Supreme Court of New South Wales

Strata Plan 79215 v Nazero Constructions Pty Ltd [2016] NSWSC 231 (15 March 2016)

Last Updated: 15 March 2016

Supreme Court
New South Wales

Case Name:	Strata Plan 79215 v **Nazero** Constructions Pty Ltd
Medium Neutral Citation:	[2016] NSWSC 231
Hearing Date(s):	11 March 2016
Decision Date:	15 March 2016
Jurisdiction:	Equity - Technology and Construction List
Before:	Meagher JA
Decision:	1. Judgment for the plaintiff against the first defendant for damages assessed at $2,638,219. 2. Order the first defendant pay the plaintiff's costs of the proceedings insofar as they relate to the claim against it. 3. Direct that the proceedings against the 2nd to 5th defendant be listed for directions on Friday 3 June 2016 at 12:00PM.
Catchwords:	DAMAGES – contract – building – breach of statutory warranties in Home Building Act 1989 (NSW) – where judgment for liability entered with damages to be assessed – where defendant did not appear for assessment hearing – whether expert reports addressed defects the subject of liabilit judgment and reasonable costs of remedying those defects – n question of principle
Legislation Cited:	Civil Procedure Act 2005 (NSW), s 70 Home Building Act 1989 (NSW), s 3A, 18B, 18C,18D Evidence Act 1995 (NSW), s 59 Strata Schemes Management Act 1996 (NSW), ss 65, 227 Uniform Civil Procedure Rules 2005, r 30.1
Category:	Principal judgment
Parties:	Owners - Strata Plan 79215 (Plaintiff) **Nazero** Constructions Pty Limited (First Defendant) Lansdown Projects Pty Limited (Second Defendant) JA Westaway & Son Pty Limited (Third Defendant) Jan Westaway (Fourth Defendant) Ian Westaway (Fifth Defendant)

Representation:	Counsel: P Bambagiotti (Plaintiff) A Di Francesco (4th to 5th Defendants) Solicitors: Makinson d'Apice (Plaintiff) Wood Marshall Williams (4th to 5th Defendants)
File Number(s):	2013/345816

JUDGMENT

1. The plaintiff is the owners' corporation established by the registration of Strata Plan 79215. Accordingly it is the owner of the common property of a residential building consisting of 12 units and basement car parking in Mona Vale.
2. It claims damages from the defendants for breaches of the statutory warranties in s 18B of the *Home Building Act 1989* (NSW) (the **Act**). The first defendant is sued as builder and the second to fifth defendants are sued as developers.
3. The plaintiff is entitled to the benefit of those statutory warranties as against the first defendant under s 18D(1) of the Act and, as the immediate successor in title to the second to fifth defendants, against them as if they had undertaken the relevant building work: s 18C.
4. On 13 November 2015, Ball J entered judgment in favour of the plaintiff against the first defendant with damages to be assessed. The present application is for the assessment of those damages.
5. The second and third defendants are in liquidation and the plaintiff has not sought leave to proceed against them. The fourth and fifth defendants are defending the claim against them and it is agreed that that part of the proceeding should be stood over for directions on 3 June 2016.
6. In these circumstances, and insofar as Uniform Civil Procedure Rules 2005 (**UCPR**), r 30.1 (3) might otherwise require that the hearing of the assessment of damages as against the first defendant proceed at the same time as the hearing of the claim against the fourth and fifth defendants, I dispense with the application of that rule.
7. The first defendant did not appear at the hearing for the assessment of damages. I am satisfied that, notwithstanding that the first defendant also did not appear at the hearing on 13 November 2015, the fact of the further damages assessment hearing on 11 March 2016 has been brought to its attention. I am also satisfied that the defendant had received prior to the November hearing copies of the reports and affidavits relied on in support of the damages claim.
8. The principal evidence on the assessment hearing took the form of experts' reports. None of the experts were not called. However, affidavit evidence was filed which established by sworn testimony, albeit hearsay, that each of those experts held the opinions contained in the reports. On that basis I allowed the reports into evidence and in doing so, dispensed with the application of the hearsay rule (*Evidence Act 1995* (NSW), s 59) to the extent that it required those opinions be proved by direct evidence given orally or by affidavit.
9. The claim in relation to which judgment for liability was entered is formulated in the plaintiff's Amended Technology & Construction List Statement filed 20 March 2015. The defects which are the subject of that claim, and accordingly of that liability, are described in two schedules of defects attached to that Statement.
10. The amount of damages claimed in respect of those defects is $2,729,899 excluding GST for which no claim is made. The assessment of damages in that amount is made in a report of Mr Madden, a qualified quantity surveyor, dated 19 December 2014.
11. He was provided with the reports of experts retained by the plaintiff which identify defects in the building work and the rectification work which, in their opinion, is reasonably necessary to remedy those defects.

12. Those experts, and the defects which they identified, are:

    Expert Nature of defects
    Mr Broune Structural and Engineering Defects
    Mr Ratcliff Leaks and Waterproofing Defects
    Ms Shubbiah Air Conditioning and Mechanical Ventilation System Defects
    Mr Murrow Fire Safety Defects
    Mr Tonin Acoustic and Soundproofing Defects
    Mr McGill Hydraulic Plumbing Systems Defects
    Mr Parks General Building and Construction Defects

13. Mr Madden assesses the direct costs of rectifying the defects identified by those experts at $1,326,461. He has assessed the additional costs which will be incurred to allow that rectification work, to be undertaken by individual contractors and suppliers, to proceed. He calculates those additional or "on" costs at $1,251,177.
14. Mr Madden's assessment includes a further amount of $60,581 in respect of rectification works already completed. That those works have been completed and paid for is proved by the affidavit evidence of Messrs Donely and Stokes.
15. Finally, Mr Madden's assessment includes an amount of $91,680 for "consequential costs". Those are costs likely to be incurred as a result of the owners or occupiers of the 12 units having to vacate those units and remove furniture from them for a period of 12 weeks so as to allow the rectification work to proceed. That amount includes $77,280, which is the estimated cost of the residents renting alternative accommodation for that period.
16. The amounts assessed as damages in Mr Madden's report are:

    Trade costs $1,326,461
    On costs $1,251,177
    Consequential costs $91,680
    Rectification works completed $60,581

    _____
    Total: $2,729,899

17. The first question is whether the defects which are the subject of the liability judgment are the same as those which are the subject of Mr Madden's report. That is said to be established by a comparison of the schedules to the Amended Technology & Construction List Statement and the schedules to Mr Madden's report. I have not undertaken that exercise. However, it has been undertaken in the affidavit evidence of Mr Wells and Mr Andrews.
18. Mr Andrews' evidence is that the defects which are the subject of the experts' reports referred to above correspond with those described in the schedules to the Amended Technology & Construction List Statement and that those same defects are the subject of Mr Madden's report and opinion.
19. I am satisfied that Mr Madden is qualified to express the opinions he has and that he has addressed the reasonable cost of remedying each of those defects in the way recommended by the relevant expert who identified the defect. I am also satisfied that each of those experts was qualified to express an opinion as to the nature of that remedial work and that each has done so by reference to what is reasonably necessary.
20. There is one remaining question raised by Mr Madden's assessment. That is whether the plaintiff is entitled to the consequential costs claimed. Notwithstanding that after the hearing was concluded the plaintiff indicated that it no longer pressed this claim, I will address it briefly. The claim brought by the plaintiff as owners' corporation is not one in which it is said that the owners of the lots in the strata scheme are jointly entitled to claim against the defendants: cf *Strata Schemes Management Act 1996* (NSW) (**Strata Schemes Act**), s 227. Accordingly its claim must be dealt with on the basis that it is confined to the first defendant's liability to the owners' corporation for loss or damage suffered by it.

21. The costs of moving furniture and finding alternative accommodation are not costs which in the ordinary course would be incurred by the plaintiff as distinct from the owners or occupiers of the residential units. Unless the plaintiff is liable on some basis to incur those costs, or to reimburse or indemnify those owners or occupiers for incurring them in the carrying out of work to repair the common property, it is not entitled to recover them by way of damages. No statutory provision was relied on by the plaintiff as giving rise to such a liability in the owners' corporation. The costs would not be incurred in respect of "any damage to a lot or any of its contents caused by or arising out of the carrying out" of the proposed rectification work. Accordingly the owners' corporation would not liable for them under s 65(6) of the Strata Schemes Act.
22. The basis on which the plaintiff initially contended that it could be liable to reimburse the unit owners for those costs was as damages for breach of its obligation under s 62 of the Strata Schemes Act to maintain and repair the common property. The relevant breach was said to be the existence or continuance of the defects which are the subject of the claim against the first defendant. However the existence of those defects was not the result of any breach by the plaintiff and their continuance, which could only involve delay in the performance of any obligation to repair, does not in this case give rise to the need for the owners or occupiers to vacate their units. Had it been pressed, I would have rejected this claim for consequential costs.
23. In the result, the plaintiff is entitled to judgment against the first defendant for an amount calculated at follows:

    Trade costs $1,326,461
    On costs $1,251,177
    Rectification works completed $60,581

    _____
    Total defects (excluding GST) $2,638,219

24. The orders I make are:

1. Judgment for the plaintiff against the first defendant for damages assessed at $2,638,219.

2. Order the first defendant pay the plaintiff's costs of the proceedings insofar as they relate to the claim against it.

3. Direct that the proceedings against the 2nd to 5th defendants be listed for directions on Friday 3 June 2016 at 12:00PM.

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