



Supreme Court
New South Wales

Case Name: Cohen v Zanzoul trading as Uniq Building Group (No 2)

Medium Neutral Citation: [2020] NSWSC 838

Hearing Date(s): 4, 5, 6, 7, 8, 11 & 29 May, 26 June 2020. Written submissions 29 May, 22, 24 & 26 June 2020.

Date of Orders: 30 June 2020

Decision Date: 30 June 2020

Jurisdiction: Equity - Technology and Construction List

Before: Stevenson J

Decision: Decisions made concerning the disputed items as per Scott Schedule.

Catchwords: BUILDING AND CONSTRUCTION – contract – defects – whether defendant had opportunity to rectify works – whether plaintiffs failed to mitigate their loss
BUILDING AND CONSTRUCTION – consideration of incomplete works and defective works – use of Scott Schedule

Cases Cited: Bellgrove v Eldridge (1954) 90 CLR 613; [1954] HCA 36
Bitannia Pty Ltd v Parkline Constructions Pty Ltd [2009] NSWSC 1302
Cohen v Zanzoul [2020] NSWSC 592
Ellis's Townhouse Pty Ltd v Botan Pty Ltd [2017] NSWCA 20
Tabcorp Holdings Ltd v Bowen Investments (2009) 236 CLR 272; [2009] HCA 8
The Owners – Strata Plan No 76674 v Di Blasio Constructions Pty Ltd [2014] NSWSC 1067

Category: Consequential orders (other than Costs)

Parties: Paul Cohen (First Plaintiff/Cross-Defendant)
Phylcia Cohen (Second Plaintiff/Cross-Defendant)
Danny Zanzoul t/as Uniq Building Group
(Defendant/Cross-Claimant)

Representation: Counsel:
Mr T T Bors (Plaintiffs/Cross-Defendants)
Mr J Young with Ms R Thrift (Defendant/Cross-
Claimant)

Solicitors:
Colin Biggers & Paisley (Plaintiffs/Cross-Defendants)
Gavel & Page (Defendant/Cross-Claimant)

File Number(s): 2017/393016

JUDGMENT

- 1 I delivered my primary judgment in this matter on 19 May 2020.¹ These reasons assume familiarity with that judgment. I shall use the same abbreviations here.
- 2 I found that:
 - (a) Mr and Mrs Cohen repudiated the Contract on and from 7 December 2015;²
 - (b) Mr Zanzoul accepted that repudiation on 3 April 2018;³
 - (c) Mr and Mrs Cohen then had accrued rights to recover damages from Mr Zanzoul for any defective or incomplete work;⁴ and
 - (d) Mr Zanzoul then had an accrued right to recover monies due to him under the Contract.⁵
- 3 It was agreed that I would first publish a judgment dealing with contractual and other identified issues but defer consideration of the detail of the amounts recoverable by Mr and Mrs Cohen.⁶
- 4 Following delivery of my 19 May 2020 judgment, the parties agreed that the most efficient way to progress matters was for them to prepare a Scott

¹ Cohen v Zanzoul [2020] NSWSC 592.

² At [31] and [96]ff.

³ At [106].

⁴ At [34] and [117].

⁵ At [35] and [118].

⁶ At [30].

Schedule setting out, in the light of the evidence in the proceedings, and in particular the expert evidence, the parties' submissions as to the amount recoverable by Mr and Mrs Cohen for General Building Defects and Hydraulic Defects.

5 A Scott Schedule has now been prepared. It identifies 122 General Building Defects and 42 Hydraulic Defects, the parties' competing contentions in relation to those matters, and the experts' assessment of the value of the defects.

6 It is agreed that, subject to what follows, I should resolve those issues by reference to the Scott Schedule.

7 Mr Young, who appears with Ms Thrift for Mr Zanzoul, raised three issues which require consideration before I deal with the Scott Schedule.

Mr and Mrs Cohen's entitlement to recover damages in respect of defects notified on 11 February 2016

8 The first relates to Mr and Mrs Cohen's entitlement to recover damages in respect of the defects notified to Mr Zanzoul in Mr Cohen's email of 11 February 2016.⁷

9 After Mr Cohen sent that email, he and Mr Zanzoul exchanged further emails, the result of which exchange was that Mr Zanzoul said that he was "more than happy to come back and fix items you say are urgent" but that "you will need to address the long overdue payments to which I am entitled also".⁸

10 I found that what Mr Zanzoul meant by this was that he would not return to the site to attend to alleged defects until Mr Cohen acknowledged that money was due to him.⁹

11 Mr Young and Ms Thrift submitted that Mr Zanzoul was "entitled" to carry out these rectification works but that as Mr and Mrs Cohen "did not provide this opportunity" to Mr Zanzoul, it followed that Mr and Mrs Cohen "are not entitled to damages" for the items identified in Mr Cohen's email of 11 February 2016.

⁷ Judgment at [68]ff.

⁸ Judgment at [75].

⁹ Judgment at [77].

- 12 To justify the contention that Mr Zanzoul was “entitled to carry out the rectification of these works”, reference was made to the observations of White J in *Bitannia Pty Ltd v Parkline Constructions Pty Ltd*.¹⁰ I can see nothing in what fell from White J in *Bitannia* to justify this submission.
- 13 In any event, it follows from my findings that Mr Zanzoul did not exercise any “entitlement” to rectify defects because he wanted an acknowledgement that he would be paid. He said that he would not return to the site until he received such an acknowledgement. That was perhaps a reasonable and understandable position for Mr Zanzoul to take. But it is not the case that he was denied an opportunity to rectify defects.
- 14 In any event, Mr and Mrs Cohen’s entitlement to damages for defective work accrued when the defective work was done. Now, to the extent that the defective work has been established or agreed, Mr and Mrs Cohen are entitled to recover the cost of rectifying the defective work.

Mitigation

- 15 Mr Young and Ms Thrift submitted that Mr and Mrs Cohen were obliged to give Mr Zanzoul a reasonable opportunity to repair the alleged defects: see Ball J in *The Owners – Strata Plan 76674 v Di Blasio Constructions Pty Ltd*.¹¹
- 16 Mr Young and Ms Thrift submitted that it followed that Mr and Mrs Cohen had failed to mitigate their loss.
- 17 But Mr and Mrs Cohen did give Mr Zanzoul an opportunity to repair the alleged defects. As I have said, Mr Zanzoul said that he would not return to the site without acknowledgement of payment.
- 18 Further, the question of failure to mitigate was not relevantly pleaded.¹²
- 19 In any event, there is no evidence that Mr Zanzoul could have returned to the site and rectified defects at a cost less than those ultimately incurred by Mr and Mrs Cohen.

¹⁰ [2009] NSWSC 1302 at [82].

¹¹ [2014] NSWSC 1067 at [44].

¹² Failure to mitigate was pleaded at paras C13(c) and C14(c) of Mr Zanzoul’s Amended Technology Construction List Response, but not in the context now advanced.

20 Any questions of whether or not the amounts incurred by Mr and Mrs Cohen were reasonable have been dealt with by the experts and are now reflected in the competing contentions of the parties in the Scott Schedule.

Incomplete work

21 A component of Mr and Mrs Cohen's claim is for incomplete works. The parties are now agreed which works should be classified as being incomplete.

22 Because Mr Zanzoul has an accrued right to be paid in respect of the Payment Claims that he made, he will be paid for the work he did in relation to "incomplete works".

23 Mr and Mrs Cohen's claim is for the further costs of completing those works.

24 Mr Young and Ms Thrift submitted that Mr and Mrs Cohen "are now only entitled to recover the amount to complete the incomplete works additional to that which they would have been obliged to pay [Mr Zanzoul] to complete the works". Mr Young and Ms Thrift submitted that, as that amount had "not been demonstrated on the evidence" Mr and Mrs Cohen "have failed to establish any loss in relation to any incomplete works".

25 I do not agree.

26 Mr and Mrs Cohen have shown what it cost to complete the works and the experts have dealt with that matter in their reports. The question will be resolved in accordance with the Scott Schedule. I see no basis to somehow discount that amount by reference to the amount Mr and Mrs Cohen would have been obliged to pay Mr Zanzoul had he completed the work.

Conclusion in relation to the three issues

27 For these reasons my conclusion is that none of these further matters provide the basis to resolve the remaining issues otherwise than in accordance with the Scott Schedule.

28 My conclusions in relation to the items in the Scott Schedule are set out in the Schedule to these reasons. [Scott Schedule 180620 \(972303, pdf\)](#)

29 The parties should confer and agree on the orders needed to finalise the proceedings.

30 In due course, I will hear the parties as to costs.

31 I stand the matter over for directions at 9.30 am on 7 August 2020.

Amendments

30 June 2020 - Attachment included.

01 July 2020 - The attached schedule has been amended.

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