expending it, the concept of unjust enrichment should be limited to the value of the enrichment, that is, the benefit derived by the party taking it."[5]

15. An example of such a feature might be the encouragement by the property owner to the other party to spend money on the improvement.

16. The third case I was referred to is the South Australian case of *Angelopoulos v Sabatino*[6]. This was the case where the owners of a hotel requested one Constantino to organise and oversee work necessary to restore the hotel. The plaintiffs carried out the work and installed expensive plant upon the encouragement of the owners and the recommendation of Constantino.

17. The court found an entitlement to restitution and measured the compensation in accordance with the *dictum* of Deane J in *Pavey's* case, which I have quoted, on the basis of the value of the work done This is a very different case from the present where the involvement of Mr Hughes was more passive.

18. The fourth case to which I have been referred is *Fensom v Cootamundra Race Course Reserve Trust*[7], a decision of Bryson J in 2000. His Honour concluded that the conduct of the defendants contributed to the work being done on the racecourse and this encouragement led to the valuation based on its reasonable cost. Nevertheless, in the course of His Honour's judgment he said this:

> "In relation to improvements the concepts of acceptance of improvements by the owner of land is made difficult because it is the nature of improvements to become part of the property itself, and taking back possession of the property with the improvements is not always acceptance of the benefit of the improvements. The supposed acceptance, the whole circumstances of the parties' dealings and the plaintiffs' conduct in making the improvements must be evaluated and a conclusion must be reached overall as to whether the circumstances give rise to an obligation to make fair and just restitution. As with other areas of the law which require decisions to be based on evaluation and the application of standards, a clear and complete exposition of all supporting reasoning is hardly possible. The principles upon which the remedy is awarded do not allow precision of statement. In my view, the concept of acceptance of benefit as used in the context of unjust enrichment was fulfilled for the improvements and their value, and not for the plaintiffs' actual expenditure or labour."[8]

19. I have read with interest the analysis by the magistrate of the cases to which he was referred and his reasons for preferring the enhanced value as the appropriate measure. I find no error in them. Indeed, I agree entirely with his conclusion.

20. I do so for a number of reasons which I will briefly list:

> (1) the disparity between the two valuation figures;
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> (2) the fact that the work was not carried out at the urging and encouragement of Mr Hughes; his attitude was rather one of acquiescence;
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> (3) the fact that the works were carried out by tenants with a view to their own continuing occupancy of the house and perhaps its eventual purchase;
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> (4) the do-it-yourself way in which the work was carried out. It seems that the Molloys had the discretion as to the work they carried out, when it was carried out and as to its quality, and Mr Molloy put his own skill and time into it;
>
> (5) the non-commercial basis of the acquisition of materials and trade labour. This suggests that a commercial basis for compensation is inappropriate. This has had the further consequence that the cost to the Molloys of providing the labour and materials cannot be accurately quantified, as the magistrate observed.

21. I conclude therefore that the cross-appeal of the Molloys must fail.

The allowance for the bathroom and toilet

22. In order to understand this point I set out the following chronology:

In July 2001 the property was sold to a third party, the purchasers.

September 2001, the Molloys moved out and the Hegarty inspection and photographs took place.

In 2002 the purchasers moved in and carried out renovations, including stripping the bathroom and toilet as part of their own refurbishment project.

September 2002, the Moroney inspection.

23. The evidence before the magistrate established that the existing bathroom and toilet had, when the Molloys moved out, been the subject of incomplete renovations. The toilet was in place and functioning. In the bathroom the vanity basin was installed and was functioning. There was no bath. The shower was roughed-in awaiting the lining to the shower recess. The photographs show the shower base in place and the state of plumbing suggests that it was operable but that absent wall lining and shower screen, this would be hardly practicable The presence of paint pots and rollers suggests incomplete painting. The shower screen which had been purchased and was stored awaiting installation was included in the July 2001 sale.

24. The evidence of Mr Moroney was that the value of the property was enhanced by the work of the Molloys by $8,000. The magistrate understood this to be calculated on the basis of the property as it was upon his inspection in September 2002. This was after the bathroom and laundry had been stripped and a partition wall removed by the purchasers. His Honour then accepted the witness as saying that if the bathroom and toilet were in the condition as they appear in Mr Hegarty's photographs, there should be added to the value of the property a further $5,000 for the bathroom and a further $1,000 for the toilet.

25. It was submitted on behalf of Mr Hughes that this conclusion was based on a misapprehension of Mr Moroney's evidence. It was put that, properly understood, Mr Moroney said his figure of $8,000 was based on the condition of the house, not as it was in September 2002, but on the basis that a functioning bathroom and toilet were still there.

26. I remind myself that in an appeal such as this the question is not whether the magistrate made an erroneous finding of fact. The court will interfere only where the finding of fact cannot be supported by any view of the evidence. I was taken to various parts of the transcript where Mr Moroney's answers appear obscure and even contradictory. His evidence, however, was not contradicted by any witness. In the end it is clear that his assessment of the enhanced value of $8,000 was on the basis of the building being as he saw it in September 2002.

27. Such adjustments as have to be made with respect to the bathroom and toilet must be by way of increase in his assessment on the basis that these parts of the house were, in September 2001, in a better condition than they were 12 months later. Accordingly, the first submission put on behalf of Mr Hughes must fail.

28. Next it was said on his behalf that the magistrate's finding that this increase must be $5,000 for the bathroom and $1,000 for the toilet were not supported by the evidence.

29. I can dispose of this submission insofar as it concerns the toilet very shortly. Mr Hegarty's photograph number 35 shows the toilet with the pan in place. I was told that the evidence shows that in September 2001 this was the position and that the toilet was functional. Twelve months later when Mr Moroney inspected the property the room had been stripped and the fitting removed. His adjustment was of $1,000. The finding of the magistrate must stand.

30. The position with respect to the bathroom is not so clear. I have been referred to the evidence of its state in September 2001 and in September 2002. The magistrate at page 22 of his reasons recorded Mr Moroney as saying that the sale price of $198,500 would have been more than $200,000 had the bathroom been functional. He said that the exact figure would depend upon the type of fittings but that it would be $5,000 for a basic bathroom, up to $10,000 for more up-market fittings.

31. The magistrate then said in his judgment that Mr Moroney:

> "agreed if the bathroom was in the condition depicted in the Hegarty photographs, $5,000 would be added to the enhanced value of the property."

Counsel for the Molloys frankly accepted that the transcript does not contain such a statement by the witness.

32. It was put that this quoted sentence was not what Mr Moroney in effect said. It was said that the evidence as a whole demonstrated beyond argument that the bathroom in September 2001, shown in the Hegarty photographs, was not a functioning bathroom. The shower was not operable. Accordingly, the extra $5,000 should not be added. The case should then return to the magistrate for him to determine what, if any, part of the $5,000 should be added to the basic $8,000 plus $1,000.

33. The evidence, as a whole, showed that little work was required to complete the bathroom. This was one only of a number of items that required to be done in order to complete the house. Mr Hegarty's estimate was that all of this might be done in two days at a cost of only $750. But the magistrate in this case was not concerned with the cost of carrying out the work; he was finding the enhanced value to a purchaser.

34. Mr Moroney said that the incomplete and non-functional bathroom would not appeal to such a purchaser. On the other hand, the selling agent Vanch Carroll had no difficulty in offering the property for sale in mid 2001 as a home with two bathrooms.

35. I return then to the evidence of Mr Moroney. It is clear that in part of it he said that the extra value of $5,000 related to the bathroom as shown in the photographs. While it must be accepted that he elsewhere departed from this position, the magistrate was entitled to do the best he could in the light of the whole of the evidence without necessarily descending to the last dollar. Doubtless His Honour was comforted by the opinion of Mr Moroney that the range of extra value for the bathroom, depending upon fittings, might be very much more than $5,000.

36. In short, I am not prepared to hold that His Honour's conclusion on this matter is not supported by the evidence. This ground of appeal must therefore fail.

37. I mention finally for completeness that the Molloys raised a further question in their cross-appeal. It is expressed in the notice as follows:

> "Did the learned magistrate err in law when he accepted the evidence of the defendant's valuer based upon an inspection of the works which included substantial subsequent works done by a stranger at the premises which that witness acknowledged that he had mistaken for the plaintiff's work?"

38. The defendant's valuer referred to is Mr Moroney. The question was not the subject of a ground of appeal, it was not developed in argument before me. I do not see it as my role to trawl through the incomplete transcript to determine whether this question has any substance. Accordingly, the appeal and the cross-appeal will be dismissed.

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[1] [1987] HCA 5; (1987) 162 CLR 221; (1987) 69 ALR 577; 61 ALJR 151.
[2] [1987] HCA 5; (1987) 162 CLR 221 at 263; (1987) 69 ALR 577; 61 ALJR 151.
[3] [1979] 2 NZLR 111.
[4] [1995] 2 Qd R 214.
[5] [1995] 2 Qd R 214 at 228.
[6] [1995] SASC 5230.
[7] [2000] NSWSC 1072.
[8] [2000] NSWSC 1072 at [97].

APPEARANCES: For the appellant Hughes: Mr CD Johnson, counsel. C Kyriacou & Associates, solicitors. For the respondents: Mr P Duggan, counsel. Wilson & Co, solicitors.
