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## SUPREME COURT OF VICTORIA

**WELLER v KLAD ALUMINIUM CO PTY LTD**

McInerney J

21 July 1980

**CONTRACT LAW – BUILDING CONTRACTS – PARTIES AGREED FOR EXTERIOR OF HOUSE TO BE COVERED IN ALUMINIUM KLADDING – \$1000 NOT PAID BY BUILDER INTO A SPECIAL PURPOSE BANK ACCOUNT AS REQUIRED BY THE ACT – CHARGE FOUND PROVED – WHETHER MAGISTRATE IN ERROR: *BUILDING CONTRACTS (DEPOSITS) ACT 1962, S3(3)*.**

P. agreed to have the exterior of her house covered with aluminium kladding. If by that contract it was agreed to "alter or add to" the house then s3(3) of the *Building Contracts (Deposits) Act 1962* ('Act') required the builder to pay the sum of \$1000 into a special purpose bank account. The builder failed to pay such amount into a bank account and was charged with a breach of s3(3) of the Act. The Magistrate found the charge proved. Upon appeal—

**HELD: Order nisi discharged.**

**The short point was whether the contract was a contract "to construct, alter or add to a dwelling house" within the meaning of s3(1) of the Act. The words "alter and add to" are words which take their meanings from the context in which they occur. Having regard to the fact that the house was, on the evidence, a brick house with a cement rendering, the mode of "kladding" must have required some affixation by means of bolts or some other structure to the brickwork of the house. The affixation of aluminium "kladding" in that manner to a house falls within the Act. The contract in this case was a contract to alter the house in a structural way, and it was a contract to add to the dwelling house. What was involved here was something which involved some structural work, and that kind of structural work involved an addition or an alteration to a house. Whilst this particular kind of construction may have fallen within both the words "alter" and "add to" it was sufficient to say that on the evidence it was open to the Magistrate to come to the conclusion to which he did.**

**McINERNEY J:** This is an order to review a decision of the Magistrates' Court at Hawthorn on 7 September 1979 when the defendant, Klad Aluminium Company Pty Ltd was convicted under the provisions of s3(3) of the *Building Contracts (Deposits) Act 1962*, "in that having contracted (with a Mrs Pashallis) to alter or add to a dwelling house at 10 Warland Road, Moorabbin, it did, at Hawthorn, on the 13th day of September 1973 fail to pay into a special purpose account in a bank in Victoria in the joint names of the owner and itself a sum of money, to wit \$1,000, which had been paid to it on the 6th day of December 1978 by the owner in pursuance of the contract before the alterations or additions commenced."

There is no contest as to the facts in this case. The contract was entered into on 5 December 1978 and the relevant provisions of that contract are that the defendant, the applicant before me, accepted a request by Mrs Pashallis to carry out certain work, namely, "To klad all exterior walls of main buildings with Permalum aluminium weatherboards colour bone-white, C.O. 5/5."

The contract price was \$5,592. A deposit of \$1,000 was paid but was not in fact paid by the defendant company into a special purpose account in a bank in Victoria, to be nominated by the defendant, in the joint names of the owner and builder within the time required under the Act. The short point is whether the contract was a contract "to construct, alter or add to a dwelling house" within the meaning of s3(1) of the Act.

It has been pointed out that s3(8) contains a provision that "every contract to which this section applies shall be deemed to contain a term that the moneys held in the special purpose account shall be applied in or towards satisfaction of the amount or amounts which first become payable to the builder under the terms of the contract." The evidence as to the work to be done is of the scantiest nature. All that can be collected from the affidavit of Mr Goldberg, which sets out the evidence given before the Magistrate, is that Mr Kitts, the managing director of the defendant company, told Mrs Pashallis on 5 December that "she should not bother having the

windows replaced with aluminium windows but that she should have the exterior walls covered with aluminium kladding", and that at that time the house was in fair condition, that it had been recently renovated and painted outside, but that there were some cracks in the external wall.

It was submitted by Dr Buchanan that there was no "alteration" or "addition" within the meaning of that section, unless in some way the size of the building would have been added to. Something additional should have been placed on the dwelling-house and some additional structure made.

The words "alter and add to" are words which, in my view, take their meanings from the context in which they occur. There are some cases in which the words "additions and alterations" have been held to be referable only to structural additions and alterations. Those cases include the case of *In re Clarke's Settlement* (1902) 2 Ch 327, to which Dr Buchanan referred me, the case arising under the *Settled Land Act* of 1890. Those cases are discussed by Sholl J in a judgment in *Equity Trustees Executors & Agency Company Ltd v Riddell* [1954] VicLawRp 26; (1954) VLR 161; [1954] ALR 350, but they throw, in my judgment, little light on the question I have to determine. I am not assisted by any statement of the reasons of the learned Stipendiary Magistrate, and I must take him as having held, without perhaps having advanced reasons, that the evidence to which I have referred and the terms of the contract made it clear that there was no question here but that the contract was one to alter or add to Mrs Pashallis' house.

Having regard to the fact that the house was, on the evidence, a brick house with a cement rendering, I infer that the mode of "kladding" must have required some affixation by means of bolts or some other structure to the brickwork of the house. The affixation of aluminium "kladding" in that manner to a house does, in my view, fall within the Act. I am disposed to think the contract in this case was a contract to alter the house in a structural way, and I am also disposed to think it was a contract to add to the dwelling house. It may be true that to paint a house is not to add to it, or perhaps even to alter it, but what was involved here in something which, in my view, does involve some structural work, and I take that kind of structural work as involving an addition or an alteration to a house. I am disposed to think that this particular kind of construction falls within both the words "alter" and "add to" but it is not necessary for me, I think, to decide that finally.

It is sufficient to say that on the evidence it was open to the Magistrate to come to the conclusion to which he did come and that, in the circumstances, the order nisi which was granted on the grounds "(a) that the said Magistrate was in error in holding that the contract entered into between Lillian Maisie Pashallis was a contract to alter or add to the dwelling house within the meaning of the section and (b) that on the evidence the Magistrate should have dismissed the information" fails as to each ground. In the result therefore, the order nisi will be discharged.