Supreme Court

New South Wales

Case Name:	Owners Strata Plan 78465 -v- M D Constructions Pty Ltd
Medium Neutral Citation:	[2016] NSWSC 162
Hearing Date(s):	16, 17, & 18 February 2016
Decision Date:	19 February 2016
Jurisdiction:	Equity - Technology and Construction List
Before:	Hammerschlag J
Decision:	Judgment for the plaintiff against the defendant in the amount of $577,490.66. Defendant to pay plaintiff's costs of the proceedings to be assessed on the footing that they have continued in the District Court and the plaintiff will not be entitled to recover any costs from the defendant in connection with the application for the transfer to this Court of these proceedings
Catchwords:	BUILDING AND CONSTRUCTION – Home Building Act 1989 (NSW) ss 18B, 18E(1)(a) – claim for damages for breach of statutory warranty by builder in respect of work not performed in a proper and workmanlike manner – where particulars of defective work were pleaded by reference to an expert report and then amended to refer to another report whether the change constitutes commencing proceedings for the purpose of s 18E(1)(a) – mitigation of damages – whether plaintiff failed to mitigate damages by not giving the defendant builder an opportunity to rectify defective work – HELD – change in particulars was not the commencement of new proceedings – no failure to mitigate because the plaintiff did not act unreasonably in not giving the defendant the opportunity to remedy the defective work
Legislation Cited:	Consumer, Trader and Tenancy Tribunal Act 2001 (NSW) Home Building Act 1989 (NSW) Civil Procedure Act 2005 (NSW)
Cases Cited:	Owners Strata Plan 76674 v Di Blasio Constructions Pty Ltd [2014] NSWSC 1067 Shepherd v Felt and Textiles of Australia (1931) 45 CLR 359

Category:	Principal judgment
Parties:	Owners Strata Plan 78465 - Plaintiff M D Constructions Pty Ltd - Defendant
Representation:	Counsel: D. Hand - Plaintiff J.R. Young - Defendant Solicitors: Makinson d'Apice Lawyers - Plaintiff G&S Lawgroup - Defendant
File Number(s):	2014/135295

EX TEMPORE JUDGMENT

DEFECTS AND QUANTUM

1 HIS HONOUR: This litigation started life on 19 March 2013 when the plaintiff, Owner's Corporation Strata Plan 78465, which is a 10 apartment double storey residential development in Narrabeen on the Northern Beaches, lodged a claim in the *Consumer, Trader and Tenancy Tribunal* (CTTT) against the defendant, which built the apartments, for breach of the statutory warranties under s 18B of the *Home Building Act* 1989 (the Act).

2 It is common cause that, by s 18B of the Act, the defendant is taken to have warranted to the plaintiff in its contract that its work would be performed in a proper and workmanlike manner and in accordance with the plans and specifications set out in their contract. There was no written contract. The defendant also owned at least one apartment for some time.

3 The building is systemically defective. It is not impervious to water and it leaks. None of the 37 apertures for its windows and doors have flashings. Bathrooms leak because they do not have effective waterproof membranes. Corner angles of hobs on various balconies have corroded. The balcony balustrades do not comply with the Building Code of Australia. For reasons which appear below, it is not necessary to go into further detail.

4 The Court heard expert evidence (in concurrent session) from building experts as to the scope of work necessary to repair the defects, and from quantity surveyors as to costings. Some limited matters were agreed, but significant areas of dispute remained. The defendant hotly disputed the scope of works claimed by the plaintiff and the asserted cost to carry them out. However, during the course of the trial the parties, responsibly, in an attempt to curtail the length and expense of the hearing, agreed that the Court should make findings as to the scope of works required, without the necessity to give reasons, before the quantum evidence was led so as

to facilitate quantum being dealt with on one, rather than alternative, bases. I ruled on scope of works. It is fair to say that, save in two somewhat modest respects, the plaintiff succeeded. The parties then agreed that I should rule in like fashion on quantum, which I did. The consequence was that the plaintiff established, and I determined, that it suffered damage by the defendant's breach of statutory warranties, and that subject to two grounds of resistance put up by the defendant (which I deal with below), the plaintiff is entitled to a verdict in the amount of $577,490.66 (including GST).

5 The first ground of resistance is that the plaintiff cannot bring its claim because it is out of time under s 18E(1)(a) of the Act – which the parties agree applies as it stood prior to its amendment on 1 February 2012. It provided, relevantly, that:

> Proceedings for a breach of statutory warranty must be commenced within 7 years after...the completion of the work to which it relates.

6 The second ground of resistance is that the plaintiff failed to discharge its duty to mitigate its damage "by reason of [its] refusal to allow the defendant the opportunity to arrange for rectification of the defects alleged".

7 As will appear below, neither of these grounds has any merit. I will deal with them in turn.

PROCEEDINGS OUT OF TIME?

8 Before the CTTT, the defendant contended that the proceedings were out of time under the Act. On 20 September 2013 this contention was dismissed by the CTTT. It was not pleaded again until final submissions before me.

9 Sometime before 24 June 2014, the proceedings were transferred to the District Court of New South Wales. I observe that s 23 of the *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW) (as it then applied) provided that on transfer to the District Court, the proceedings would continue before that Court as if they had been instituted there.

10 On 24 June 2014, the plaintiff filed a Statement of Claim in the District Court. After pleading the availability of the statutory warranties, in paragraph 12, it pleaded as follows:

> The work involved in the construction of the Property contained defects (the Defects) that constitute breaches of the Statutory Warranties by the defendant.
>
> Particulars of the Breaches
>
> a. Structural Building Defect Inspection Report by Bill Moisidis of Bellmont Facade Engineering dated 9 May 2012; and
>
> b. Structural Building Defect Inspection Report by Bill Moisidis of Bellmont Facade Engineering dated 5 June 2014.

(I will refer to these reports as the Moisidis Reports).

11 The defendant filed a Defence on 11 July 2014 pleading as follows to paragraph 12:

> The defendant denies the allegation set out in paragraph 12 that 'The work involved in the construction of the Property contained defects (the Defects) that constitute breaches of the Statutory Warranties by the defendant.

12 On 10 February 2015, the plaintiff filed an Amended Statement of Claim which changed the particulars to read:

> Particulars of the Breaches
>
> (a) Report of cornerstone Building Consultancy Pty Ltd dated 13 October 2014
>
> (b) Schedule A to Amended Statement of Claim (annexed).

(I will refer to this report as the Cornerstone Report).

13 Schedule A described the particular defects alleged for the Common Area and unit by unit, and gave paragraph references to the Cornerstone Report.

14 The defendant filed an Amended Defence on 27 February 2015. There was no amendment to the paragraph pleading to paragraph 12 of the Amended Statement of Claim. In neither pleading did the defendant take any limitations point.

15 On 11 September 2015, I ordered that the District Court proceedings be transferred to this Court pursuant to s 140 of the *Civil Procedure Act 2005 (NSW)* (the CPA). Section 143(1)(a) of the CPA provides:

> (1) Subject to the rules of court applicable in the higher court, any proceedings with respect to which a transfer order takes effect are to be continued in the higher court:
>
> (a) as if the proceedings had been duly commenced in the higher court on the date on which they were commenced in the lower court.

16 On 16 October 2015, I fixed the matter for hearing on 15 February 2016. In fact the hearing commenced on 16 February 2016 due to the illness of the defendant's director. It proceeded on the District Court pleadings. During final submissions, no prejudice to the plaintiff having been shown, I granted the defendant leave to amend its Defence to plead its s 18E point.

17 Section 18E(1) of the Act was amended on 1 February 2012, but the amendment does not apply to contracts made before that date. The form of the section as it applies here is set out above.

18 There is no issue that the CTTT proceedings were within time, that they were continued in the District Court and that they continue here.

19 The defendant puts that when, on 10 February 2015, the plaintiff amended its Statement of Claim in the District Court by changing the particulars to paragraph 12

through deleting the reference to the Moisidis Reports and inserting reference to the Cornerstone Report, this was the commencement for the first time of proceedings for breach of warranty with respect to the work to which the breach of statutory warranty relates, and it was therefore out of time.

20 The defendant does not put that the defects described in the Moisidis Reports were any different to those described in the Cornerstone Report. Indeed, the defendant made it clear that the Court should operate on the assumption that the reports deal with the same claimed defects. The Court was not even taken to the Moisidis Reports.

21 The defendant's contention is that the plaintiff commenced proceedings for breach of statutory warranty in respect of defects identified only, and defined, by the Moisidis Reports, and that the Amended Statement of Claim must be viewed as a new commencement of proceedings for the purposes of s 18E(1) of the Act, because it identifies and defines the defects by reference to a different report, even though the reports describe the same actual defects.

22 This proposition need only be stated to be rejected.

23 Section 18E(1) concerns proceedings for a breach of warranty, relevantly here, that work will be performed in a proper and workmanlike manner. It requires the complaint to be made concerning the failure to perform that work within a particular period of time.

24 The defects complained of, and the subject of the proceedings, were alleged (and have been found) to exist in fact. They were initially described (or particularised) by incorporating descriptions or identifications made in the Moisidis Reports. It would have been no different had the plaintiff had merely recited the description of the defects in longhand, without taking the shortcut of referring to the Moisidis Reports. The defects do not depend for their existence on the Moisidis Reports, or for that matter, on the Cornerstone Report.

25 There was merely a change in the form of the particulars by which the defects were identified. The amendment to the particulars was not the commencement of proceedings in respect of those defects.

MITIGATION

26 As mentioned earlier, the original building contract was not in writing, and no provision has been established concerning how defects were to be made good.

27 The applicable principles were lucidly summarised by Ball J in *Owners Strata Plan 76674 v Di Blasio Constructions Pty Ltd* [2014] NSWSC 1067.

28 I proceed on the footing that as part of its duty to mitigate damages, an owner is required to give its builder an opportunity to minimise the damages it must pay by rectifying defects except where its refusal to give that opportunity is reasonable, or where the builder has repudiated the contract by refusing to conduct any repairs.

29 What is reasonable depends on all of the circumstances. One relevant factor is whether the owner reasonably lacks confidence in the willingness and ability of the builder to do the work. The defendant must prove that the plaintiff has acted unreasonably; it is not for the plaintiff to prove that it acted reasonably. The matter is one for objective assessment.

30 I record that the defendant put that only evidence of matters actually known to the plaintiff was admissible in that assessment. I reject this submission. Once a defendant puts the matter in play, all circumstances relevant to an objective assessment of the plaintiff's position become examinable. The plaintiff is not limited to reliance on facts or circumstances actually known to it at the time, but may rely on facts which come to its attention afterwards, but which pertain to the defendant's conduct at the relevant time. The applicable principle, albeit in a slightly different context, is explained in *Shepherd v Felt and Textiles of Australia* (1931) 45 CLR 359. So, for example, if a plaintiff later learns that a builder was at the relevant time incapable of doing the work because it was insolvent, it may rely on the fact. It could hardly lie in the mouth of a builder to say that it was unreasonable on the part of the owner not to employ it to repair defects when it was insolvent at the time.

31 In the present case, however, even limiting examination to matters known to the plaintiff by the time it commenced proceedings, the defendant has fallen well short of establishing that the plaintiff has acted unreasonably.

32 The plaintiff was and is entitled, in light of all of the defendant's conduct, to have no confidence in the ability of the defendant to do the work competently.

33 Further, the defendant's conduct throughout has been tantamount to a refusal to repair or take responsibility for repairing the existing defects.

34 The defendant's original work is systemically defective. It failed for reasons best known to itself to install any of the required flashings for window and door apertures, a basic building requirement. Almost every shower leaks. This is enough to displace any suggestion that the plaintiff acted unreasonably in not having the defendant do the work (assuming it was willing to do so). But there is a lot more.

35 The Court heard evidence from two apartment owners (who were not relevantly challenged and whose evidence I accept) of dealings with the defendant's director, Mr Kiumars Hashemizadeh, in the early stages of when the defects began to be discovered.

36 Ms Denise Chen, the owner of unit 8, had a conversation with him in 2009 about water leaking into her bathroom, during which he agreed to repair it by water proofing the outside wall. He carried out some work, but the problem was not rectified, and water continues to seep through the wall.

37 In 2010 or 2011, she noticed water leaking into the main bedroom through the balcony sliding door frame – he agreed to fix it. Again, some work was done, but the problem was not rectified.

38 In late 2011, Ms Chen complained to Mr Hashemizadeh about leaks in the upper part of the outer wall, and a large water and mould stain that had appeared. A conversation, reflective of Mr Hashemizadeh's unwillingness to assume responsibility and of an unrealistic position, to the following effect took place:

CHEN: Water is leaking into the second bedroom through the outer wall. The wall is stained and mould is growing.

HASHEMIZADEH: I am not going to fix it. It is not my problem. The staining and mould is caused by your tenant showering too often and not ventilating the unit.

39 The consequence was that on 6 January 2012, Ms Chen commenced her own proceedings in the CTTT. This resulted in a conciliated settlement under which an order was made that the defendant repair the defects in her apartment by 29 February 2012. Some repair work was done, but the leak to the second bedroom wall was yet again not repaired.

40 Ms Wynette Ann Monserrat, the owner of unit 7 and a member of the executive committee since April 2010, noticed in 2010 and 2011 water ingress from the balcony doors and windows and into the main bedroom ceiling. She communicated with Mr Hashemizadeh, who attended her unit in about November 2010, and applied sealant around the leaking balcony doors, but the water ingress continued.

41 He attended again in about January 2011 and drilled holes into the frame of the balcony walls, but the water ingress continued. In April 2011, he told her that the problem was the doors and windows, but he had been unsuccessful in getting the manufacturer to take responsibility. He offered to give her the manufacturer's details, an offer which (in my view reasonably) she declined. He also offered to use sealant, which offer she also (reasonably) declined.

42 In 2012, on a further inspection, Mr Hashemizadeh told her that there was a crack in the slab of the ceiling. He recommended filling it with sealant and repairing the ceiling and undertook to let the strata manager know, but the defects were not rectified by the defendant.

43 On 17 July 2012, the plaintiff's solicitors wrote to the defendant providing a copy of a defect inspection report which had been obtained from Bellmont Facade Engineering (Bellmont) outlining the defects and methodology for repair. Bellmont proposed that the parties meet to reach agreement in relation to the scope of rectification. The plaintiff informed the defendant that it was not authorised to carry out repairs until there was agreement, and drew attention to the fact that the defendant did not hold a building licence.

44 In a reply dated 27 July 2012, the defendant did not agree to rectify all defects outlined in the report, or the method of repairs advised, but, rather, took the position that it had rectified all defects advised by its own consultants with the method they advised. It pointed out that licenced contractors had undertaken the rectification work.

45 On 28 August 2012, the plaintiff, through its solicitors, proposed a meeting between its expert and the defendant, with suggested dates. In a reply dated 3 September 2012, Mr Hashemizadeh advised he would be pleased to meet with the plaintiff's expert "in attempt to reach agreement in relation to the issues in dispute, the method of rectification and who's [sic] responsibility it is to carry out the works". Thus at this point, as has throughout been the case, the defendant was not accepting responsibility for the work to be done. Mr Hashemizadeh went on to make a number of complaints against both Bellmont and the strata managers and challenged the validity of an Annual General Meeting of the plaintiff held on 10 July 2012.

46 The defendant read an Affidavit of Mr Hashemizadeh of 18 August 2015, but he was not available for cross examination (including by telephone) due to apparent illness. In the circumstances, the plaintiff elected not to cross-examine. In his Affidavit, Mr Hashemizadeh states that he never refused to undertake repairs, and requested only that the scope of works be agreed before having the work done.

47 As the evidence and the conduct of these proceedings themselves clearly demonstrate, there was no realistic prospect of the defendant agreeing to carry out an agreed scope of works that recognised the extent of the defects in the work. In both its Defence and Amended Defence, the defendant made no admissions as to the existence of any defect. It has throughout argued the extent of the defects. Its initial untenable position in the CTTT was that the claim was out of time, and it still takes this position.

CONCLUSION

48 In final submissions the defendant put that if its s 18E(1) and mitigation points failed, the Court should not give a money verdict, and instead should exercise its jurisdiction to order the defendant to rectify the defects itself. Leaving aside that the

defendant itself does not have a building licence, for the same reasons that the failure to mitigate contention has failed, I consider there to be no proper basis upon which to exercise a discretion in favour of the defendant to grant relief in that form.

49 There will be a verdict for the plaintiff against the defendant in the amount of $577,490.66.

50 I will hear the parties on costs, particularly in light of the fact that these proceedings were transferred to this Court on the footing that the amount involved exceeded the jurisdiction of the District Court, which has turned out to be far from the fact. The exhibits are to be returned.

COSTS AND ORDERS

51 After hearing the parties on costs his Honour made the following orders:

(1) Judgment for the plaintiff against the defendant in the sum of $577,490.66.

(2) The defendant is to pay the plaintiff's costs of the proceedings to be assessed on the footing that they have continued in the District Court and the plaintiff will not be entitled to recover any costs from the defendant in connection with the application for the transfer to this Court of these proceedings.

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