



Supreme Court  
New South Wales

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Case Name: Owners Strata Plan 93810 v KCN Constructions Pty Ltd

Medium Neutral Citation: [2021] NSWSC 176

Hearing Date(s): 3 March 2021

Decision Date: 3 March 2021

Jurisdiction: Equity - Technology and Construction List

Before: Hammerschlag J

Decision: (1) Judgment for the plaintiff against the first defendant for \$739,969.  
(2) The first defendant is to pay the plaintiff's costs of the motion filed 23 October 2020.

Catchwords: BUILDING AND CONSTRUCTION – Proceedings settled by Deed of Settlement entitling plaintiff to judgment against the first defendant in the event that the defendant did not carry out certain remedial building works, in particular in relation to fire safety – Deed included an undertaking by the first defendant to pay legal costs in three fixed instalments – Where first defendant breached the Deed – Plaintiff accordingly entitled to judgment

Legislation Cited: Home Building Act 1989 (NSW)

Category: Principal judgment

Parties: Owners Strata Plan 93810 – Plaintiff  
KCN Constructions Pty Ltd – First Defendant  
Garthowen Pty Ltd – Second Defendant

Representation: Counsel:  
G. Stapleton - Plaintiff  
J.P. Jagger, Solicitor - Second Defendant

Solicitors:  
Construction Legal – Plaintiff  
Bradbury Legal – Second Defendant

File Number(s): 2018/262555

## **EX TEMPORE JUDGMENT**

- 1 HIS HONOUR: On 25 September 2019, the plaintiff and the first defendant (**KCN**) settled the principal proceedings in which the plaintiff had sued KCN (and still sues the second defendant) for damages said to have been suffered by the defective construction of the residential apartment complex at 11-13 Garthowen Crescent, Castle Hill, NSW, of which the plaintiff is the owners corporation. KCN was the builder. The second defendant was the developer.
- 2 The principal proceedings were commenced in the District Court and transferred here. The plaintiff sued for breach of statutory warranties given to it by the *Home Building Act 1989* (NSW). Its main complaint related to fire safety inadequacies.
- 3 The hearing of the principal proceedings was scheduled to take place before Stevenson J starting on 16 September 2019 when they settled as between the plaintiff and KCN. Subsequently, the plaintiff and KCN entered into a Deed of Settlement on 25 September 2019 (the **Deed**).
- 4 Under cl 2 of the Deed, which is the Operative Part, relevantly:
  - (1) KCN undertook to carry out general works identified in Annexure D to the Deed and fire safety works identified in Annexure C;
  - (2) if the general works were not completed by 16 January 2020, the plaintiff would be entitled to apply to Court for, and KCN would consent to, judgment for damages in the amount identified for each non-completed item in an independent report which was annexed to the Deed (**the WT Report**);
  - (3) if the fire safety works were not completed by 18 December 2019, the plaintiff would be entitled to apply to Court for, and KCN would consent to, judgment for damages in the amount identified for each type of non-completed fire safety work in the WT Report. There were provisions for KCN to obtain an extension of time; and
  - (4) KCN agreed to pay the plaintiff's legal costs in three equal instalments of \$60,000 on 14 October 2019, 16 March 2020 and 16 September 2020 respectively, which if not paid within 7 days after the respective

dates, would entitle the plaintiff to judgment (to which KCN consented) for the unpaid amounts.

- 5 The proceedings were stood over to 7 February 2020 to allow KCN to perform its obligations.
- 6 On 13 January 2020, the plaintiff and KCN agreed to extend the time for the works to be completed to 30 September 2020.
- 7 By Notice of Motion filed on 23 October 2020, the plaintiff moves against KCN for judgment. KCN was given notice of the application but did not appear. The second defendant appeared but had no role to play.
- 8 The plaintiff read the affidavits of John Eric Matthews, its chairman, affirmed 22 October 2020, and of Peter William Antcliffe, a building surveyor and fire safety expert, affirmed 6 November 2020. A three volume Court Book running to approximately 1000 pages was tendered.
- 9 The court had the benefit of clear and concise submissions prepared by Counsel for the plaintiff. They will be marked MFI-2 and kept with the papers.
- 10 The evidence establishes that KCN has failed to fulfil its obligations to carry out both the general and fire safety works, and failed to pay the third instalment of \$60,000 due on 16 September 2020. A list of the complete and incomplete items and the costs attributed to each in the WT Report was part of the evidence adduced through the affidavit of Mr Matthews.
- 11 The material establishes that the total amount identified for the non-completed items in the WT Report, to which the plaintiff is entitled to a verdict for damages is, including GST, \$678,843.48.
- 12 The plaintiff is also entitled to judgment for the unpaid instalment of \$60,000.
- 13 The plaintiff is accordingly entitled to a total verdict of \$738,843.38.
- 14 The plaintiff is entitled to pre-judgment interest on the amount of \$60,000 from 16 September 2020 to the date of judgment in the amount of \$1125 and the plaintiff is also entitled to the costs of the motion.
- 15 The Court orders:
  - (1) Judgment for the plaintiff against the first defendant for \$739,969.

- (2) The first defendant is to pay the plaintiff's costs of the motion filed 23 October 2020.
- (3) The proceedings are stood over to 23 April 2021.
- (4) Liberty to apply on three days' notice.

16 The exhibits are to be returned.

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