



District Court
New South Wales

Case Name: The Owners of Strata Plan 84879 v Ex Parte JMA Developments Pty Ltd & Anor

Medium Neutral Citation: [2017] NSWDC 424

Hearing Date(s): 7 – 8 August 2017

Date of Orders: 7 August 2017

Decision Date: 7 August 2017

Jurisdiction: Civil

Before: Neilson DCJ

Decision: I give verdict and judgment for the plaintiff against the second defendant for \$835,400.

I order the second defendant to pay the plaintiff's costs

Catchwords: CONTRACTS – BUILDING AND CONSTRUCTION
CONTRACT – APPLICATION OF STATUTORY PROVISIONS – First defendant (a builder) constructed four townhouses for second defendant (a developer) – Property subsequently came into possession of plaintiff (owners' corporation) which became "successor in title" to developer and the developer became statutorily liable for any breach by the builder

Claim proceeded ex parte.

Legislation Cited: Home Building Act 1989
Strata Scheme (Freehold Development) Act 1973

Category: Principal judgment

Parties: Owners of Strata Plan 84879 (Plaintiff)
JMA Developments Pty Ltd (First Defendant)
Denver Property Group Pty Ltd (Second Defendant)

Representation: Counsel:
Ms M Doleneć (Plaintiff)
Ex Parte (Defendants)

File Number(s): 2015/299508

Publication Restriction: Nil

JUDGMENT

- 1 HIS HONOUR: This matter has proceeded ex parte. The statement of claim was filed on 20 November 2015. The second defendant filed a defence on 3 December 2015. That was filed on its behalf by Mr Patrick Tudehope of Solomon Tudehope Solicitors, Strathfield. Now that firm has filed a notice of ceasing to act. I am satisfied, by an order I made yesterday and exhibit A, that the director of the second defendant was aware of the hearing of this matter today and that the plaintiff was intending to proceed its case ex parte.
- 2 According to the statement of claim on or about 1 February 2011 the second defendant entered into a contract with JMA Developments Pty Ltd (JMA) for JMA to construct a residential development at a property known as 59 Shirley Road, Wollstonecraft. According to the defence that contract was made on 3 February 2011. Nothing turns on that minor inconsistency.
- 3 The work to be carried out at Shirley Road, Wollstonecraft, comprised the construction of four townhouses. According to par 11 of the statement of claim, the contract was a contract to perform "residential building work" as that expression is defined in Sch 1 cl 2 of the *Home Building Act 1989*. That pleading is traversed in the defence which denies that the work called upon by the contract was to do "residential building work" within the meaning of the Act as the work, the subject of the contract, included works which were not "residential building work". Nevertheless, it is common ground that the parties agreed that the warranties in accordance with s 18B of the *Home Building Act 1989* applied to this development.
- 4 By operation of s 18C(2) of the *Home Building Act* the second defendant, to which I shall refer hereafter to as "the defendant", was a "developer" and is deemed to have itself undertaken to do the building works which JMA did on its behalf.

- 5 On 26 June 2013 Strata Plan 84879 became the registered proprietor of the property at 59 Shirley Road, Wollstonecraft. The plaintiff is the owner of that strata plan. By operation of s 18 of the *Strata Scheme (Freehold Development) Act 1973* the owners' corporation of Strata Plan 84879 became the registered proprietor of the land in question. The plaintiff corporation is the "successor in title" to the defendant under the *Home Building Act 1989*. It follows that the defendant is liable to the plaintiff for any breaches by the builder, JMA, of the statutory warranties applicable to the development at 59 Shirley Road, Wollstonecraft.
- 6 I have carefully read the statement of claim and the second defendant's defence. Suffice it to say that the issues tendered by the pleadings are whether from about November 2014 the plaintiff became aware of defects in the property, and what defects there were in the property, and whether the defects found in the property were caused by the builder's breach of one or more of the statutory warranties which are applicable under the contract for the construction of the four townhouses.
- 7 It follows axiomatically that if such defects are identified, and proved, that the defendant is liable under the building contract, as construed by the law, for any breaches of the statutory warranties initially owed by the builder to the developer but now owed by the developer to the owner.
- 8 Despite this matter proceeding ex parte, the material is voluminous. There are three lever arch binders of documents. They contain a large number of reports. Exhibit B is a report prepared by Mr Peter Blair, reviewed by Mr Richard Stapleton, on behalf of Structured Project Management (Australia) Pty Ltd (SPMA). The report bears date 30 June 2015. The introduction to the report commences thus:

"SPMA have been engaged by the owners Strata Plan 84879 to supply a Building Defects Report for the building located at 59 Shirley Road, Wollstonecraft. The following report has been prepared by Mr Peter Blair based upon inspections carried out on 25 November 2014. It is noted that SPMA have carried out scoping investigations prior to this date for the purposes of establishing if there were defective works within the works. Subsequent investigations to this date have been for the purposes of intrusive investigation into more detailed defects.

This report is prepared based solely upon visible defects observed by Mr Peter Blair during these inspections and was prepared in accordance with Australian Standard 4349 Inspection of Buildings. This allows for non-destructive visual inspection using equipment such as moisture metres where access is available or provided. Where access was available to the roof space via manholes within the units, this area was inspected although this was not always possible due to access restrictions in setting up ladders and the like.

All defects listed are considered by Peter Blair to be defects under the *Home Building Act 1989* (NSW) ("HBA") as applicable at the time of the contract for these works. In carrying out this assessment, the author has referred to the following as supporting documentation in assessing whether an item is considered a defect under this Act: ..."

There are then listed 20 provisions including the *Home Building Act 1989*, the *Building Code of Australia 2010*, the development consent granted by the North Sydney Council on 28 April 2009 and various Australian standards and other provisions which regulate the building and construction industry. The report of Mr Blair is some 51 pages in length and the rest of the lever arch binder comprises annexures to that report.

- 9 The next report is exhibit C. It is a report of Mr Stuart Boyce on behalf of BCA Logic Pty Ltd. That company holds itself out as being "Building Regulation and Fire Safety Engineering Consultants". The executive summary of the report is this:

"1.1. Stuart Boyce of BCA Logic Pty Ltd has been engaged to undertake an assessment of the BCA and Fire Safety related defects to the existing development and formulate a scope of rectification works to address each identified defect.

1.2. A schedule of BCA and Fire Safety related defect works was identified by Peter Blair which has been used as the basis of the scope for rectification works within his report. However, additional BCA related defects have also been identified by Stuart Boyce which have been included in the scope of rectification works.

1.3. The review included [an] assessment of the available plans, approvals and a visual inspection of the building. No destructive testing or examination was undertaken, therefore it is likely that there are more areas of non compliance not identified in this report.

1.4. In conclusion, it is considered that there are significant non compliances within the building and that extensive works are required to be carried out in order to achieve a true and correct Annual Fire Safety Statement for the building and to achieve compliance with the relevant performance requirements of the BCA [*Building Code of Australia*]."

- 10 Exhibit D is a series of reports which were prepared by a Mr Robert McDonald of ROH Contracting Services Pty Ltd. That company holds itself as building

consultants carrying out inspections and providing specifications for waterproofing and timber flooring. Mr Robert McDonald is a practising consultant in waterproofing. His consulting is based on 31 years' experience in the construction industry including 24 years' experience as a specialist building contractor in waterproofing in both commercial and domestic environments. The various reports of Mr McDonald concern water penetration and waterproofing defects in the property.

- 11 Exhibit E are reports of Mr Robert Macansh who is a director of and quantity surveyor for Quanto Pty Ltd. That company holds itself out as providing the services of quantity surveyors. The reports of Mr Macansh bear date 13 August 2015 and 3 May 2016 and in essence quantify the plaintiff's claim.
- 12 The documentation provided does not make for an easy analysis of the plaintiff's claim nor does it provide a coherent presentation of the plaintiff's claim. I am guided in providing these reasons by the outline of the plaintiff's claim submitted to me by Ms Dolenec, on behalf of the plaintiff, which has been marked 2 for identification. The plaintiff's case has been divided into three separate parts.
- 13 The first part concerns "water penetration and render defects in the façade of the building". That is divided into three separate areas. The first has been identified by Ms Dolenec as "weep holes and flashings". The relevant defect is summed up in this fashion by Mr Blair in his report. He refers to a photograph of the exterior of unit 2 taken above the living area sliding door and then continues thus:

"...the cavity brick construction is drained by flashings which discharge any cavity water via weepers incorporated into the masonry exterior skin. A number of weepers are blocked with render. This problem is systemic to the façade. The Building Code of Australia requires weepers to be installed at centres to allow water to drain from the cavity. Masonry flashings are required to be installed at the first course of bricks above ground level (known as a damp proof course) as well as below and above window units (sill and head flashings respectively). Flashings shall be of an appropriate material as described by the Building Code of Australia. Centres of weep holes shall be such that water can drain freely from the cavity they cross. Flashings should terminate at the outer surface of the masonry units and the weep holes should be free and clear of debris for the entire height of the masonry unit. It is further noted that flashings should have appropriate end turn ups to prevent water from flowing off the end of the flashing (with respect non continuous flashings such as head and sill flashings) and back into the masonry. Expressed joints

(vee joints) should be formed where flashings are installed to prevent cracking of the render.

Failure to provide drainage to flashings can result in water ingress to the interior skin of the building resulting in damp and unhealthy conditions. Failure to provide weepers at required centres and locations is considered a defect in accordance with the *Building Code of Australia* s FP1.4 and hence the *Home Building Act* s 18B(a), a warranty that the work will be formed in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract.

Flashings are defective if not installed in accordance with AS3700 and AS2904."

That there are defects in the weep holes and flashings is undoubted. According to exhibit E, the cost of rectifying the problem with weepholes and flashings is \$17,907 plus GST; it is item 3 on p 906 of exhibit E. When I refer to sums of money hereafter, it will be the sum of money without making any allowance for GST.

- 14 The next item has been described by Ms Dolenec as "water entry through cracking, render repairs and painting". Commencing on p 23 of his report Mr Blair says this:

"There are multiple defects relating to the external rendering and flashing of the building. The render is exhibiting cracking and delaminating in multiple locations referred to in the drawings, schedule and photographs attached at Annexure L. There are multiple instances of blocked or missing weep holes. There are instances of masonry cracking. The external façade of the building and its integrity are essential to maintaining a building that complies with the *Building Code of Australia* with respect to s F1 Damp and Waterproofing. The type of construction utilised at 59 Shirley Road for the façade is a combination of framed concrete and in fill masonry panels or load bearing masonry. Proper detailing of interfaces between masonry and concrete elements is essential to ensure that a durable external façade is provided. The cracking and delaminating render will result in water entry points to the inner cavity of the masonry structure or into the building internals around openings and adjoining concrete elements. Should water enter the interior areas of the building it will result in damp and unhealthy conditions which is considered a breach of the *Home Building Act 1989* s 18B(a), a warranty that the work would be performed in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract.

Cracking to render is caused by movement of the substrate attributable to defective installation of cement render when first applied to the building. The substrate upon which the render is founded also exhibits movement with brick growth and concrete shrinkage occurring simultaneously. The render itself being cementitious with a high degree of fines also shrinks. Further, where render over dissimilar substrates (concrete elements adjoining masonry elements) there is differential absorption of moisture from the render resulting in potential delamination if proper primings and cleaning were not applied.

Cracking is also attributable to a failure of an articulation or control joint in providing appropriate movement for the joint.

Cracked and delaminated render is considered a defect for the following reason: ..."

The author then refers to a publication made by the Department of Fair Trading. The cost of the rectification is \$95,610. That can be found on p 906 (according to the continuous numeration provided by the plaintiff) or on p 6 of 10 of appendix C, the estimate of costs for rectification of defects provided by Mr Macansh in exhibit E. The item on page numbered 906 is item 2.

- 15 To undertake those works it is necessary to provide for a complete scaffold to the exterior of the property for the repairs to be carried out. The cost of the scaffold is \$37, 152. That can be found on the same page of Mr Macansh's report at item 1.
- 16 The next part of the plaintiff's claim concerns the problems with water penetration and the waterproofing of internal wet areas and is, in essence, the subject of exhibit D, the reports of Mr McDonald. The property has four main bathrooms and three en suites. The first item of the second section concerns the waterproofing of wet area thresholds and timber doorframes for these bathrooms. The relevant part of Mr McDonald's report can be found on p 50 of his first report of 11 May 2015. It is this:

"22.1. The waterproofing at the thresholds of the wet areas is defective in all nine bathrooms and not compliant with AS3740 2010, s 3 Installation, cl 3.9 Junctions, subcl 3.9.1 2 Perimeter flashing, subcl 3.9.2, subcl 3.9.1.2 Perimeter flashing at floor level openings, figure 3.3(a) and (b).

22.2. The installation of the timber doorframes at the wet area thresholds is defective in all nine bathrooms and not compliant with Australian Standard 3740 2010, s 3 Installation [et cetera supra].

22.3. There are water penetrations at the thresholds of unit 2 en suite bathroom and unit 3 bedroom, en suite bathroom, which are not compliant with BCA Volume 1, s F Health and Amenity, Pt F1 Damp and Weatherproofing, Performance Requirement FP1.7 ...

22.4. The floor tiles have not been installed in the wet areas to the recommended minimal falls according to AS3740 2010 Waterproofing of domestic wet areas, s 3 Installation, cl 3.3 Falls in Floor Finishes and cl 3.4 Shower Floors. This is poor workmanship and a breach of the Home Building Act 1989 ...

22.5. The waterproofing membrane installation to half the Manufacturer's specified dry film thickness is poor workmanship and a breach of the *Home Building Act 1989*, Pt 2C Statutory Warranties, s 18B ..."

- 17 No separate quantification is provided for those items as such. However, the cost of full replacement of floor tiles for the en suite bathrooms for units 2 and 3 is twice the sum of \$6,216 or \$12,432. The cost of the replacement of wet area thresholds for each of the main bathrooms in each of the four units plus the en suites in units 1 to 4 is 4 x \$1,417 or \$9,919.
- 18 The outline of the plaintiff's case then provides a subheading for "water penetration to each of the units". The first item in this subcategory has been described by counsel as "water ingress masonry upstand". The relevant section of Mr McDonald's supplementary report of 27 July 2015 is this:
- "14.1.10. The solid masonry walls to the balconies require the application of a façade waterproofing membrane to prevent water ingress and transmission of moisture that would affect the balcony waterproofing membrane upturn to the wall and waterproofing to the balcony perimeter. The external acrylic paint is inadequate to prevent moisture ingress through the top of the wall and this is poor workmanship and a breach of the *Home Building Act 1989 Pt 2C* ..."
- This is a problem in both unit 1 and unit 2.
- 19 According to the plaintiff, two items in exhibit E quantify this damage. The first is comprehensive p 901, item 18, repair fractures to masonry balustrade wall render level 2, and the cost of that is \$2,990. The next item is item 14 on p 903, which again requires \$2,990.
- 20 The next item under this subheading provided by the plaintiff is the tiling of each balcony. Shortly stated, the skirting tiles are delaminating due to inadequate fixing and inadequate allowance for movement. The item applicable here is that the balcony is serviced by a single drain. In the event of a blockage, there is no way for water to escape the structure and that would result in water ingress to the unit. That defect must be remedied. According to the plaintiff the relevant items in exhibit E can be found on comprehensive p 901 item 17, \$870; p 903, item 13, \$870; and p 904, item 13, \$1,695.
- 21 The next item is headed "Water penetration to bedroom 3/bedroom 3 window glazing" but that is again a defect that I have already identified and there is no separate costing for this additional item.
- 22 The next item concerns a defective membrane referable to unit 3. The relevant part of Mr McDonald's report of 27 July 2015 is this:

"I observed that the waterproofing membrane used on this balcony was a bitumen modified one-part moisture-curing polyurethane. On other balconies, identified the balcony waterproofing membrane as a modified acrylic liquid applied acrylic. Tile adhesives will not form a bond to the bitumen modified polyurethane, due to the presence of bitumen oils that act as a bond breaker to adhesives and sealants. The tiling adhesive above the waterproofing membrane was also applied to the back of the tile and did not bond to the acrylic paint coating on the wall surface resulting in failure of the tile adhesive."

23 The cost of rectifying that defect is \$6,716.

24 The next item, the final item in this subsection, concerns water ingress into the lower lobby. At 16.4 of his report of 27 July 2015, Mr McDonald said this:

"The plaster is damaged by water within the lobby evidencing water ingress. Elevated moisture readings of 30% were noted at the base of stair. Evidence of unrepaired previous damage to ceiling over."

Commencing at 16.4.8, Mr McDonald went on to say this:

"16.4.8. I inspected the upper metal roof over the western lobby. I observed that the apron flashing to the roof is fabricated as a single piece of flashing, with an upturn to the cavity wall. The upturn has a deformed edge, which has been filled with sealant. I observed that the renders to the cavity wall above the flashing are fractured.

16.4.9. All the metal roof flashings and upturns of the apron flashings and parapet capping flashings have been fabricated in the same manner; from one piece fabricated metal flashings, with a deformed edge at the top and sealed to the acrylic painted wall renders with sealant ...

16.4.10 . The junction of the metal roof at the masonry walls, including parapets and cavity walls, is at the interface of the metal roof and a masonry upstand. The two elements of the construction act independently and have differential movement subject to thermal exposure. The metal roofing sheets require additional tolerances for thermal expansion and contraction compared to the masonry walls. To accommodate these differential movements roof flashings, irrespective of the type of roofing material, have traditionally been constructed of two parts; the lower part referred to as the apron flashing, and the upper part referred to as a cover flashing or over flashing. The lower apron flashing is fixed to the roofing sheets and batons, while the cover flashing is fixed to the masonry wall or chased and sealed into the wall. The two sections are not fastened together and move independently of each other, with an overlap between the upturn of the apron flashing. In the case of roofing penetrations for services (or adjoining vertical walls) the separation of the two parts of the flashing are critical for weatherproofing and waterproofing of the junction between the roof and the adjoining wall or penetration.

16.4.11. The single piece apron and parapet flashing with the formed edges is defective construction and poor workmanship. The thermal induced expansion and contraction of the roof results in sealant failure to the deformed edge and acrylic wall coating. I observed that the sealant to the section of the roof flashing above the entry lobby has been replaced previously due to failure. The original sealant used by the roofing contractor was silicone which has a

low modulus of rupture and very low shear strength to resist shear movement of the vertical and horizontal planes."

The moral of the story is it is best to stick to traditional practices.

- 25 The cost of the rectification of this defect is, according to exhibit E, covered by another area of the quantity surveyor's assessment.
- 26 The next subheading in the second section of the outline of the plaintiff's case concerns water penetration of the common property. The first concerns the car stacker. Mr McDonald said this:

"The walls of the stacker pit are constructed of concrete blocks measuring 200 x 400 on the face. Major water ingress is occurring through the wall and the slab to wall junction evidencing no functional membrane. This water is collected in a pump out sump serviced by a single pump. The wet conditions provide a saturated environment which is not a fit for purpose storage for vehicles. The construction of the stacker is such that it results in the vehicles being kept in this environment constantly. This will result in premature corrosion in the vehicles. The stacker itself derives support from the base of the slab which is saturated. The stacker column bases are visibly corroded, again, indicating a reduced service life. In the event of pump failure, it is foreseeable that the pit could fill resulting in the effective destruction of the vehicles stored at the lower level."

- 27 The cost of repairing that defect is \$38,015.
- 28 The next problem identified in this section concerns the roof over the living room of unit 3. In the report of 27 July 2015 Mr McDonald says at 17.3:

"The small pebble bed is serviced by a single 20mm electrical conduit which is blocked. This drainage is not considered adequate to drain the bed."

This pebble bed is above the roof in question.

- 29 The cost of the rectification of that is \$6,945.
- 30 The next item is headed "Shirley Avenue Stairs". Mr McDonald has written this:

"The stairs [unit 1 to Shirley Avenue] are significantly damaged by efflorescence flows. Tiling codes require screeds and tiling to be installed to avoid efflorescence. As the efflorescence is excessive, a source of water needs to be identified and eliminated so as to avoid high water flows through the screed. It is noted that lighting has been chased into the back of the bounding walls and not grouted or sealed exposing the wall masonry to rainwater and garden water. The planters are not waterproofed, however this is not a defect unless proven to be contributory to the efflorescence."

- 31 The cost of rectifying the identified defect \$7,237.

32 The final item under this section of the plaintiff's claim concerns the common property storeroom which is the subject of the whole of Mr McDonald's report of 19 April 2016. Mr McDonald observed water staining of the fibro cement sheet lining the storeroom ceiling in two locations. He later went on to say this:

"I accessed the upper tiled walkway above the basement carpark storeroom and observed that the upper landing has two downpipe penetrations directly above the water penetrations in the storeroom below."

He then refers to a number of photographs which show the penetrating downpipes do not have any adequate waterproofing around them or that the waterproofing has failed.

33 The cost of the rectification of that work is \$9,356.

34 The next section of the outline of the plaintiff's case concerns the defects identified by Mr Boyce in exhibit C. There are a large number of such defects. The masonry wall of the western walkway to units 3 and 4 is less than 1 metre in height which is a failure to comply with the relevant part of the building code. There is an enclosure for bins. The ceiling height of that enclosure does not comply with the minimum requirements of the code. Mr Boyce found that there were multiple windows throughout the site where a bottom leaf of a double hung window set had been riveted closed. That allowed ventilation only by operating the top leaf. The measured seal height was less than that required by the building code. Whilst the operable portion had a measured height above the FFL of approximately 1340, there is in fact a climbable sill at 530 which is a technical non-compliance for which an alternative solution should be provided. He has noted that changes to the SSMA will again result in changes to that regulation which is retrospective but postdates the works that have been done. He believed that this problem was systemic in all windows of that type in the building.

35 Mr Boyce found a number of non-compliances with respect to pathway widths along required ramps and stairs. He found that there was no non slip nosing to external stairs on the western walkway to units 3 and 4. He found a gap of 160 millimetres between the wall and balustrade of the balcony of the master bedroom of unit 3 which was a breach of the BCA. There was a privacy screen on the level 2 balcony of unit 1 but it could be climbed by a child, I assume, and

was not compliant with the Building Code. In the garage he found that the pedestrian egress door was not a fire door and that could impair egress from the building in the event of a fire. Again, other emergency doors within the garage were not fire doors, as they ought to have been.

- 36 I could go on and continue to seek to detail, in short fashion, a large number of similar defects detected by Mr Boyce. Again, there appear to be many problems with ventilation including laundry exhausts, window openings and building requirements not being fulfilled such as the provision of adequate smoke alarms and an emergency egress from the lift lobby and missing fire collars in the carpark and the separation between balconies being inadequate and that representing a fire hazard.
- 37 The costings for the defects identified by Mr Boyce concerning unit 1 can be found in exhibit E, overall, p 902, items 21 to 25; for unit 2 they can be found on p 903, items 17 to 21; for unit 3, p 905, items 14 to 18; and for unit 4 on p 906 item 7. The relevant defects in the common property are described on p 906, items 4; and on p 907, items 9, 10, 19, 24 and 25.
- 38 Mr Macansh has quantified the cost of rectifying each breach of warranty. To those sums he has added various other amounts including experts' fees, overheads and margins. They are described on p 908 to 909 using the comprehensive numbering system in his first report. In his first report, Mr Macansh quantified the cost of remedying the breaches as \$691,403 or, when GST was added, \$760,559. In his second report dated 3 May 2016 he identified remedial works amounting \$9,356, which when GST is added, comes to \$10,291. The total of those sums is \$770,850.
- 39 However, that must be read down to the statutory jurisdiction of this Court. Unlimited jurisdiction was not sought in the statement of claim nor has it been agreed to by the defendant. The quantum of the plaintiff's case therefore must be reduced to \$750,000. However, the plaintiff is entitled to interest, if it can be allowed. I can allow interest on \$750,000 from the date on which such a sum was first said to be payable by Mr Macansh, on 15 August 2015. I am told by learned counsel for the plaintiff, relying upon her instructing solicitor, that the amount of interest claimable under the Rules (the table can be conveniently

found in Ritchie's Service under UCPR 36.7) to be \$85,400. If I add that sum to \$750,000, I come to a grand total of \$835,400.

40 For those reasons, I give verdict and judgment for the plaintiff against the second defendant for \$835,400.

41 I order the second defendant to pay the plaintiff's costs.

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